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FACING THE SUNSET: AN EGALITARIAN APPROACH AGAINST TAXING COUPLES AS A UNIT

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With the sunset of marriage penalty relief in 2025, Congress has a bittersweet opportunity to align the taxable unit with the guiding norm of taxation according to "ability to pay." The federal income tax brackets have been designed around a misguided and poorly targeted assumption that comparing married couples is appropriate, whether because of pooling income, economies of scale, or untaxed housework and caregiving. This Article argues that the individual, rather than (married) couples, should emerge as the unit for income taxation under an egalitarian approach to distributive justice.

Welfarist insights and egalitarian arguments sometimes align on solutions to tax policy questions. But the precise lens through which one views questions of distributive justice can make a difference in thinking about the taxable unit. A welfarist approach, in this context, opens the door to inequality through bonuses that depend on marriage or relationships. Although no perspective has an easy time with couple's penalties, an egalitarian perspective more persuasively rejects taxing phantom income (especially in a tax system resembling the one that we have).

This Article echoes prior calls for the end of the joint return. Although not necessarily theoretically tidy, distinct solutions are likely to be necessary to balance the importance of preventing abuse by related parties and to account for non-business deductions and credits. Realistically, then, it will likely be necessary to blur the lines between individual taxpayers for some—but not all—purposes. This Article points to workable options for accomplishing this balancing while avoiding disproportionate benefit for high-income taxpayers.

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INTRODUCTION

With the sunset of marriage penalty relief in 2025,[1] Congress has a bittersweet opportunity to align the taxable unit with the guiding norm of taxation according to "ability to pay."[2] The temporary marriage penalty relief enacted in 2017[3] was necessary in the first place because the federal income tax brackets have been built on the premise that comparing married couples to one another is appropriate and helpful. The use of the marital unit may be based on pooling, economies of scale, and administrative simplicity. But the marital unit is misguided and poorly targeted in a modern country that has moved past the "separate spheres."[4] The tax brackets should re-center on individual workers to achieve equity.

Welfarist insights and egalitarian arguments sometimes align on solutions to tax policy questions. But the precise lens through which one views questions of distributive justice can make a difference in thinking about the taxable unit. A welfarist approach is generally dominant in tax policy scholarship.[5] This could open the door to inequality

1. *See* I.R.C. § 1(j) (2018) (substituting tax brackets in subsection (j) for taxable years beginning before 2026); Rebecca M. Kysar & Linda Sugin, Opinion, *The Built-In Instability of the G.O.P.'s Tax Bill*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/opinion/republican-tax-bill-unstable.html [https://perma.cc/8WRX-NRDX] (contrasting the "deep, permanent rate cut for corporations" with "modest and temporary relief for individuals" and predicting that the 2025 sunset "creates uncertainty for taxpayers and sets up undesirable conflicts in the future as people fight to keep them").

2. *See* Stephen Utz, *Ability to Pay*, 23 WHITTIER L. REV. 867, 867 (2002) (documenting "broad, if not universal, agreement that fair taxation should be in accordance with 'ability to pay'" (footnotes omitted)); *see also* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 871 (4th ed. 1850) ("The subjects of every state ought to contribute to the support of the government, as nearly as possible, in proportion to their respective abilities."); Edwin R. A. Seligman, *Progressive Taxation in Theory and Practice*, 9 AM. ECON. ASS'N Q. 562, 767–71 (1908) (tracing applications of the "faculty theory" from property to income, and proportional to progressive).

3. *See* Tax Cuts & Jobs Act of 2017, Pub. L. No. 115-97, § 11001(a), 131 Stat. 2054, 2054–55 (2017) (codified as amended in scattered sections of 26 U.S.C.).

4. *Cf.* Maxine Eichner, *The Road to Free-Market Family Policy*, 1 J.L. & POL. ECON. 239, 244–45, 247 (2021) (documenting how the "separate spheres ideology"—supposing a working man and a domestic woman, as opposed to the more unitary model of the family farm—helped to rationalize the brutal working conditions and low wages during the rise of industrial capitalism). Eichner also documents the reversal, as early as the 1960s, after which both major political parties have sought to encourage a two-laborer model to minimize the role of the welfare state. *See id.* at 251–59.

5. *See* James R. Repetti, *The Appropriate Roles for Equity and Efficiency in a Progressive Individual Income Tax*, 23 FLA. TAX REV. 522, 571, 596 (2020) (urging an emphasis in tax policymaking on equity over efficiency and noting the indeterminacy of utility); Lily L. Batchelder, *Optimal Tax Theory as a Theory of Distributive Justice* 2–3 (Aug. 8, 2020) (unpublished article), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3724691 [https://perma.cc/6Z64-Y2CY]

through bonuses that depend on marriage or relationships.[6] Although no perspective has an easy time with couple's penalties, an egalitarian perspective more persuasively rejects taxing phantom income (especially in a tax system resembling the one that we have).

This Article argues that the individual, rather than groups, should emerge as the subject of income taxation under an egalitarian theory of distributive justice. Accordingly, this Article echoes many calls for the end of the joint return[7] and situates this in a broader set of issues. Although not necessarily theoretically tidy, distinct solutions will likely be necessary to balance the importance of preventing abuse by related parties and to account for non-business deductions and credits. Realistically, then, it will likely be necessary to blur the lines between individual taxpayers for some—but not all—purposes. This Article outlines workable options for accomplishing this balancing while avoiding disproportionate benefit for high-income taxpayers.

The Tax Cuts and Jobs Act of 2017 eliminated most marriage penalties for two-earner married couples; entwined with this relief were large marriage bonuses for single-earner married couples.[8] That

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(observing that optimal tax theory has a "virtual monopoly in economics" and is "increasingly dominant in legal scholarship," which has a competing theme of "resource egalitarianism").

6. *See* Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 737–38 (2013) (explaining why a welfarist might want to analyze families but suggesting that marriage is an imperfect proxy for sharing, economies of scale, and imputed income).

7. *See, e.g.*, EDWARD J. MCCAFFERY, TAXING WOMEN 277–79 (1997); ANTHONY C. INFANTI, OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES 84–89, 156 (2018); DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT 60–63 (2021) (observing that for elimination of the singles' penalty and repeal of the joint return to happen, "the public needs to demand it—and for the public to demand repeal, they need to understand exactly how the same policy, so equitable on the surface, actually perpetuates inequality"); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 95 (1971); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burden*, 59 TEX. L. REV. 1, 67 (1980); Lynn A. Stout, Note, *The Case for Mandatory Separate Filing by Married Persons*, 91 YALE L.J. 363, 363 (1981); Laura Ann Davis, Note, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197, 197, 199 (1988); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 108 (1993); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 344 (1994); Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 609 [hereinafter Infanti, *Decentralizing Family*]; Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 684 (2010) [hereinafter Kahng, *Loneliest Number*]; Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109, 218 (2011); Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 383 (2016).

8. *See* Tax Cuts & Jobs Act of 2017, Pub. L. No. 115-97, § 11001(a), 131 Stat. 2054, 2054–55 (2017) (codified as amended in scattered sections of 26 U.S.C.); Daniel Hemel, *Beyond the*

is why the 2025 sunset will expand marriage penalties, with a silver lining of marriage bonus reduction. As the sunset is likely to increase tax for a diverse set of taxpayers, there is a bittersweet opportunity to rethink and improve this perennially perplexing area of the tax law. A brief review of the tax brackets will illustrate why.

The tax brackets represent statutorily defined ranges of the taxable income reported on the tax return; within a bracket, the income is taxed at a given percentage.[9] In our progressive income tax system, such brackets of income are taxed at successively higher rates.[10] A wider bracket can bestow a tax cut by imposing a lower rate of tax on a greater portion of the taxpayer's income. Narrower brackets mean more income will be taxed at higher rates.

A no-marriage-penalty structure needs to have double-wide tax brackets for married couples.[11] But in the no-marriage-penalty model, there is a higher tax on unmarried individuals, by comparison with a married person whose spouse does not work in the labor market.[12] Thus, in a joint return system, the "bonus" for the single-earner who is married is entwined with avoiding a penalty for two-earner married couples and penalizing unmarried individuals.[13] Alternatively, eliminating the unmarried individual penalty results in a severe two-earner marriage penalty if married couples are taxed as a unit.

With all options potentially on the table, it is appropriate to consider whether the tax system should impose couple's penalties at all. The most recent proposal by House Democrats on the Ways and Means Committee almost completely defers tinkering with the tax brackets.[14] President Biden has pledged that no one making more than

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Marriage Tax Trilemma, 54 WAKE FOREST L. REV. 661, 673–75 (2019) (noting the general thrust of penalty repeal in the Tax Cuts and Jobs Act of 2017 (TCJA) and describing the many remaining marriage penalties, which can be substantial).

9. *See* I.R.C. § 1 (2018).

10. *Id.*

11. *See* Kahng, *Loneliest Number*, *supra* note 7, at 654; Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1429–31 (1975).

12. *See* Kahng, *Loneliest Number*, *supra* note 7, at 656–57.

13. *See id.*; Bittker, *supra* note 11, at 1413–14. The brackets for married filing separately (MFS) are one-half of the married filing jointly (MFJ) brackets; MFS does not afford a workaround for the marriage penalty. *See* Bittker, *supra* note 11, at 1429. *Compare* I.R.C. § 1(c) (tax table for unmarried individuals), *with* § 1(d) (tax table for married filing separately, which has narrower brackets).

14. *See* COMM. ON WAYS & MEANS, 117TH CONG., AMENDMENT IN THE NATURE OF A SUBSTITUTE TO THE COMMITTEE PRINT OFFERED BY MR. NEAL OF MASSACHUSETTS § 138201 (2021), https://docs.house.gov/meetings/WM/WM00/20210914/114042/HMKP-117-WM00-20210914-SD002.pdf [https://perma.cc/G85U-JY7L] (renumbering § 1(j) headings but not altering or

$400,000 a year will see a tax increase under his plans.[15] But only modest adjustments (compared to the $400,000 figure) have been proposed for MFJ returns.[16] One may speculate that Congress will reconsider the tax brackets below the top tax bracket closer to the 2025 sunset.

Perhaps the most compelling justification for a marriage penalty is the likelihood of economies of scale for a couple as compared to an individual.[17] Marriage, however, is an imperfect proxy for cost savings.[18] The tax literature has observed that it would be very difficult to extend marriage-like tax treatment to de facto families.[19]

What has received less attention is that the current filing statuses already incorporate a penalty for forming a household with another single person. This penalty is attributable to the head of household status, which only allows one person to be the head, but does not bar multiple households from literally living under the same roof.[20] Clearly, the tax system already anticipates that taxpayers will exercise some degree of discretion about what constitutes a household.

In sum, generalized concerns about the administrability of open-ended standards concerning non-marital statuses should be taken seriously but need not be determinative. We should engage directly with the question whether a more inclusive approach, such as a de facto couple's penalty mirroring the marriage penalty, would be fair. This Article concludes that such an extension would not be appropriate, particularly in a tax system resembling the one that we have.

In historical perspective, aggregating the income of married taxpayers was not concerned so much with vertical equity; the initial

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extending 2017 tax bracket changes scheduled to sunset in 2025, except with respect to the return to the 39.6% bracket).

15. *See* John Kartch, *Dems Set Biden Up to Break Tax Pledge*, AMS. FOR TAX REFORM (Sept. 16, 2021, 2:02 PM), https://www.atr.org/BidenPledge [https://perma.cc/P6YZ-7M5Q] (documenting numerous statements from campaign to the present).

16. *See* DEP'T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2022 REVENUE PROPOSALS 60 (2021); COMM. ON WAYS & MEANS, 117TH CONG., *supra* note 14, § 138201 (providing new tax tables and inflation adjustments).

17. *See* Bittker, *supra* note 11, at 1422–25 (critiquing the economies of scale justification); Hemel, *supra* note 8, at 695 (probing welfare effects of economies of scale).

18. *See* Alstott, *supra* note 6, at 737–43 (explaining uncertainties of how welfarist analysis should take families into account); Kahng, *Loneliest Number*, *supra* note 7, at 656–57 (observing that there can be an "unmarried couple's penalty" or an "unmarried couple's bonus" though impossible to find a bonus along with the "single person's penalty"); Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1524–25, 1543–44 (2006).

19. *See* Alstott, *supra* note 6, at 744–48. *But see* Hemel, *supra* note 8, at 691–92 (noting that "imperfect proxies" are pervasive in tax law).

20. *See infra* text accompanying notes 97–98.

impetus was to eliminate income splitting via community property.[21] Congress chose to eliminate this by all but requiring the joint reporting of income while simultaneously giving married couples a tax cut.[22] However, a head of household status was created for "sympathetic widows, widowers, and others who supported families" just a few years later.[23] Some years later, to keep the system from being too unfair to unmarried individuals, Congress shrank the tax brackets for married taxpayers.[24] Taken together, these events created a patchwork of bonuses and penalties for marriage.[25]

A plausible apology that has been offered for the marriage penalty is that ability to pay increases when two working individuals marry and reduce their collective expenses.[26] For this reason, couples or groups could be relevant, but the marriage penalty legislation did not attempt to recognize couples who were not married. The marriage penalty is better understood as a compromise to limit the single person's penalty.[27] Scholars have concluded with the "trilemma" that the system cannot maintain progressivity, treat (married) couples equally, and remain marriage-neutral.[28]

Many tax scholars almost reflexively dismiss the criterion of couples neutrality, even among married couples.[29] But underlying marriage penalties and couples neutrality is a central question still worth

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21. *See generally* Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 L. & HIST. REV. 259, 265–66 (1988) (explaining that before the spread of community property, the beneficial tax consequences of community-property systems and husband-wife partnerships could be filed away by policymakers as "exceptional cases" that would not "do great harm to the treasury of the United States").

22. *See* Bittker, *supra* note 11, at 1412–13.

23. Kahng, *Loneliest Number*, *supra* note 7, at 655.

24. *See id.*

25. As Hemel and others have pointed out, the marriage penalty in the tax brackets was created with the enactment of the head of household status, which includes favorable tax brackets and is limited to unmarried taxpayers. *See* Hemel, *supra* note 8, at 672–74. But the central marriage penalty has typically been pinned to the shrinking of the MFJ tax brackets in 1969. *See* Kahng, *Loneliest Number*, *supra* note 7, at 655. At this point, the MFJ tax brackets were less than double the unmarried individual taxpayer brackets.

26. *See* Bittker, *supra* note 11, at 1422–25 (suggesting that the explanation makes sense at "subsistence" levels but breaks down at higher incomes); Kahng, *Loneliest Number*, *supra* note 7, at 677–80 (arguing that a single person is not generally better off than a married couple with only one spouse working outside the home).

27. *See* Bittker, *supra* note 11, at 1428–30.

28. COMM. ON WAYS & MEANS, 92D CONG., TAX TREATMENT OF SINGLE PERSONS AND MARRIED PERSONS WHERE BOTH SPOUSES ARE WORKING 78–79 (1972) [hereinafter Cohen Statement] (statement of Edwin S. Cohen, Assistant Secretary of the Treasury for Tax Policy).

29. *See* Zelenak, *supra* note 7, at 362–63; Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1609–10 (1996); Kahng, *Loneliest Number*, *supra* note 7, at 661–63.

engaging: should the prospect of cost savings, wealth, happiness, and the like be deemed to enhance ability to pay? Lily Kahng has affirmed the "venerable" notion that the extra cost of adding a spouse to one's household should be viewed as consumption.[30] Pivoting from this observation, however, Kahng points out that the cost of being single is considerable despite the—arguably irrelevant—fact that a single person does not have to support a partner.[31] Some of these costs of being a single person are financial;[32] others are more intangible.[33] Thus, Kahng treats the cost of being single as a "plausible challenge"[34] to the marriage bonus even without treating marriage as consumption. This line of reasoning merits further attention.

The potential cost savings for married couples, as well as other individuals who cooperate in a household, typically relate to economies of scale as well as untaxed "imputed income" from self-help that benefits the group.[35] In line with these considerations, this Article considers the possibility of a relatively small credit for being a single person. Such a credit would imply a penalty for sharing together as a couple or household.

By contrast, the current system cuts in different directions. The head of household status can imply a marriage penalty or a household penalty.[36] The Earned Income Tax Credit (EITC) penalizes marriage for low-income couples.[37] These penalties are in tension with bestowing substantial bonuses on high-income, single-earner married couples.[38]

In assessing whether neutrality is appropriate, individualized circumstances should matter. However, imputed income and economies

30. *See* Kahng, *Loneliest Number*, *supra* note 7, at 679.

31. *See id.* at 680.

32. *See id.*

33. *See id.* (noting "premium for many consumer goods and services" as well as "negative attitudes and stereotypes" associated with the status of being single).

34. *See id.*

35. See *id.* at 677.

36. *See* Hemel, *supra* note 8, at 673–74 (summarizing common marriage penalties). A household penalty would be triggered if two unmarried taxpayers who were heads of household form one "household" without marrying. That is because it is impossible for more than one person to furnish "over half of the cost of maintaining the household." *See* I.R.C. § 2(b)(1).

37. *See* Zelenak, *supra* note 7, at 398–401. Phase-outs of non-tax benefits as well as the Earned Income Tax Credit quickly bar those who are recognized as a unit, assuming both individuals have income. *See* Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405, 407 (1997).

38. *See generally* Hemel, *supra* note 8, at 673 (illustrating bonuses and penalties under varying conditions and concluding that a married couple could potentially save $70,000, in terms of the present value of annual marriage penalties, by remaining unmarried).

of scale cut in different directions for different households. Arguably, couples or households are not a reliable proxy for increased ability to pay. Additionally, other structural features of the tax system counsel against ascribing phantom income to families. For these reasons, this Article rejects the idea of a penalty to address economies of scale, imputed income, and the like. As Anne Alstott has argued concerning marriage neutrality, there should instead be a careful, nuanced approach depending on the goals of the particular provision.[39]

This Article corroborates the case for taxing the individual by reinforcing the under-inclusiveness of "taxable income" and linking it to the considerations that have been used to defend couple and household penalties.[40] As the concept is now defined, taxable income will often understate ability to pay on account of incentive provisions.[41] Although taxable income remains useful enough for progressive tax brackets, it is inappropriate to craft brackets using statuses as a proxy for household economies of scale. The system ignores many other compelling differences in purchasing power of taxpayers with the same taxable income. Singling out family status was—and remains—a means of privileging those who conform to the separate spheres ideology.[42]

As another anchor: if universal basic income (UBI) represents a remote contingency along the spectrum of options to help families,[43] centering the individual will be the best attainable option at approximating it. That is because combining spouses into a taxable unit keeps secondary earners from earning an income that is free from tax.[44]

The design of benefits programs, in general, likely implicates distinct considerations, which lie beyond the scope of this Article. Identifying poverty is distinguishable from assessing ability to pay tax, except for peripheral cases. The fact that cash and other assistance

39. *See* Alstott, *supra* note 6, at 758 ("We might—and should—go further in examining the implications of the new individualism for tax policy and the welfare state. References to marriage and family occur frequently throughout the Code, and a thorough review would revisit them to ask whether formal marriage represents a sound distinction in light of the purposes of the provision.").

40. *See infra* Section II.B.

41. *See infra* text accompanying notes 218–225.

42. *See generally* Alstott, *supra* note 6, at 731 (discussing how the joint return has historically benefitted nuclear families with one "family head" that advances family interests).

43. *See generally* Hemel, *supra* note 8, at 677–78 (criticizing the longstanding scholarly preoccupation with this trio of questions and supporting a universal basic income (or "demogrant"), combined with a flat tax, which could generate a (less) progressive tax system without the marriage bonus/penalty).

44. *See* Zelenak, *supra* note 7, at 340.

programs generally look to households rather than individuals[45] should be largely beside the point for the federal income tax.

In sum, although one might argue for UBI, or at least more gradual phase-outs of benefits designed to alleviate poverty, it is defensible to sever those debates from the design of the tax brackets.[46] Marriage bonuses are not a good solution to respond to any of the foregoing considerations. Nor are joint returns necessary to tax community property fairly. The end of the joint return is overdue, and not just because of the marriage penalty. Joint filing also discourages secondary earners from working.[47]

If the joint return is abolished, knock-on effects should be anticipated. Presumably, there will be self-help attempts to achieve marriage bonuses outside the intended structure.[48] In addition, the tax return as we know it has to channel tax incentives for non-business deductions and credits. There is no reason to think that in an individual-filing system, interdependence, caregiving, and dependency would suddenly become unimportant. Although the tax brackets are progressive, the tax system generally works regressively when delivering tax incentives.[49] All this is compatible with abolishing the joint return.

Part I summarizes the historical background and the tax literature on marriage bonuses and penalties. Part II argues for the individual as the unit of taxation. First, it situates the taxable unit debate in theories of distributive justice underlying progressivity. It then applies these insights against marriage bonuses and couple's penalties. Part III then proposes an end to the joint return and discusses the related steps that may be necessary in an individual-filing system. This Article

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45. *See* Alstott, *supra* note 6, at 669.

46. *See infra* Section III.B.

47. This is referred to as the "stacking effect." In a system with progressive tax brackets, the economic impact is essentially to add the marginal earner's income on top of the primary earner's income. Thus, starting out at a high marginal rate of tax, it is relatively difficult for the secondary earner to justify entering or returning to the labor market, especially if combined with non-deductible childcare expenses. *See* Alstott, *supra* note 6, at 705–06; Zelenak, *supra* note 7, at 365–71; Gann, *supra* note 7, at 30–46. *See generally* Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 993–94 (1993) (focusing on behavioral incentives and urging adjustments for two-earner families).

48. *See* Alstott, *supra* note 6, at 734–36 (sketching preliminary proposals to combat sham transactions); Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do with Joint Tax Filing?*, 11 NEV. L.J. 718, 738 (2011); Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1560–64 (2008).

49. *See* Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 561 (1995).

concludes that even if economies of scale, imputed income, and the like are material, an income tax is a poor vehicle to address those differences among taxpayers. For this purpose, consumption and wealth taxes, because of their distinct tax bases, would be superior to the use of proxy statuses in the income tax.

PART I. HISTORICAL BACKGROUND AND REVIEW OF TAX LITERATURE ON FILING STATUSES

A. Early Perspectives on Marriage Penalties and Bonuses

Qualifying for the most favorable filing status could be worth thousands of dollars per year under current tax law.[50] The joint return privileges one-earner married couples and penalizes two-earner married couples relative to unmarried individuals.[51] The path to this confusing regime of bonuses and penalties likely reflects a mix of accident, path dependence, and compromise.[52]

The federal income tax initially took two parallel approaches to address marriage. The flat 1% tax component allowed a $1,000 additional exemption for a spouse, on top of the basic $3,000 exemption.[53] The other track taxed high-income individuals at progressive rates up to 6%.[54] This surtax did not provide any adjustment for marriage.[55]

Lawrence Zelenak has unearthed the story of how, during the legislative process leading up to the Revenue Act of 1913, as well as after its enactment, a prescient controversy about the taxable unit, marriage

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50. *See* Hemel, *supra* note 8, at 673; *see also Key Elements of the U.S. Tax System*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-are-marriage-penalties-and-bonuses [https://perma.cc/FNU4-ABEM] (last updated May 2020) (illustrating how an earner who makes $200,000 could enjoy over a $7,000 marriage bonus, while two people making $20,000 each could suffer a total of over $2,000 in marriage penalty); Kyle Pomerleau, *Understanding the Marriage Penalty and Marriage Bonus*, TAX FOUND. (Apr. 23, 2015), https://taxfoundation.org/understanding-marriage-penalty-and-marriage-bonus/ [https://perma.cc/8UBX-EKXM] (quantifying a range of scenarios from low income to high income).

51. See sources cited *supra* note 50 for scenarios penalizing two-earner couples and showing bonuses for one-earner couples.

52. *See* Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 3–6 (2000).

53. *See* Revenue Act of 1913, Pub. L. No. 63-16, § II(C), 38 Stat. 114, 168 ("[T]here shall be deducted from the amount of the net income . . . the sum of $3,000, plus $1,000 additional if the person making the return be [married] . . . ."); LAWRENCE ZELENAK, FIGURING OUT THE TAX: CONGRESS, TREASURY, AND THE DESIGN OF THE EARLY MODERN INCOME TAX 169, 173–74 (2018).

54. *See* ZELENAK, *supra* note 53, at 174.

55. *See* Revenue Act of 1913, Pub. L. No. 63-16, § II(A)(2), 38 Stat. 114, 166 (1915) (taxing the "net income of every individual . . . [that] exceeds $20,000" at the progressive rates).

bonuses, and marriage penalties ensued.[56] More specifically, the catalyst was the structure of the personal exemptions in the "normal" flat tax.[57] Early op-eds complained of what scholars now call "secondary earner bias"—largely framed in the op-eds as unfairness to married women on account of the reduced exemption.[58] Nor was the relevance of de facto families as a comparator lost on initial commenters. The personal exemption for married taxpayers was not simply double the unmarried taxpayer exemption, which could lead to bonuses or penalties.[59] Concerns were raised that generous exemptions would stimulate tax avoidance transactions.[60] This was justified by the Treasury on account of what surfaces decades later as the "economies of scale" narrative.[61] Meanwhile, the "additional" tax did not adjust for family status, even while the normal tax raised marriage bonus/penalty concerns.[62]

Thus, the basic design concerns were almost immediately apparent. First, Congress was concerned about taxing the rich at higher rates.[63] Second, this inequality concern was layered with an exemption.[64] These exemptions probably reflect a desire to avoid impoverishment by taxation[65] at lower incomes. The debate demonstrates that even in a world more closely resembling the "separate spheres,"[66] the public was already concerned about secondary earner bias and equity for de facto families.[67]

Congress eventually pivoted away from the initial concerns surrounding redistribution, the exemption level, and secondary earners.[68]

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56. *See* ZELENAK, *supra* note 53, at 166–202.
57. *See id.* at 169–70.
58. *See id.*
59. *Id.* at 168.
60. *Id.* at 176.
61. *Id.* at 180 n.56.
62. *Id.* at 174.
63. *See id.* at 176–77.
64. *Id.* at 181.
65. *Cf.* Ariel Jurow Kleiman, *Impoverishment by Taxation*, 170 U. PA. L. REV. (forthcoming) (manuscript at 4 n.8) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775246 [https://perma.cc/3T9L-AYX6] (noting that the "concept has appeared in economic development literature, but has not been adopted widely"). As Kleiman defines the term, "fiscal impoverishment means that some low-income people pay net positive taxes, with their tax cost exceeding the cash and near-cash benefits they receive." *Id.* at 14.
66. *See* Eichner, *supra* note 4, at 244–46.
67. *See* ZELENAK, *supra* note 53, at 181 (describing calls for head of family status in 1913). As Zelenak puts it, "even before 1948 Congress had, in the limited context of the personal exemption, considered just about every possible approach . . . ." *Id.* at 202.
68. The story behind the move toward marriage bonuses is well known and can be summarized briefly here. *See generally* EDWARD J. MCCAFFERY, TAXING WOMEN 120–31 (1999) (discussing

That is largely because assignment of income from one married taxpayer to the other had emerged as a new and growing concern.[69] The Supreme Court held that community property law (but not marital income splitting agreements) effectively assigns income for federal tax purposes.[70] The knock-on effect was to undermine progressive tax rates by allowing the reporting of half the married couple's income on each person's tax return.[71] Each return, then, took advantage of a full set of the lower-rate tax brackets.[72] Meanwhile, taxpayers in common law property states tried to achieve a similar benefit with trusts and sham business partnerships.[73] Although the government often won in court, income splitting was administratively burdensome to combat.[74]

Although income splitting was a compelling problem, the joint return solution was not a foregone conclusion, and its central achievement—couples neutrality—has not withstood modern developments in family law. As this Article will explain, valid concerns about assignment of income should be balanced against other values.[75] The joint return is a simple means of trying to neutralize assignment of income while aligning with other political incentives.[76] As Carolyn Jones explained, Congress enacted the precursor to the modern joint return to channel a postwar tax cut, with the intent to privilege "traditional gender roles and power relationships."[77]

One might also claim that marriage is an administratively simple criterion to apply. This misses considerable complexity, which

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the development of the tax system in the United States and its effects on women from 1913 to 1948); Jones, *supra* note 21, at 259 (explaining that prior to income-splitting, federal income was assessed on an individual basis); McMahon, *supra* note 48, at 725–38 (discussing the introduction of joint returns and the ways in which couples shifted their income for tax purposes); Dennis J. Ventry, Jr., *Saving* Seaborn*: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459, 1460 (2011) (focusing on the principle that "ownership equals taxability").

69. *See* Zelenak, *supra* note 7, at 345–48.

70. *See* Poe v. Seaborn, 282 U.S. 101, 110–11, 117–18 (1930) (looking to ownership under state law to assign community income to taxpayers and distinguishing *Lucas v. Earl*, decided the same year); Lucas v. Earl, 281 U.S. 111, 114–15 (1930) (rejecting "attenuated subtleties" to tax income to "the man who earned it").

71. *See* McMahon, *supra* note 48, at 730.

72. *Id.* at 734.

73. *See id.* at 725–30.

74. *Cf. id.* at 730 (noting that the government won half the time but taking this as a consideration against individual filing).

75. *See infra* Section III.B.

76. *See, e.g.*, Jones, *supra* note 21, at 295–96; McMahon, *supra* note 48, at 727–28; Ventry, *supra* note 68, at 1516–18; *cf.* Zelenak, *supra* note 7, at 347 (noting that the joint return is not about "pooling" resources but rather a "historical accident" in response to Supreme Court decisions on income splitting).

77. *See* Jones, *supra* note 21, at 294–96.

fortunately goes under the radar for most taxpayers.[78] Moreover, the joint return has not prevented domestic partners from splitting community income.[79] Simplicity, in this context, will almost certainly remain a question of degree.

B. Head of Household Status

The head of household filing status was enacted in 1951.[80] This status appears to have been enacted as a response to claims for equity in comparison to sole earners who were taxed under the MFJ brackets.[81] As explained above, the joint return was concerned, dually, with neutralizing income splitting and avoiding marriage penalties.[82] Unsurprisingly, taxpayers had long complained that marriage was an inequitable focus, with regard to ability to pay tax, even before the large marriage bonus in 1948.[83] A head of household was taxed roughly halfway between one married earner and one unmarried earner.[84]

Scholars have focused on the upside down distribution of tax savings from the head of household status.[85] However, as Goldin and Liscow state, this largely goes "beneath the radar" and has rarely been quantified.[86] Using brackets instead of credits to encourage support almost necessarily will be regressive. Because the status is grounded in support of a dependent,[87] the brackets function as a substitute for nonbusiness deductions. This allows the subsidy to flow disproportionately to high bracket taxpayers.[88]

As others have observed, the creation of the head of household status had a collateral effect of creating a marriage penalty.[89] Before

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78. *See generally* Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 787–823 (1989) (detailing many questions of degree about who counts as married and for precisely what purposes under the tax law).

79. *See infra* text accompanying notes 109–114.

80. *See* Revenue Act of 1951, Pub. L. No. 82-183, § 301, 65 Stat. 452, 480 (codified as amended in scattered sections of 26 U.S.C.). *See generally* Jacob Goldin & Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parents*, 71 TAX L. REV. 367, 369, 387–404 (2018) (arguing for "differential tax treatment by marital status for those with children," providing statistics on regressive distribution of benefits from head of household status, and proposing small head of household credit).

81. *See* Bittker, *supra* note 11, at 1428; Kahng, *Loneliest Number*, *supra* note 7, at 655.

82. *See supra* Section I.A.

83. *See supra* text accompanying note 67.

84. *See* Bittker, *supra* note 11, at 1417.

85. *See* Goldin & Liscow, *supra* note 80, at 382–87.

86. *Id.* at 367.

87. *See* I.R.C. § 2(b) (2018) (describing the required relationships).

88. *See* Goldin & Liscow, *supra* note 80, at 368–69.

89. *See id.* at 371.

the head of household status, the exemptions sometimes carried a marriage penalty.[90] Zelenak found no trace of awareness on the part of taxpayers, presumably because the comparator of unmarried cohabitation was not one that resonated in the early twentieth century.[91] Although brackets tend to be more salient than exemptions, scholars nevertheless tend to pin the marriage penalty on the 1969 tax bracket modifications that reduced the marriage bonus.[92] But as early as 1951, the new head of household filing status created a marriage penalty in the tax brackets.[93]

The severity of the head of household marriage penalty depends on how many households are assumed for purposes of the comparison with similar unmarried taxpayers. At a minimum, one of the spouses presumably would have been a head of household, but for the marriage.[94] Under a one-household assumption, the married couple is trading MFJ brackets for one head of household plus one unmarried individual. Although few married couples maintain two households, the number may be greater than one would imagine.[95] Thus, it could sometimes be appropriate to frame the penalty by comparison with the total bracket width of two heads of households.[96]

Relatedly, courts have left the door open for more than one taxpayer to claim head of household status at one dwelling without barriers separating the putative households.[97] Fact-intensive questions could, of course, be raised on an audit as to whether two individuals at the same address are really maintaining distinct households.

90. *Id.*

91. *See* ZELENAK, *supra* note 53, at 186 n.85.

92. *See* Goldin & Liscow, *supra* note 80, at 409–10 n.111; Kahng, *Loneliest Number*, *supra* note 7, at 655; Bittker, *supra* note 11, at 1429–31 (tracing the "marriage penalty" to 1969 although noting that unmarried taxpayers could sometimes pay less tax as heads of household even before 1969).

93. *See* Bittker, *supra* note 11, at 1417.

94. *Id.* at 1416–17.

95. *See* Jennifer Altmann, *Married but Living Far Apart*, N.Y. TIMES (May 16, 2020), https://www.nytimes.com/2020/05/16/fashion/weddings/coronavirus-some-couples-reconsider-living-apart.html [https://perma.cc/NBU8-WVXS].

96. *Compare* Zelenak, *supra* note 52, at 68 n.267 (suggesting that the assumption of two households is unrealistic), *with* Hemel, *supra* note 8, at 673 (assuming two heads of two households for purposes of calculating marriage penalties).

97. *See* Est. of Fleming v. Comm'r, 33 T.C.M. (CCH) 619, 621–22 (1974); *see also* Lyddan v. United States, 721 F.2d 873, 875–86 (2d Cir. 1983) (estranged married couple living in the same home did not maintain separate households); Jackson v. Comm'r, 70 T.C.M (CCH) 2022, 2024 (1996); Daya v. Comm'r, 80 T.C.M. (CCH) 743, 754–55 (2000); *see also* Memorandum from the Assistant Chief Counsel, Internal Revenue Serv., to the District Counsel, New England, SCA 1998–041, at 1–2 (Apr. 3, 1998) (advising that whether two unmarried taxpayers could claim head of household at a "shared dwelling" depends on all the facts and circumstances).

Relevant factors could include separate bedrooms for the putative heads of household, whether the parties have separate familial and social activities outside of the home, common meals, and potentially many other economic or social ties.[98]

In sum, the head of household status should impact the scholarly conversation about the marriage bonus and penalty for the following reasons. First, in a system with this status, to eliminate marriage penalties, there would need to be bigger (and likely untenable) single person penalties and marriage bonuses. Second, unlike marriage penalties, head of household status anticipates potentially invasive inquiries into intimate conduct and other connections rather than relying on a legal status. Third, assuming that fact-intensive disputes underlying the "household" criterion are tolerable, expanding the marriage penalty beyond the legal status of marriage cannot be rejected so easily.

C. The Trilemma: Progressivity, Marriage Neutrality, and Couples Neutrality

The familiar and more pervasive system of marriage bonuses and penalties dates to 1969.[99] At that point, the MFJ brackets were set at less than a two-to-one ratio compared to the unmarried taxpayer brackets.[100] This created a marriage penalty for two-earner couples.[101] Unlike the head of household marriage penalty,[102] this new marriage penalty could not conceivably be dismissed as a peripheral or inappropriate comparison.

In defense of the marriage penalty, Assistant Secretary for Tax Policy Edwin Cohen stated:

> I hope you will forgive me for this mathematical presentation, but it becomes apparent from this analysis that you cannot have each of these principles operating simultaneously, and that there is no one principle of equity that covers all of these cases. No algebraic equation, no matter how sophisticated, can solve this dilemma. Both ends of a seesaw cannot be up at the same time. Any rule that is selected will, in some cases, appear to penalize married couples and, in other cases

98. *See* Memorandum from the Assistant Chief Counsel, Internal Revenue Serv., to the District Counsel, New England, *supra* note 97, at 4–6.

99. *See supra* text accompanying note 92.

100. *See* Goldin & Liscow, *supra* note 80, at 371.

101. *Id.*

102. *See supra* text accompanying notes 89–96.

> seem to penalize single persons. All that we can hope for is a reasonable compromise.[103]

Cohen did not address the inconvenient fact that the existing tax brackets for head of household incorporated the concept of a household. To achieve couples neutrality (or something like it), the tax law could have centered on and built on the household concept. In any event, the tax literature builds from this trilemma, which holds that we cannot perfect and preserve all three values: progressivity, marriage neutrality, and couples neutrality.[104]

Those who oppose progressive tax rates largely, though not entirely, escape taxable unit design problems.[105] A flat tax, however, would represent a radical change to the system, and goes far beyond the conversation about marriage bonuses and penalties. With an assumption of progressivity, the standard move in the tax literature is to then dismantle couples neutrality and argue for the end of the joint return. This argument comes in two flavors: couples neutrality arguably is meaningless, and even if it is meaningful, it is arguably insufficiently inclusive (of de facto couples).[106] Although Hemel's interesting work suggests that marriage penalties may not be all bad, scholars have shown little interest in intentionally taxing marriage.[107]

There is, however, a modern twist on the story that has not been adequately emphasized in the literature. Specifically, the joint return has not eliminated incentives for income splitting or incentives for states to innovate with property and domestic relations law. This goes beyond the occasional quirk inherent in the election for married couples to file separate tax returns. That is because income splitting can now be accomplished outside of the joint return, with legal certainty, and without any need for aggressive tax planning.

What Congress did not foresee is that decades later, states would go on to enact non-marital unions. Non-marital unions have revived the combination of tax brackets for the unmarried and the income

103. *See* Cohen Statement, *supra* note 28, at 79.

104. *See supra* text accompanying note 43.

105. *See* Hemel, *supra* note 8, at 676 (explaining that a flat tax proposal that could afford some measure of progressivity, if combined with universal basic income).

106. *See, e.g.*, Zelenak, *supra* note 7, at 354–63; Kahng, *Loneliest Number*, *supra* note 7, at 660–63; Motro, *supra* note 18, at 1523–30.

107. *See* Alstott, *supra* note 6, at 750–52 (outlining issues for an explicit tax on marriage as a form of privilege, luck, or endowment); Hemel, *supra* note 8, at 697–703 (questioning whether such marginal marriages are optimal and whether it is unwise to be even neutral toward marginal marriages).

splitting benefits of community property. In Revenue Ruling 2013-17, issued by the Internal Revenue Service before the federal government recognized same-sex marriage, same-sex married couples achieved income splitting via community property.[108]

Non-marital unions have not become obsolete after the Supreme Court's landmark opinion in *Obergefell v. Hodges*.[109] With a purpose of facilitating the retention of pension and social security benefits, Washington restricts its domestic partner status to those over age sixty-two.[110] California, however, has removed a similar age restriction.[111] Nevada,[112] by contrast, has never restricted its domestic partnership law to senior citizens.

The Treasury Department has promulgated regulations clarifying that civil unions, domestic partnerships, and other non-marital unions do not constitute marriage for federal income tax purposes.[113] Informal guidance from the Internal Revenue Service helps taxpayers report community income—not just on MFS returns but also on the returns of unmarried domestic partners.[114]

With this twist, the MFJ and MFS tax brackets have functionally ceased to prevent substantial geographical disparities among taxpayers. Clearly, the tax law cannot prevent income splitting without more complexity. Nor does the tax law address couples fairly. As this Article will argue in Part II, abolishing income splitting is a better solution than grouping couples into a taxable unit. However, a more robust and inclusive vision of economies of scale and couples neutrality needs to

108. *See* Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

109. Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (holding that "same-sex couples may exercise the fundamental right to marry").

110. *See* WASH. REV. CODE §§ 26.60.010–.60.901 (2021).

111. *See* CAL. FAM. CODE § 297 (West 2020); *see also* Sammy Caiola, *What You Need to Know About California's New Domestic Partnership Law*, CAP. PUB. RADIO (Dec. 26, 2019), https://www.capradio.org/articles/2019/12/26/what-you-need-to-know-about-californias-new-domestic-partnership-law/ [https://perma.cc/6QXS-LFVR] (explaining that California has expanded the right for same-sex and opposite-sex couples to apply for domestic partnership to those who are over eighteen but under sixty-two).

112. *See* NEV. REV. STAT. § 122A.030 (2019).

113. *See* Treas. Reg. § 301.7701-18(c) (2020); *see also* Definition of Terms Relating to Marital Status, 81 Fed. Reg. 60,609, 60,610–15 (Sept. 2, 2016) (to be codified at 26 C.F.R. pt. 1, 20, 25, 26, 31 & 301) (dismissing comments in opposition of a bright-line rule largely on the ground that it would be burdensome to evaluate different unions and draw lines). *See generally* Anthony C. Infanti, *Hegemonic Marriage: The Collision of "Transformative" Same-Sex Marriage with Reactionary Tax Law*, 74 TAX LAW. 411, 424–26 (2021) (criticizing incoherence of the Treasury's decision and arguing that this represents dominant groups protecting their privilege).

114. *See generally* INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. NO. 555, COMMUNITY PROPERTY 2–11 (2020) (explaining to taxpayers how to report community income on joint or separate returns).

be confronted to persuasively make that argument. If economies of scale and couple's penalties make sense, it would make sense to examine whether it is possible to expand the framework to de facto couples. As Part II will argue, however, a more inclusive couple's penalty goes in the wrong direction. Even if there is some force to the couple's penalty argument, the income tax is a poor vehicle to implement the penalty.

D. Considerations Outside the Trilemma

Several considerations lie outside the core "trilemma" surrounding the taxable unit. All of these considerations militate against income splitting and the joint return. Although this Article posits that there is reason enough within the trilemma to reject the joint return and revive an individualistic system for progressive taxation,[115] these additional considerations might well tip the balance for one who remains unconvinced by the other arguments.

1. Fairness to and Incentives for Secondary Earners

Even in 1914, op-ed commentators decried the impact of a $1,000 exemption for married women.[116] As compared to the $3,000 exemption for a single person in 1913, the smaller exemption represented a marriage penalty.[117] This basic pattern has been carried forward into the MFJ tax brackets, which since at least 1969 are less than double the size of the unmarried individual tax brackets.[118]

Scholars have refined the basic insight to blend the loss of tax-free imputed income (from childcare) with the stacking effect of joint filing. The net effect is a potentially powerful incentive for an earner on the margin to perform untaxed housework or childcare rather than earn compensation for services outside the home. That is because the secondary earner (1) will effectively be taxed at the marginal tax rate of the primary earner, and (2) will obtain limited tax benefits for the cost of childcare.[119]

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115. As Part II argues, progressivity requires taxation centered on the individual; and even an inclusive couple's penalty is indefensible in the income tax, or at least a realistic one that would resemble ours in any meaningful way.

116. *See* ZELENAK, *supra* note 53, at 177.

117. *See id.*; Revenue Act of 1913, Pub. L. No. 63-16, § II(C), 38 Stat. 114, 166.

118. *See supra* text accompanying note 61.

119. *See, e.g.*, MCCAFFERY, *supra* note 7, at 120–26; Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559, 564–77 (2016); Staudt, *supra* note 29, at 1600–03.

The one-earner married couple bias of the tax system has a disparate impact along the dimensions of class, gender, and race.[120] In the tax literature, the prototypical secondary earner is a woman married to a man who earns a high income.[121] In contrast, many women are simply nowhere near "marginal" as to labor market participation; there may be no meaningful choice as to whether to work outside the home. Indeed, they may well shoulder the bulk of the housework as well as a job in the market. Black women are likely to be both the primary earner and the primary houseworker.[122]

Dorothy Brown has uncovered further nuances at the intersection of race and the joint return. Black households have been more likely to pay a marriage penalty, including a severe marriage penalty.[123] Black households have been more likely to phase out of the EITC.[124] In addition, black households are not likely to benefit proportionally from marriage bonuses.[125] Eliminating marriage penalties by creating bigger marriage bonuses is little comfort for unmarried taxpayers; relatedly, Brown notes that black taxpayers are more likely to be unmarried.[126]

Theoretically, incentives against secondary earners working are powerful. It is not clear just how impactful the incentives are on taxpayer decisions to work at all or adjust their hours.[127] McCaffery has

120. *See generally* Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1472 (1997) ("By constructing all families as homogeneous, the literature successfully masks any race, class, or gender bias that may be embedded in the operation of the federal tax laws.") (interrogating the assumption that women are marginal wage earners).

121. *See* BROWN, *supra* note 7, at 36–37 ("Black wives . . . have always worked outside the home more than white wives, even after controlling for income." (footnote omitted)); Staudt, *supra* note 29, at 1590–92; Brown, *supra* note 120, at 1490–99; Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 792–95 (1997).

122. *See* Staudt, *supra* note 29, at 1591–92; Brown, *supra* note 120.

123. *See* Brown, *supra* note 120, at 1503.

124. *See* Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755, 832–33 (2005) [hereinafter Brown, *The Tax Treatment of Children*]; *see also* Brown, *supra* note 120, at 1479–81 ("The EITC marriage penalty is a function of its phase-out provisions being identical for single and married individuals."); BROWN, *supra* note 7, at 52 ("[The EITC] has steep marriage penalties, and recent tax reform efforts left those penalties largely intact.").

125. *See* BROWN, *supra* note 7, at 53–57; Brown, *supra* note 120, at 1493–95.

126. BROWN, *supra* note 7, at 57.

127. *See* Staudt, *supra* note 29, at 1611–14 (noting limited labor impacts and marriage impacts of penalties); Brown, *supra* note 120, at 1503 (noting very limited impact of stacking effect on labor force participation of Black women); CONG. BUDGET OFF., FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 10–12 (1997) (noting countervailing effects and estimating small percentage impact on participation of primary or secondary earners from tax impact of marriage).

suggested lowering (possibly to a negative tax) the rate of tax on secondary earners.[128] Hemel identifies some research pointing to the likelihood that a significant number of marginal marriages may be tipped over the line toward cohabitation by the tax disincentives.[129] Hemel also suggests that it may be efficient to tax secondary earners at a lower rate, even if that provides a marriage bonus, and even if that effects a transfer from two-earner couples.[130]

Ending the joint return would not go as far as scholars such as McCaffery and Hemel suggest. However, as this Article will argue, taxing secondary earners at lower rates to maximize utility should be rejected.[131] Arguably, a more compelling challenge for a just approach to taxing the family is to rationalize and account for the endowment of secondary earners.

Nancy Staudt has argued that the tax system should recognize the value of housework.[132] Moreover, by taxing this labor, women's dignity and equity would be fostered.[133] Recognizing its value, in turn, may lead to fair treatment. Part of fair treatment, Staudt argues, is addressing the vulnerability of women who are not part of the Social Security system, except derivatively through their husbands.[134] She offers the solution of taxing imputed income of women but crediting the tax for many (if not most) women.[135] This would, de facto, be a tax only on the housework of middle- and upper-income women, but the incidence could well be on the husband's discretionary spending.[136]

Although theoretically the case is not clear cut, the tax system is unlikely to tax imputed income from housework and childcare. Moreover, a public option for childcare could help low-income families build wealth and enable secondary earners to have a free enough

128. *See* MCCAFFERY, *supra* note 7, at 277–79; McCaffery, *supra* note 47, at 1060 (concluding that there is a "strong theoretical case" for such preferences).

129. *See* Hemel, *supra* note 8, at 697 ("modest but measurable effect"); Nancy R. Burstein, *Economic Influences on Marriage and Divorce*, 26 J. POL'Y ANALYSIS & MGMT. 387, 392–93 (2007); Edward Fox, *Do Taxes Affect Marriage? Lessons from History* 45 (N.Y.U. Ctr. For L., Econ. & Org., Working Paper No. 17-15, 2017).

130. *See* Hemel, *supra* note 8, at 683–85 (suggesting a tax on married primary earners and unmarried people that is higher than the tax on married secondary earners).

131. *See infra* Section II.A.

132. *See* Staudt, *supra* note 29, at 1616–18.

133. *See id.* at 1619–20.

134. *See id.* at 1639–40.

135. *See id.* at 1636–38.

136. *See id.* at 1639–40.

choice to work.[137] If a government spending program to facilitate work by parents is the true goal in this context, taxing imputed income is not an acceptable substitute.

2. Marriage Penalties at Low Incomes

The problem of what to do about marriage penalties at low incomes has perplexed policymakers and led to controversy. In 1913, the question was whether to double the $3,000 exemption for the normal tax. Instead, Congress added a $1,000 additional exemption for a spouse, opting to create a marriage penalty.[138] In 1969, marriage penalties most saliently were incorporated into the tax brackets.[139] In years since, these marriage penalties (other than the head of household penalty) have been eliminated from the exemption amount and the lowest tax brackets.[140]

The EITC is typically described as a type of wage support for low-income workers, often lifting them out of poverty.[141] But it may be helpful to frame the EITC as a means-tested payroll tax exemption. One might maintain that the payroll tax is regressive, constitutes a tax even though it resembles a benefit scheme, and impoverishes workers who have very little ability to pay.[142] Regardless of whether one

137. *See* Shannon Weeks McCormack, *Postpartum Taxation and the Squeezed Out Mom*, 105 GEO. L.J. 1323, 1346–48 (2017) (observing that although it is unlikely to take place soon, "the U.S. government could drastically improve the plight of young mothers by following the example of the many other developed nations whose governments provide both services and legal protections to support new mothers").

138. *See supra* text accompanying note 53.

139. *See supra* text accompanying note 92.

140. *See* Michael Durkheimer, *Under the GOP Tax Bill, Not Being Married Could Cost You*, FORBES (Dec. 17, 2017, 3:08 PM), https://www.forbes.com/sites/michaeldurkheimer/2017/12/17/under-the-gop-tax-bill-not-being-married-could-cost-you/ [https://perma.cc/J4SY-GNTY]; *cf.* Hemel, *supra* note 8, at 672–73 (taking into account features other than the tax brackets and concluding that marriage penalties have persisted even at lower incomes).

141. *See, e.g.*, Francine J. Lipman, *(Anti)Poverty Measures Exposed*, 21 FLA. TAX REV. 389, 493–94 (2017) [hereinafter Lipman, *(Anti)Poverty Measures Exposed*]; Francine J. Lipman, *Access to Tax ~~In~~Justice*, 40 PEPP. L. REV. 1173, 1182 (2013) [hereinafter Lipman, *Access to Tax ~~In~~Justice*]; Vada Waters Lindsey, *Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction*, 44 U. MICH. J. L. REFORM 83, 85 (2010) ("largest *tax benefit* program for working individuals" (emphasis added)); Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the Minimum Wage*, 57 TAX L. REV. 301, 301 (2004) ("largest federal anti-poverty program"); Shaviro, *supra* note 37, at 408 ("transfer program for low-income workers").

142. *See* Lipman, *(Anti)Poverty Measures Exposed, supra* note 141, at 489–91; Linda Sugin, *Payroll Taxes, Mythology, and Fairness*, 51 HARV. J. ON LEGIS. 113, 136 (2014).

frames it as a subsidy or a tax exemption, acute marriage penalties can apply in the domain of the EITC.[143]

Scholars have uncovered marginal tax rates exceeding 100% for low-income couples.[144] This arises because the EITC has a very rapid phase-out. Its bracket width essentially increases for children but not for the number of taxpayers. Thus, there can be an acute marriage penalty for a two-earner married couple. In contrast, traditional safety net programs assess resources on a household basis, which would capture not just marriage but also cohabitation.[145]

With respect to marriage penalties at low incomes, it would be naïve to anticipate that ending the joint return will eliminate the issue.[146] Safety net programs lie beyond the scope of this Article; however, this Article posits that tax benefits like the EITC are distinguishable from safety net programs, even if the EITC has been characterized as lifting taxpayers out of poverty. This Article is primarily aimed at crafting appropriate and equitable distinctions among those who have taxpaying capacity. However, it is appropriate briefly to anticipate the limits of this Article's central thesis and explain how it can accommodate a distinct approach at low incomes. This Article will address potential concerns of scope and consistency in Section III.B.

3. Joint and Several Liability–Hardships on Innocent Spouses

Tax scholars have raised consciousness of the hardships of a spouse being subjected to joint and several liability for filing a joint tax return.[147] Presumably, ending the joint return would obviate the need for more complicated fixes to the joint and several liability regime. However, in an individual filing system, there could be lingering linkages between taxpayers—for example, if deduction and credit portability are implemented. For this reason, Congress might still wish to consider joint liability, though perhaps to a more limited extent. These complications lie beyond the scope of this Article.

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143. *See* Shaviro, *supra* note 37, at 408–09; Brown, *supra* note 120.

144. Shaviro, *supra* note 37, at 407.

145. *See* Lipman, *(Anti)Poverty Measures Exposed*, *supra* note 141, at 417–20.

146. *See* Brown, *The Tax Treatment of Children, supra* note 124, at 793–801 (documenting the view that the EITC is "welfare," thus generating a hostile reception politically).

147. *See, e.g.*, Michelle Lyon Drumbl, *Joint Winners, Separate Losers: Proposals to Ease the Sting for Married Taxpayers Filing Separately*, 19 FLA. TAX REV. 399, 424–26 (2016) [hereinafter Drumbl, *Joint Winners, Separate Losers*]; Michelle Lyon Drumbl, *Decoupling Taxes and Marriage: Beyond Innocence and Income Splitting*, 4 COLUM. J. TAX. L. 94, 102 (2012).

PART II. FAIRNESS REQUIRES RECENTERING ON INDIVIDUALS

At the risk of oversimplification, underlying the taxable unit is a central question whether the tax system should be agnostic about how many people it takes to earn a given sum of money. For example, a doctor might earn as much as two nurses, or as much as four administrative assistants. It is inappropriate to lose sight of the need for the tax system to draw appropriate distinctions between differently situated taxpayers. If appropriate distinctions are to be made between the doctor, the nurse, and the assistant, this may require recentering on individuals rather than allowing relationships to blur the lines between taxpayers. This part explains why an egalitarian theory of distributive justice, which arguably underlies the tax brackets, militates strongly in favor of an individual-filing system. As others have noted, however, tax scholarship overwhelmingly has used a welfarist approach.[148] Although these perspectives may often yield similar results, the differences can be important in thinking about the taxable unit.

As Part I has detailed, the design of the taxable unit ultimately raises a variety of legal and policy questions.[149] Broadly speaking, the set of frictions includes the progressivity of the tax rates, the risk of discouraging or at least overtaxing work by secondary earners, whether to treat couples equally, whether to burden marriage (or other relationships likely to involve sharing and imputed income), and how to prevent tax abuse by related parties.

Although selecting a focus amid these important considerations may seem arbitrary, this Article starts from the premise that progressivity is one of the most fundamental features of a tax system.[150] It is not quite as fundamental as whether to have an income tax at all—versus, for example, a consumption tax. Given the decision to have an income tax, whether to have a progressive tax (or a flat tax) is arguably the next most fundamental design choice.

In short, tax systems generally seek to apportion the burden according to ability to pay.[151] The tax base, such as income, measures

148. *See* Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904, 910–11 (2011) (noting that "few [tax] scholars have argued that more attention should be paid to a liberal or deontological approach, an approach that focuses on fairness, or equality, or freedom, or individualism").

149. *See supra* Part I.

150. *Cf.* Seligman, *supra* note 2, at 767–75 (developing the intellectual history of progressive taxation).

151. *See supra* text accompanying note 2; *cf.* Alfred G. Buehler, *Ability to Pay*, 1 TAX L. REV. 243, 243 (1946) ("To many persons ability to pay is synonymous with justice in taxation.").

ability to pay more concretely. The income tax essentially seeks to tax not just consumption, but also savings as a better proxy for ability to pay than consumption alone.[152] Most scholars would agree that a progressive income tax cannot be justified using the benefits principle[153] or a libertarian conception of distributive justice.[154] This leaves two chief competitors: welfarist and egalitarian approaches.[155] Although it is important to be transparent about the underlying values in a progressive tax system,[156] it is probably unrealistic to expect any one theory to account for all aspects of a satisfactory tax system. All perspectives have explanatory and normative strengths and weaknesses and will likely in specific situations need to be tempered by other values.[157]

Although this part concludes that the tax system should not tax couples as a unit, it does not reflexively reject the idea because of the current system. The tax system has privileged marriage and has not systematically recognized other arrangements. However, it is

Although Buehler is preoccupied with the existence of other considerations, such as "expediency, benefits, social policy, the effects of taxation" and other factors, even Buehler assumes that ability to pay is central. *See* Buehler, *supra*, at 258.

152. Buehler, *supra* note 151, at 251 (noting that "[b]oth property and consumption are defective as measures of ability" "unless complicated adjustments are added that are impracticable of application."); *see, e.g.*, JOHN A. MILLER & JEFFERY A. MAINE, THE FUNDAMENTALS OF FEDERAL TAXATION 3 (3d ed. 2013) ("[A] system should levy taxes commensurately with one's ability to pay those taxes. It is generally thought that incomes taxes and consumption taxes are best on this count.").

153. As Deborah Schenk has explained, "[t]he benefits principle posits that government expenses should be allocated in proportion to the benefits received." Deborah H. Schenk, *Saving the Income Tax with a Wealth Tax*, 53 TAX L. REV. 423, 458 (2000).

154. Miranda Perry Fleischer & Daniel Hemel, *The Architecture of a Basic Income*, 87 U. CHI. L. REV. 625, 646 (2020). However, some strands of libertarianism may support more intervention on the theory that there is not enough left in the way of good, unowned resources to permit a fair application of its principles. *See id.* at 647. *See generally* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 297 (1974) (arguing for minimal state intervention). As Professors Fleischer and Hemel explain, libertarianism refers "to a set of ethical and political theories sharing a belief that individuals have a right to be free from coercion . . . and that the results of market interactions presumptively should remain undisturbed." Fleischer & Hemel, *supra*, at 646.

155. *See* Fleischer & Hemel, *supra* note 154, at 639 & n.34 (documenting the "predominance in debates over tax-and-transfer policy" of welfarism, egalitarianism, and libertarianism); *cf.* Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1460–64 (2006) (situating the "fairness-versus-welfare debate" "within the discourse of moral and political philosophy").

156. *See* James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129, 1131 (2008) ("Tax policy has ignored the necessity of first identifying equity goals appropriate for a just government and then designing a tax system to help achieve those goals."); Linda Sugin, *A Philosophical Objection to the Optimal Tax Model*, 64 TAX L. REV. 229, 231 (2011) (arguing for "a nuanced, philosophical understanding of fairness that incorporates the role of taxation into a broader conception of a just society").

157. *Cf.* Solum, *supra* note 155, at 1453–54 (noting that "every legal theory worth its salt claims to be true or correct in some sense" though "the fact of reasonable pluralism is one of the features of the world that has important normative consequences").

important to consider whether a more inclusive system would be appropriate.

A. Marriage Bonus

The federal income tax has long imposed higher rates on top income earners.[158] Top marginal tax rates trended largely downward since 1981, going from a top marginal rate of 70% in 1981, then to 50% until 1986.[159] Over the last few decades, the top rate of tax has seesawed and occasionally has gone as high as 39.6%.[160] Under legislation enacted in 2017, the highest bracket is currently 37% (through 2025).[161] In the interest of completeness, though not to endorse the approach: the brackets distinguish capital gains—and, more recently, dividends.[162] In general, investment income has usually been taxed at much lower, almost flat, rates.[163] Such lower taxation has been justified on a variety of grounds, such as mitigating bunching,[164] inflation,[165] and lock-in.[166] Although the appropriateness of capital gains preferences are contested, this Article takes the capital gains preference as a given feature of the system. Relatedly, retirement investment is subject to many tax incentives.[167] And home ownership benefits from a capital gain exclusion[168] as well as the non-taxation of imputed rental income;[169] meanwhile, mortgage interest is an itemized

158. For a tabular history of the tax brackets, see *Historical U.S. Federal Individual Income Tax Rates and Brackets, 1862–2021*, TAX FOUND. (Aug. 24, 2021), https://taxfoundation.org/historical-income-tax-rates-brackets/ [https://perma.cc/S6RQ-UFMR].

159. *See id.*

160. *See id.*

161. *See* I.R.C. § 1(j) (2018).

162. *See id.* § 1(h).

163. Alex Muresianu et al., *Biden's Proposed Capital Gains Tax Would Be Highest for Many in a Century*, TAX FOUND. (Apr. 26, 2021), https://taxfoundation.org/biden-capital-gains-tax-rate-historical/ [https://perma.cc/9LTF-KJEA].

164. *See* Suburban Realty Co. v. United States, 615 F.2d 171, 186 (5th Cir. 1980) (noting importance of "appreciation in value accrued over a substantial period of time" and "'bunching' effect").

165. Reed Shuldiner, *Indexing the Tax Code*, 48 TAX L. REV. 537, 563–64 (1993).

166. *Id.* at 559.

167. Eric Toder et al., *Tax Incentives for Retirement Savings*, TAX POL'Y CTR. (May 11, 2020), https://www.urban.org/sites/default/files/publication/102198/tax-incentives-for-retirement-savings.pdf [https://perma.cc/C935-LZA3].

168. *See* I.R.C. § 121 (2018).

169. *What are the Tax Benefits of Homeownership?*, TAX POL'Y CTR., http://www.taxpolicycenter.org/sites/default/files/briefing-book/4.8.1_what_are_the_tax_benefits-from-home-ownership.pdf [https://perma.cc/FBD8-8K8S].

deduction.[170] Thus, the system is progressive with respect to labor income, but more flat or regressive when it comes to income from capital.[171]

As discussed above, it is a truism that tax liability ought to be based on "ability to pay."[172] As I have argued in other work, "ability to pay" is "protean."[173] Focusing on ability to pay does not necessarily prefigure a system with progressivity.[174] A flat tax would, to be sure, scale up with income. But our federal income tax has always, except for brief interludes, been progressive.[175] Although a flat tax combined with a universal basic income would be somewhat progressive,[176] UBI seems very distant from political possibility.[177] Moreover, the progressivity of such a system would be limited compared to the top marginal tax rates our tax system has often imposed.[178]

Scholars typically ground our progressive tax system in welfarist theories of distributive justice.[179] Welfarism seeks to maximize the total utility in society, which could be defined in various ways,[180] but utility is widely assumed to be difficult or impossible to measure or compare between individuals.[181] In tax, welfarists focus on maximizing social welfare, which requires attention to the marginal utility of a

170. *See* I.R.C. § 163(h).

171. *See* CONG. BUDGET OFF., THE DISTRIBUTION OF HOUSEHOLD INCOME AND FEDERAL TAXES, 2011, at 5 (2014), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/49440-distribution-income-and-taxes-2.pdf [https://perma.cc/T8KS-MR7J] (finding that labor income "falls off significantly for households in the top 1 percent of the distribution").

172. *See supra* text accompanying notes 151–152.

173. James M. Puckett, *Improving Tax Rules by Means-Testing: Bridging Wealth Inequality and "Ability to Pay,"* 70 OKLA. L. REV. 405, 426–28 (2018).

174. *See* Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 519–20 (1952).

175. *See Historical U.S. Federal Individual Income Tax Rates and Brackets, 1862–2021*, *supra* note 158.

176. *See* Hemel, *supra* note 8, at 676.

177. *Cf.* Fleischer & Hemel, *supra* note 154, at 629 (proposing but "hazard[ing] no predictions as to the imminence of a UBI").

178. Hemel, *supra* note 8, at 680.

179. *See, e.g.*, Blum & Kalven, *supra* note 174, at 519–20 ("It is hard to gain much comfort from the special arguments, however intricate their formulations, constructed on notions of benefit, sacrifice, ability to pay, or economic stability."); Lawsky, *supra* note 148, at 904 (declining marginal utility assumption "has been crucial in tax scholarship over the last sixty or so years, as optimal tax theory and welfarism have become important ways that many in the legal academy evaluate tax policy"); Michael A. Livingston, *Blum and Kalven at 50: Progressive Taxation, "Globalization," and the New Millennium*, 4 FLA. TAX REV. 731, 745–46 (2000) (critiquing the tax literature's focus on marginal utility).

180. Chiefly, utility could mean subjective happiness or well-being; preference satisfaction; rational preference satisfaction; or satisfaction of objective goods. Lawsky, *supra* note 148, at 911–12.

181. *See* Solum, *supra* note 155, at 1456–57; Lawsky, *supra* note 148, at 909.

dollar paid to the tax authority.[182] For example, one might suppose that the next dollar of income is worth much less to someone wealthy than to an average worker. To the latter, marginal income may go toward food, rent, and necessaries, rather than luxuries and other discretionary spending.

In some applications, welfarist theories of distributive justice may arrive at essentially the same place as more egalitarian visions of distributive justice. However, this Article posits that welfarist justifications are not transparent about their guiding values or the justifications for our progressive tax system.[183] It is not necessarily true that the rich value marginal dollars less than an average worker.[184] And although wealth often conjures up images of parties, travel, jets, and yachts, it is not true that wealth equates to waste. Bill Gates, Warren Buffet, and many of the other wealthiest individuals in the U.S. seek to devote much of their wealth to socially responsible causes.[185] Analysis and assumptions concerning utility, however, facilitate a discussion with a veneer of scientific reliability, which may seem less debatable than normative values.

A push to identify normative values would be in deep tension with welfare economics. As Solum explains, "Whatever the source of economists' aversion to value judgments, much of the history of welfare economics can be seen as involving value parsimony, or efforts to get the maximum prescriptive content from the 'weakest' (meaning 'least controversial') normative assumptions."[186] Yet the basic assumption that (almost) everyone would prefer an unfair society in which there is greater net utility is contested.[187] And the assumption of diminishing marginal utility is even more hotly contested.[188] For these reasons, egalitarian principles will more reliably explain a progressive income tax.

Egalitarian theories of justice, in contrast, are openly normative. Egalitarian approaches emphasize providing for individual freedom

182. *See* Lawsky, *supra* note 148, at 905.

183. *Cf. id.* at 946–51 (implying that welfarists may be more normative than they realize or are engaged in refusal to accept the likely facts).

184. *See id.* at 914.

185. *See History of the* Pledge, GIVING PLEDGE, https://givingpledge.org/About.aspx [https://perma.cc/R47B-A8HA].

186. Solum, *supra* note 155, at 1461.

187. *See id.* at 1462.

188. *See supra* text accompanying notes 181–184 for a modern critique. Even in earlier debates on the income tax, however, the assumption was contested. *See* Buehler, *supra* note 151, at 249.

and dignity over aggregate utility; yet they reject the libertarian insistence that the market is fair or provides meaningful freedom.[189] In sum, they "defend the core values of equality of resources, neutrality toward visions of the good life, and individual freedom."[190] Moreover, egalitarian theories take note of the arbitrariness of the wealth, ability, talent, and connections attributable to the chance circumstances of one's birth.[191]

Entwined with this solicitude for dignity and freedom is accountability for free choices, as opposed to luck. Although not without difficult line-drawing questions, this principle is generally taken to justify ex post redistribution to correct unjust distributions that were in no meaningful sense attributable to a free choice.[192] A potential clarification or application of this principle holds that all individuals should have "effective access to enough resources to avoid being oppressed by others and to function as an equal in civil society."[193]

Clearly, the progressive tax brackets evidence a deep concern that wealth is attributable to many arbitrary factors, such as luck, talent, and connections. President Roosevelt attacked wealth concentration to justify progressive taxation.[194] Henry Simons, an economist and thought leader on the income tax, suggested: "The case for drastic progression in taxation must be rested on the case against inequality—on the ethical or aesthetic judgment that the prevailing distribution of wealth and income reveals a degree (and/or kind) of inequality which is distinctly evil or unlovely."[195]

This does not, however, mean that an egalitarian would think there is no moral significance in work efforts, nor does it mean that incentives are unimportant. But on the topic of incentives, there is a countervailing "income effect" that may neutralize the "substitution effect."[196] Simply put, most people cannot simply substitute leisure for

189. *See* Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 980 (1999) (citing BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); JOHN RAWLS, A THEORY OF JUSTICE (1971); PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM? (1997); Ronald Dworkin, *What Is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFFS. 185 (1981); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFFS. 283 (1981)).

190. Alstott, *supra* note 189, at 980.

191. Fleischer & Hemel, *supra* note 154, at 643.

192. *See id.* at 644.

193. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 320 (1999).

194. *See* Buehler, *supra* note 151, at 256.

195. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 18–19 (1980).

196. *See* Repetti, *supra* note 156, at 1182.

work—and presented with a meaningful choice between work and leisure, taxpayers may prefer to achieve their spending and saving goals. Moreover, incentives can also lead to harmful consequences. Incentive compensation has been associated with undue risk taking and disregard for social values.[197] There is also concern that concentration of wealth brings undue political power and control.[198]

In sum, a potential normative vision for progressivity involves a balancing exercise between redistribution, facilitating democratic values, and preserving good incentives. The tax brackets, in this conception, seek to mitigate wealth concentration, alleviate poverty, and leave space for rewards to enable a mix of labor, investment, leisure, and spending. This open balancing of values does not lead to the mathematical modeling of welfarism and optimal tax analysis.

When it comes to applying progressive taxation to families, one's perspective on distributive justice will matter. Recognizing the dignity and the impact of choices requires a focus on the individual.[199] In light of these considerations, let's return to the opening scenario for this part. We will not make appropriate distinctions between the doctor, the nurse, and the administrative assistant if the doctor is taxed more like a nurse because the doctor gets married to a homemaker. Welfarists have, however, opened the door to just this sort of blurring between taxpayers.

Not only can welfarism not persuasively rebut marriage bonuses and penalties, but it may also be used to affirmatively defend or compound them. One apology for the current system with marriage bonuses is that it makes a lot of taxpayers unhappy but keeps the dissatisfaction for any particular group from being especially acute.[200] Another holds that marriage penalties are defensible because marginal marriages may not be optimal.[201] Puzzlingly, while welfarism can support marriage penalties, it can also support marriage bonuses—

197. *See* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 91 (2012).

198. *See generally* Repetti, *supra* note 156 (arguing for redistributive measures to facilitate democratic deliberation).

199. Progressive taxation is distinguishable from spending programs, which may sometimes justifiably look to groups to identify poverty. *See infra* text accompanying note 240.

200. *See* Yair Listokin, *Taxation and Marriage: A Reappraisal*, 67 TAX L. REV. 185, 186 (2014).

201. *See* Hemel, *supra* note 8, at 697–700.

because of utility multiples on account of sharing.[202] Another welfarist insight suggests providing a secondary earner incentive—so that secondary earners with high-income spouses would pay even less tax than an unmarried individual.[203]

These insights presumably rest comfortably within a welfarist approach. Of course, welfarist accounts may come unmoored from the perspective of ability to pay tax, because that is not their point. An egalitarian approach to the taxable unit, however, would focus on the arbitrariness of relatively high incomes. Although low incomes may be more ambiguous, high incomes represent success in a society that starts out very unequal and does little to remedy the power of networks and class privilege.

Fencing off one partner's income ensures that it is taxed at an appropriate rate. This would have the knock-on effect of reducing the incentives against work by marginal secondary earners. Separate filing would enable secondary earners to start from the bottom of the tax brackets, but they should not pay less than single individuals.

A family with a homemaker (who does not work in the labor market), one might counter, could be doing their very best. It may not be realistically possible for all couples to be two-earner. Moreover, even if it is a choice to do housework, this could be very rewarding and deserves dignity and respect.[204] This is a reason against taxing endowment, out of concern that an endowment tax would interfere unjustly with modes of life that are not centered on the market. Respect for the homemaker (quite likely supporting an affluent husband[205]) is distinguishable from entitling a homemaker and spouse to affirmative tax bonuses, triggered through one spouse's work on the labor market. If the underlying concern, amid the ambiguity of free choice, is to avoid oppression of any individual, it makes no sense to condition that right on the luck of pairing with someone successful enough to have a job that is good enough to support multiple people.

An egalitarian perspective might well go even further than an individual-filing approach to marriage and couples. In other words, even

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202. *See* Goldin & Liscow, *supra* note 80, at 391 (stating the higher marginal utility premise though without arguing for a marriage bonus); Hemel, *supra* note 8, at 695 (acknowledging that the "utilitarian arrives at something of an impasse").

203. *See supra* text accompanying note 128; Hemel, *supra* note 8, at 687–89.

204. *See* Alstott, *supra* note 189, at 981 (noting that liberal goals seek to enable survival on basic income and noting Van Parijs's "surfer" example).

205. *See generally* McCluskey, *supra* note 7 (arguing against subsidizing "affluent husband care" while supporting an extension of subsidy for caregiving more broadly defined).

if marriage bonuses are unacceptable income splitting, this does not directly address whether couples have greater ability to pay tax than their taxable income would indicate. Although welfarists seem drawn to considering bonuses for groups, egalitarians could naturally construe the greater wealth, security, and resources of groups as a source of taxpaying capacity. The next section explores this issue, arguing against penalties for couples and groups.

B. Couple's Penalty

As the prior section of this part concluded, progressive taxation requires individual tax brackets, without splitting income or a joint return. This leaves some gaps about how an individual-filing system should address families. Distinct from whether to permit income splitting (yielding marriage bonuses) is the question whether to continue penalizing couples (as marriage penalties have long been justified on account of economies of scale, imputed income, and the like).

Tax policy analysis typically splits along dimensions of equity, efficiency, and administrability.[206] Perhaps as a subset of some or all of these, it is hard to deny that our federal tax system also performs an expressive role. Inclusivity or exclusivity may enhance or detract from the overall morale of the system. Thus, in general, it is desirable for the system to recognize material differences among taxpayers. But marriage is too narrow a proxy for ability to pay; if domestic relationships are important, the system should draw appropriate, reasonable distinctions.[207]

Theories of distributive justice yield ambiguous prescriptions for whether to maintain a couple's penalty. A welfarist theory of distributive justice would have two countervailing themes. For example, if a couple has more ability to pay, their marginal utility may be lower. However, at the same time, if one focuses on the fact that a couple is often pooling and sharing, their total marginal utility may be closer to double. Thus, we get no clear sign let alone magnitude.

In contrast, under an egalitarian approach, it seems plausible that a successful relationship could materially add to one's wealth or

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

207. *See generally* Infanti, *supra* note 113 (discussing how the IRS's shifting position of the definition of "marriage" since recent landmark decisions has failed to realize its promised transformative potential with regard to same-sex marriage).

resources, stability, wellbeing, and consequently, ability to pay tax.[208] Moreover, being single could be less than voluntary—an indication of the talent and luck of others rather than a free choice to remain alone. Although a marriage penalty seems too narrow to address these potential concerns, perhaps a more inclusive couple's penalty could defensibly align with solicitude for taxation according to ability to pay.

On balance, however, the many objections to a couple's penalty outweigh the considerations in favor of a couple's penalty in the income tax.[209] This is especially true for a tax bracket for couples, as we currently see in the married filing jointly tax brackets. The tax bracket width represents a compromise between couples neutrality and single person penalties. Similarly, the head of household tax bracket is more of a response to other brackets rather than an inclusive means of subsidizing caregiving.[210]

However, it would be a closer call whether to incorporate a small (perhaps in the range of $500 to $1,000) credit per household.[211] Such a credit could represent a limited attempt to compensate for the difficulty of living without the safety net and support that a partner can provide. If there were one and only one credit per household, those who form a household together would lose one or more of these bonuses.

Importantly, a couple's penalty represents a proxy tax, seeking to reach the economic benefit to a couple of lower living costs, on the assumption that they achieve more purchasing power together. These cost savings could come from economies of scale and imputed income (housework, childcare, etc.). One might use the square root convention to estimate economies of scale.[212] Poverty researchers might, for example, assume that it is possible to save 30% with a couple, or 50% with four people.[213]

Although the availability of material costs savings appears hard to dispute, there is no obvious way to determine what cost savings a

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208. *Cf.* David Hasen, *Liberalism and Ability Taxation*, 85 TEX. L. REV. 1057, 1072–73 (2007) (noting the importance of endowment for the marriage bonus and penalty debate without concluding how it cuts for penalties).

209. *See infra* Section II.C for a brief discussion of the potentially hidden couple's penalties in consumption and wealth taxes.

210. *See* McCluskey, *supra* note 7, at 212–15.

211. Compare this amount with the very modest tax benefits for the elderly and taxpayers with disabilities. *See* Theodore P. Seto & Sande L. Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U. PA. L. REV. 1053, 1121–25 (2006).

212. *See* Fleischer & Hemel, *supra* note 154, at 680.

213. *Id.*

household should achieve. Choosing one model for how life should be lived would be in tension with neutrality and the choice-chance distinction underlying egalitarian approaches to distributive justice. A couple's penalty, in sum, is more akin to taxing endowment rather than income. An egalitarian approach should be concerned with restricting choice by assuming too much about cost savings, without attention to actual spending and the surrounding context.[214] Although welfarists might be less concerned with neutrality in this context, welfarists have concluded that "there is no obvious direction for tax policy" towards families, when examining the potentially countervailing effects of altruism and economies of scale on a family member's marginal utility.[215] Thus, both welfarists and egalitarians should approach couple's penalties with a healthy skepticism.

Adjusting for living costs would conflict with a broader reluctance in the income tax to recognize these differences, even when living costs are entwined with productivity. The tax system largely ignores state and local differences in living costs.[216] That is true even though some economists and tax scholars argue that the cost of living in cities can be a business expense as well as a personal expense.[217] In other words, notwithstanding that the cost of living in economically productive cities reflects job opportunities, residents in high-cost areas do not get a tax cut.

Moreover, especially given the structural flaws in our income tax, we should be wary of imputing phantom income to average taxpayers. Scholars have argued that working taxpayers (as opposed to business owners and investors) are being overtaxed.[218] A couple's penalty is likely to be financially impactful for low- and middle-income taxpayers. As defined, for most taxpayers, "gross income" is sometimes a very good starting point for ability to pay, on a cash and near-cash

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214. *See generally* Hasen, *supra* note 208, at 1061–63 (describing increasing scholarly support for endowment taxation and arguing that egalitarian theories of justice should not embrace endowment taxation except in very narrow circumstances).

215. Alstott, *supra* note 6, at 741–42; *see* LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS 387 (2008).

216. *See* James M. Puckett, *Location, Location, Location: Using Cost of Living to Achieve Tax Equity*, 63 ALA. L. REV. 591, 592 (2012).

217. *See* David Albouy, *The Unequal Geographic Burden of Federal Taxation*, 117 J. POL. ECON. 635, 648 (2009); Louis Kaplow, *Regional Cost-of-Living Adjustments in Tax/Transfer Schemes*, 51 TAX L. REV. 175, 178 (1995); Michael S. Knoll & Thomas D. Griffith, *Taxing Sunny Days: Adjusting Taxes for Regional Living Costs and Amenities*, 116 HARV. L. REV. 987, 1018 (2003).

218. *See* Mary Louise Fellows & Lily Kahng, *Costly Mistakes: Undertaxed Business Owners and Overtaxed Workers*, 81 GEO WASH. L. REV. 329, 331–32 (2013).

basis. Unfortunately, "taxable income" tends to overstate an average taxpayer's ability to pay. Mixed business-and-personal expenses such as health and childcare, commuting, payroll taxes, and rent will not be taken into account, except in a very limited way by the standard deduction.[219]

But at upper incomes, these structural flaws flip, whereas the impact of a couple's penalty would be muted. Numerous rules of general applicability operate to make the tax system much less progressive for the rich. Gross income can understate ability to pay because of the realization rule,[220] step-up in basis at death (particularly in tandem with lending transactions such as the very basic "buy/borrow/die" strategy),[221] employee benefits (such as health care),[222] retirement incentives, and homeownership preferences. In addition, taxable income is more likely to be reduced by non-business expenses, because of itemized deductions for state and local taxes,[223] charitable contributions,[224] and mortgage interest.[225] These provisions are not really intended to address ability to pay, but rather to furnish incentives. However, it still seems unfair to seek to tax phantom income of average taxpayers before addressing these larger, structural issues.

In addition, on the administrability prong of the analysis, basing the taxable unit on marriage does not achieve a couple's penalty reliably.[226] The system currently allows income splitting by couples who are in marriage-like unions that are not labeled marriage under state law.[227] This is more than a non-penalty; it also allows for a supercharged couple's bonus. Since at least 2013, registered domestic partners in California, Nevada, and Washington have been able to benefit from income splitting even though they are treated as "unmarried" for federal income tax purposes.[228]

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219. *See id.* at 362–70; I.R.C. § 262 (2018).

220. *See id.* § 1001.

221. *See id.* § 1014; Edward J. McCaffery, *Taxing Wealth Seriously*, 70 TAX L. REV. 305, 306 (2017).

222. *See* I.R.C. § 106.

223. *See id.* § 164.

224. *See id.* § 170.

225. *See id.* § 163.

226. *See supra* text accompanying notes 109–114.

227. *See* INTERNAL REVENUE SERV., *supra* note 114, at 5 (explaining how to report community income on separate tax returns).

228. *See id.* at 2 (discussing how to report community property and clarifying that domestic partners must split-report community income but are not married); Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (announcing a bright-line administrative rule that state law statuses are not marriage if not labeled marriage).

Treating couples fairly would require an extension to marriage-like unions, which would require more administrative resources to explain and audit than the purely formal approach under current law. A fair couple's penalty arguably should extend to de facto couples or non-couple households.[229] Professors Cossman and Ryder argue that it is critical to address unconventional arrangements such as polygamy, as well as non-conjugal arrangements.[230]

Another useful framework to utilize in thinking about couple's penalties is the dichotomy between consumption and "forced consumption." It is often said that an income tax reaches both consumption and savings. Consumption, implicitly, is a marker of ability to pay, not something that should lead to tax deductions or lower tax rates. Forced consumption is sometimes, but not always, excludable or deductible.[231] The rationale is that the system should be wary of including putative benefits that the taxpayer may have little choice but to accept, especially when combined with valuation difficulties.[232] Moreover, forced consumption usually points to exclusion of an actual receipt, but in the family context, forced consumption may point to additional spending (or inability to achieve cost savings). In the context of comparing single individuals with couples and households, it is not possible to know which model (forced consumption or not) applies reliably to either side of the comparison. As one scholar puts it, the question is not literally whether a decision is voluntary; rather, in assessing whether consumption is forced one should consider the individual's "rights, duties, and responsibilities" in society.[233]

Single individuals, in other words, may have higher expenses because they are forced to consume—but different individuals may prefer the single life, and it may or may not be a transitional status. It is

229. *See* Samuel D. Brunson, *Taxing Polygamy*, 91 WASH. U. L. REV. 113, 115–16 (2013).

230. *See* Brenda Cossman & Bruce Ryder, *Beyond* Beyond Conjugality, 30 CAN. J. FAM. L. 227, 258 (2017).

231. *See, e.g.*, I.R.C. § 119 (2018) (excluding from gross income certain employer provided housing and meals); *id.* § 165(h) (deduction for personal casualty losses); *id.* § 213 (deduction for medical expenses).

232. *See* SIMONS, *supra* note 195, at 53; Charles R. O'Kelley, Jr., *The Parenting Tax Penalty: A Framework for Income Tax Reform*, 64 OR. L. REV. 375, 385 (1986); *see also* Kirk J. Stark, *Fiscal Federalism and Tax Progressivity: Should the Federal Income Tax Encourage State and Local Redistribution?*, 51 UCLA L. REV. 1389, 1398–99 (2004) (considering whether amenities financed by state taxes are a kind of forced consumption and noting many counterarguments against this forced consumption claim).

233. *See* O'Kelley, Jr., *supra* note 232, at 387.

not clear, in terms of ability to pay tax, whether the status of being single should be construed as negative or positive.

Similarly, it is not clear whether the status of being part of a couple or household should be taken as a positive identity. Extended families often live together in a household; although this might be an opportunity for imputed income or economies of scale, it might also involve additional responsibilities. Non-conjugal couples may form enduring bonds, live together, and enjoy many of the advantages of couples—and will go under the radar of a traditional definition. In contrast, a deadbeat spouse might function as a burden on the sole earner rather than a source of imputed income and support. In sum, couples and households are diverse, and do not necessarily point to an enhanced standard of living, disproportionate imputed income, happiness, or ability to pay tax, as compared to an individual.

Fairness, in this context, is difficult to disentangle from concerns about incentives and responsibility. Egalitarian visions of distributive justice do not dispense with responsibility and accountability. Not imposing a couple's penalty seems to ignore a special, mutual benefit present for couples with a single-earner and a full-time homemaker. This is particularly salient when the couple is engaged in child rearing and not struggling financially.[234] A non-working spouse could still look to the other spouse's social security credits.[235] Moreover, child rearing will independently be encouraged by credits and deductions, but this usually necessitates an income, so households living in poverty cannot necessarily benefit as much from those tax benefits.[236] Arguably, this superficially hands-off, but deeply subsidizing, approach to homemaking compounds advantages for the children of middle- and upper-income families.[237] In contrast, enacting a couple's penalty

234. *Cf.* Brown, *supra* note 120, at 1503 (noting that many workers, especially black women, do not perceive work as optional and value caregiving).

235. *See* Sugin, *supra* note 142, at 136.

236. *See* Opinion, *Mitt Romney Has a Plan, and Joe Biden Should Borrow from It*, N.Y. TIMES (Feb. 23, 2021), https://www.nytimes.com/2021/02/23/opinion/biden-romney-child-poverty.html [https://perma.cc/Y5QF-WFBA].

237. *See* DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE 116–23 (2019); David Brooks, Opinion, *The Wrong Inequality*, N.Y. TIMES (Oct. 31, 2011), https://www.nytimes.com/2011/11/01/opinion/brooks-the-wrong-inequality.html [https://perma.cc/8DQ3-A2TR] (noting that college educated parents are good at passing down their advantages and suggesting that this is more important than the winner-take-all problem); Sabrina Tavernise, *Education Gap Grows Between Rich and Poor, Studies Say*, N.Y. TIMES (Feb. 9, 2012), https://www.nytimes.com/2012/02/10/education/education-gap-grows-between-rich-and-poor-

would encourage everyone to work and would be more consistent with benefits programs that require work.

Clearly, it is not entirely satisfying to follow these observations with a prescription against action in the income tax. However, the reasons for concern about high-income married couples are not at their core about imputed income and economies of scale. To address these taxpayers, it would be far more impactful to focus on achieving a more comprehensive tax base (for both the income tax and the estate and gift tax). Imputed income and living cost savings are insignificant relative to considerations surrounding the tax base and timing issues.

At other incomes, imputed income and living cost savings may be more material relative to income. However, this Article concludes that no couple's penalty should be imposed. Even if one is convinced that the structural differences, household diversity, and valuation difficulties alluded to earlier are surmountable, taxing imputed income would further strain the business-personal distinction. If household (but not individual) imputed income is taxed, directly or indirectly, the costs of generating household imputed income arguably should be recoverable as a deduction. Extending this logic further, living cost savings in a household might be excludable, in connection with the production of imputed income. There may be good reasons to deconstruct and rethink the business-personal distinction,[238] although this should look to spending rather than statuses.

An egalitarian income tax should, especially at low incomes, err on the side of permitting wealth accumulation and against interference with an already difficult path to making ends meet. Regressive tax subsidies and inconsistent theories behind benefits programs are independent problems. "Taxation" begins to blend with (1) safety net programs and (2) a related but distinct guiding principle that the taxation take care not to impoverish those who are struggling and really have no ability to pay. I reserve these very distinct and complicated themes for future work involving an egalitarian approach to distributive justice and how to address the administrative challenges of recognizing de facto couples. Preliminarily, as others have already argued, couple's penalties at low incomes seem unfair, unhelpful, or

studies-show.html [https://perma.cc/KS9R-G3CP] (pointing out how low-income families are more negatively impacted by economic processes, such as the 2008 recession).

238. *See generally* Fellows & Kahng, *supra* note 218, at 331 (criticizing tax law's deference to business owners).

unnecessary.[239] However, it is not clear from theory that spending programs should use the same unit as the tax system.[240] Independent of theoretical considerations, it seems likely for tax policy at low incomes to remain balkanized and unorthodox due to politics.[241]

In sum, the case for a couple's penalty is uneasy at best. On balance, however, non-income taxes seem better situated to capture any increased ability to pay of couples, because they do not have to rely on status as a proxy. The following section briefly explains how non-income taxes may do so.

C. Intersection with Non-Income Taxes

Although an extended analysis lies beyond the scope of this Article, non-income taxes may claw back some of the benefits of sharing and imputed income. If a couple spends less on exempt expenditures (such as food and rent), this will enable them to spend more on taxed goods and services. Consequently, they may pay more tax under the consumption tax than an individual or couple who must spend more on exempt expenditures. This may be a good example of the overall wisdom of multiple tax bases.[242]

Suppose that A and B rent separate apartments, have separate meals, and function completely independently while dating. But once they move in together, suppose they save hundreds of dollars per month on rent. Of course, one might quibble about the proper comparison. Should the baseline be that A shares a two-bedroom apartment with a stranger and then moves into a one-bedroom apartment with B, rather than two one-bedroom apartments? Moreover, not all forms of interdependency would involve sharing a bedroom. Additionally, families will likely save per unit (compared to individuals) on a variety of expenditures, not just by sharing housing or preparing meals

239. *See, e.g.*, Lipman, *(Anti)Poverty Measures Exposed*, *supra* note 141, at 490–91, 502–03 (explaining that "low-income, childless households are taxed into poverty"); Fleischer & Hemel, *supra* note 154, at 680 (proposing a new, fairer tax structure for couples); Zelenak, *supra* note 7, at 398–401 (discussing the problems with and proposed improvements to the EITC, which creates a marriage penalty).

240. *See* Alstott, *supra* note 49, at 567–68 (arguing that different approaches may be "defensible, even productive," and observing that spending programs may have different goals and that in any event, administrability considerations may defensibly keep the tax system from identifying "need" as carefully as spending programs).

241. *See* Brown, *supra* note 120.

242. *See generally* David Gamage, *The Case for Taxing (All of) Labor Income, Consumption, Capital Income, and Wealth*, 68 TAX L. REV. 355, 357 (2015) (arguing for multiple forms of tax measurement).

together.[243] Over time, such cost savings could well enable those who share and combine domestic efforts to purchase more non-exempt goods and services subject to state sales tax.

This is not a penalty from a consumption tax perspective. Because A and B consume more non-exempt goods and services, they should pay more consumption tax. However, viewed from a federal income tax perspective, the consumption tax carries some of the burden in addressing these differences.

Relatedly, cost savings may allow a couple like A and B to build home equity. The value of the home would be subject to state property tax.[244] On the other hand, before they bought a home, A and B might have paid indirectly, if their landlord(s) incorporated property taxes into the rent. Thus, the effect should not be overstated. But there is likely to be a marginal increase, because A and B are likely to occupy a higher value residence as homeowners.

None of this is to say that wealth and consumption taxes are superior to an income tax, in a general way. The limited point is that as ex-post taxes, rather than an ex-ante tax based on a status, consumption and wealth taxes are superior at reaching the increased ability to pay of functional groups. The income tax, in contrast, has a very loose relationship with differences in spending between similar individuals and will inevitably speculate about what any given group is achieving from their relationships.

PART III. ENDING THE JOINT RETURN

If the joint return persists on account of its simplicity, the time has come for a more complicated approach. The joint return has failed to achieve couples neutrality in any meaningful way.[245] The joint return has, however, created other problems by attempting (and failing) to achieve couples neutrality. Progressive tax rates should be recentered on the individual, not married couples. However, several administrative and substantive complications would likely ensue under an individual-filing regime.

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243. *See* Kahng, *Loneliest Number*, *supra* note 7, at 680.

244. A broad-based wealth tax would not limit the tax base to real property. States, however, generally limit wealth taxes to real property and limited categories of tangible personal property. David Leonhardt, *A Wealth Tax*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/2021/10/28/briefing/wealth-tax-spending-bill-manchin.html [https://perma.cc/3AAE-2YKV].

245. *See supra* text accompanying notes 99–114.

An individual-filing system, it bears repeating, would dispense with couples neutrality. As discussed in Part II, couples are not similarly situated if their earnings splits are not the same. Two people who earn $50,000 each should not be taxed the same as a couple with one worker earning $100,000. Under individual filing, a distinction would be achieved, preventing a penalty for the two-earner couple, and ending bonuses for the one-earner couple. This part also outlines options for preventing tax avoidance by high-income taxpayers who might otherwise seek to split income.[246]

Administrability, of course, is important. All other things being equal, simplicity is desirable. Simplicity, however, can be misused as a proxy to lower the nominal tax on the rich. Moreover, it is easy to complain about a provision in isolation and assert that there could be tax avoidance or evasion. That is true of the entire system, yet we rely overwhelmingly on voluntary compliance with the tax law, subject of course to audit, penalties, social pressure, and the like.[247]

Tax policy can and should be iterative. If and where there is reason to think that a particular area is the subject of unusual and extreme abuse, patches will be necessary. However, at the end of the day, tax rules should not be dismissed reflexively because of their complexity or the possibility that someone might break the law.

A. Assignment of Income

A long line of scholars addressing the joint return have called for its abolition.[248] This would, however, require further attention to assignment of income issues. Anne Alstott has identified a number of strategies to police artificial assignments of income.[249] Dennis Ventry has argued for respecting split-income under community property while eliminating most income splitting.[250] In contrast, Stephanie Hunter McMahon has defended the joint return, emphasizing the cost and difficulty of enforcing rules against assignment of income.[251]

An incremental approach would require individual filing while respecting ownership and the rule of *Poe v. Seaborn*,[252] which upheld

246. *See infra* Section III.A.

247. *See, e.g.*, J.T. Manhire, *Tax Compliance as a Wicked System*, 18 FLA. TAX. REV. 235, 244 (2016).

248. *See supra* note 7 (citing numerous scholars who have called for an end to the joint return).

249. *See supra* note 6.

250. *See* Ventry, *supra* note 68, at 1518–26.

251. *See* McMahon, *supra* note 48, at 738–46.

252. 282 U.S. 101 (1930); *see* Ventry, *supra* note 68, at 1519–26.

the split-reporting of community income.[253] The rationale is that ownership of community property effects valid income splitting (a kind of assignment of income, which is usually invalid).[254] However, agreements between spouses in separate property states are not valid assignments of income, unless there is a valid business partnership.

The approach taken in *Poe v. Seaborn* would have two principal benefits. First, simplicity—giving up on income splitting in community property states would be administratively easier than fashioning a rule against it. Second, community property presumably is more advantageous than separate property for secondary earners as well as those who primarily perform housework. Income splitting would, however, inhibit workforce participation by secondary earners, because of the stacking effect.

However, splitting income even under community property is in great tension with the reasons underlying progressive tax rates. The fact that community property involves a stronger entitlement than equitable distribution on divorce helps distinguish it from common law property. But the sharing is not relevant, given the reasons for progressive tax brackets.

McMahon has defended the current system because of the difficulty, in historical perspective, of combatting attempts by married taxpayers to assign income.[255] McMahon also resists the commodification that might need to result at the household level if individualized filing is the rule.[256] Commodification, however, could be a problem of extremely limited scope, mostly limited to family businesses.

Anne Alstott, however, explains how limitations on the collateral consequences of gifts could prove effective to address aggressive efforts to split income from property.[257] Anthony Infanti also has outlined how the tax system could police both assignment of income and assignment of deductions.[258]

On balance, this Article has proposed an end to income splitting even via community property.[259] To be sure, unchecked tax abuse is

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253. *See supra* text accompanying notes 70–74.

254. *Poe*, 282 U.S. at 117–18.

255. *See* McMahon, *supra* note 48, at 752–57.

256. *See id.* at 755.

257. *See* Alstott, *supra* note 6, at 734–36 (suggesting a look-back for some period of time, such as ten years, to ensure that the transfer had substance).

258. *See* Infanti, *Decentralizing Family*, *supra* note 7, at 639–62.

259. Without complex rules, investment income splitting could continue, if spouses transfer property to one another.

bad for the morale of the system. But it is even worse to penalize others for the potential abuses of the rich.[260] It would be better to embrace complexity, accept some non-compliance, and combat non-compliance rigorously rather than penalize ordinary taxpayers to make potential tax evaders appear "compliant."[261]

1. Tax Avoidance Complications

In an individual-filing system, there would be no need for different filing statuses with their distinct tax brackets. Most taxpayers could simply report on their individual tax return the amount of compensation reported on the taxpayer's Form W-2 received from the employer.[262] However, married business owners and their tax advisors would need to be more attentive to assignment of income issues.

To allow all taxpayers to do this, even those who are married in community property states, Congress would need to clarify the section 61 definition of "income." This would be necessary to reverse the result of *Poe v. Seaborn*.[263] Without such a technical amendment, community property taxpayers would each report half of each other's income on their individual returns; this is the taxpayer-favorable income splitting reserved now only for domestic partners in California, Nevada, and Washington.[264]

There is no reason to believe such a technical amendment would be unconstitutional. Congress has "turned off" community property for certain retirement planning purposes.[265] In addition, the "kiddie tax" has long taxed the income of property owned by minors at higher rates, under the theory that the income should be attributed to their

260. *Cf.* BROWN, *supra* note 7, at 32–33 (suggesting that Henry and Charlotte Seaborn "chose not to obey the law" and "might have been charged with tax fraud, but their 'ingenuity' was rewarded").

261. *Cf. id.* at 59 ("It's important to recognize that this tax policy was shaped by the needs of a very small, but very powerful, minority constituency: the Seaborns and the 5 percent of Americans who were paying taxes in the 1920s.").

262. *See* Aparna Mathur, *Are Most People Actually Working Two or Three Jobs? Not Really*, FORBES (Aug. 4, 2019, 10:34 AM), https://www.forbes.com/sites/aparnamathur/2019/08/04/are-most-people-actually-working-two-or-three-jobs-not-really/ [https://perma.cc/S9GE-VKHS] (explaining that as of 2017, less than 5% of Americans held multiple jobs, therefore most taxpayers only have one W-2).

263. *See* 282 U.S. 101, 118 (1930).

264. *See supra* text accompanying notes 109–114. For MFS returns, because of the tax brackets, income splitting is not beneficial to married taxpayers, although other quirks may make separate returns advantageous.

265. *See* I.R.C. § 219(f)(2) (2018) (ignoring income splitting under community property for purposes of IRA deduction).

parents.[266] Consistent with these provisions, the Court's opinion in *Poe v. Seaborn* involved construction of the tax law rather than a constitutional decision regarding income.[267]

For the great majority of taxpayers, a simple approach would be sufficient for reporting income. Unfortunately, the system must work not just for ordinary taxpayers but also must anticipate those who would be willing to devote resources to tax avoidance strategies. To be sure, there is no reason that family members cannot be business partners. But there must also be a check on the substance of the transaction to prevent related parties from distorting their income.

2. Potential Anti-Abuse Strategies

Business taxation inherently involves questions of degree and rules of reason. As indicated above, difficult valuation questions could arise with family businesses. Although courts should be able to use general doctrines to address abusive transactions, leaving the door open to self-help can raise administrative costs and perceptions of unfairness, depending on how much taxpayers who are business owners push the envelope or play the audit lottery. Consequently, it may be useful to consider rules that would discourage unreasonable income splitting attempts. The basic drawback of enacting such rules would be that the rules may reach false positives or chill legitimate transactions, bringing back a kind of scattershot couple's penalty for family businesses. Additionally, it is appropriate to question just how much to worry about sham transactions within marriage, given how marriage less and less resembles "till death do us part."[268]

Tax penalties already exist for substantial understatements of tax without good cause.[269] In addition, cookie-cutter transactions lacking economic substance might be combatted as listed transactions, carrying an additional penalty, deterring advisors from facilitating, and avoiding some of the limitations of the substantial understatement penalty.[270] Existing tax penalties seem adequate to the task of combating potential sham transactions, particularly with the propensity of

266. *See id.* § 1(g).

267. *Poe*, 282 U.S. at 109 ("The case requires us to construe sections 210(a) and 211(a) of the Revenue Act . . . and apply them, as construed . . . .").

268. *See* Alstott, *supra* note 6, at 734 (suggesting that breakups, older couples, and blended families now make marriage an inaccurate proxy for the likelihood of sham transactions).

269. *See* I.R.C. § 6662(a).

270. *See id.* § 6707A(a).

married taxpayers to engage in them likely declining as the uncertainty of marriage increases.

Penalty provisions may leave certain taxpayers tempted to play the audit lottery. Theoretically, if intra-family assignment of income is an especially grave concern, there could be higher penalties and/or lower thresholds to trigger the penalty. That said, there is little reason to think that income splitting among family businesses should be of more concern than other tax avoidance behavior. For example, commentators have long observed that partnerships go largely unaudited and may have spotty compliance with the tax law.[271] Concerns involving unrelated parties distorting income and loss through partnerships may be much starker than intra-family assignments. Additionally, estimates of the tax gap largely pin tax evasion on small businesses.[272]

If a rule of reason proves unworkable, Congress could consider a special addition to tax for high-income married taxpayers who are co-owners of a business (or employ one another). This would represent the mirror image of Congress's joint return solution in 1948.[273] As explained previously, that approach was to provide a large marriage bonus.[274] It extended the benefits of income splitting even to those couples who were not actually splitting income.[275] Adopting the opposite approach is no more complicated and has the benefit of restricting marriage penalties to a discrete group of taxpayers that are likely to abuse assignment of income principles.

Without a special rule, income splitting could legally be achieved by owning a bona fide partnership, with allocations that comply with the tax law; or for compensation that is ordinary, necessary, and reasonable. However, if line drawing proves too hazy a judgment or too costly to audit, a special rule could deny income splitting to married business owners. Presumably, this would only be warranted for high-income married business owners because they are a relatively small group, otherwise have the means to abuse the rules, and will not experience the addition to tax as particularly impactful given their income and wealth.

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271. *See* Andrea Monroe, *Integrity in Taxation: Rethinking Partnership Tax*, 64 ALA. L. REV. 289, 317–22 (2012) (describing crisis of legitimacy in partnership taxation).

272. *See* COMM. FOR A RESPONSIBLE FED. BUDGET, PRIMER: UNDERSTANDING THE TAX GAP 9 (June 17, 2021), https://www.crfb.org/sites/default/files/CRFB%20Primer_Understanding%20the%20Tax%20Gap_06162021.pdf [https://perma.cc/ACY7-B7JC].

273. Raymond v. United States, 355 F.3d 107, 111 n.7 (2d Cir. 2004).

274. *Id.*

275. *Id.*

Choosing where to draw the line could be fairly arbitrary.[276] In line with the expiration of the Bush tax cuts, $250,000 of aggregate income could be a good starting point for policymakers in thinking about who is "rich."[277] Another salient anchor is President Biden's $400,000 threshold for tax increases, which carves out roughly 95% of Americans.[278] Arguably, the threshold should be much lower.[279]

How could the addition to tax for married business owners work? The underlying insight is that we can means-test the tax benefit of the tax brackets, just like any other tax or non-tax benefit. The tax benefit comes from the lower brackets imposing a rate of tax below the rate of tax at the highest bracket.[280] The amount of savings could be computed on a worksheet. The worksheet would simply need to require the married couple to compute how much more tax they would have owed if one person had reported all their income. The couple would then be jointly and severally liable for the computed amount as an addition to tax.

As a simplified example, suppose an income tax rate of 10% on taxable income up to $50,000 and a 20% rate on taxable income above the $50,000 threshold. If one taxpayer earned $100,000, the tentative tax due would be $15,000 (that is, $5,000 on the first $50,000, plus $10,000 on the next $50,000). But if two married taxpayers earned $50,000 each, they would each owe $5,000. In the aggregate, the two taxpayers owe $5,000 less on the same aggregate taxable income (as compared to one taxpayer who earns the same amount). Of course, this is a simple example, and the tax savings depend on the facts, namely, the tax brackets and the way the taxpayers are splitting their income.

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276. *Cf.* Greg Iacurci, *Why the White House and Democrats Use $400,000 as the Threshold for Taxing 'the Rich,'* CNBC (Sept. 22, 2021, 1:17 PM), https://www.cnbc.com/2021/09/22/why-white-house-democrats-use-400000-as-threshold-to-tax-the-rich.html [https://perma.cc/3GKS-XMZ7] (quoting Leonard Burman of the Tax Policy Center for the proposition that $400,000 "is an arbitrary threshold").

277. *See* David M. Herszenhorn & Jackie Calmes, *Tax Deal Suggests New Path for Obama*, N.Y. TIMES (Dec. 6, 2010), https://www.nytimes.com/2010/12/07/us/politics/07cong.html [https://perma.cc/53AE-U725].

278. *See* Leonard E. Burman, *President Biden's No Tax Hike Pledge Problem*, TAX POL'Y CTR.: TAXVOX (Mar. 24, 2021), https://www.taxpolicycenter.org/taxvox/president-bidens-no-tax-hike-pledge-problem [https://perma.cc/H2DR-XC8V]; Tami Luhby, *Democrats Want to Tax the Rich. Here's Who They Are*, CNN, https://www.cnn.com/2021/09/19/politics/democrats-taxes-rich-explainer/index.html [https://perma.cc/K526-ZTR6] (last updated Sept. 19, 2021, 1:18 PM).

279. *Cf.* Burman, *supra* note 278 (noting that $400,000 is an "absurdly high threshold for middle class status" with a single-digit percentages of couples earning that much).

280. *Cf.* Puckett, *supra* note 173, at 444–47 (examining ways to phase out of tax benefits of low brackets based on wealth).

But the savings (in this example, $5,000) would be readily determinable by the taxpayer, software, or an accountant—and the amount could be added to the tax due as the parties choose to split the liability (with the proviso that if one does not pay, then the other could be the subject of collection efforts).

Perhaps obviously, a penalty solution is in substantial tension with this Article's central thesis that the marriage penalty and couple's penalties are unfair and should not be perpetuated. Arguably, however, those values must be balanced against values of administrability and morale of the system. If married high-income taxpayers come to represent a special tax avoidance problem, it may be reasonably necessary and proportional to the problem to enact a targeted rule (which could penalize a mere fraction of a percent of taxpayers).

Although the penalty would harmonize fairness concerns with administrative concerns, and in that sense is second best, it would be more justifiable than retaining an unfair system for everyone. Concerns about the behavioral impact on marriage, or the stacking effect that discourages secondary earners, would be very limited. The size of the group who is affected would, of course, depend on the income threshold selected. Moreover, it would only apply to two-owner (also combining an owner and an employee spouse) married couples above that threshold.

B. Non-Business Deductions and Credits

In addition to collecting tax on income, the tax return also needs a structure for offsets, such as personal exemptions and non-business deductions. There is a system already in place for married couples to file separately.[281] Because the current tax brackets for the MFS filing status are disadvantageous, it is only used by roughly a few million taxpayers.[282] The MFS system has a number of special rules on deductions and credits: (1) both taxpayers must itemize or take the standard deduction; (2) for itemized deductions, the payor generally claims the deduction; and (3) distinct phase-outs apply for certain deductions and credits.[283] As will be explained shortly, these issues are important though conceptually separate from the tax brackets addressing

281. *See* Drumbl, *Joint Winners, Separate Losers*, *supra* note 147, at 408.

282. *See id.* at 409.

283. *See id.* at 402–04; *Other Deduction Questions*, INTERNAL REVENUE SERV., https://www.irs.gov/faqs/itemized-deductions-standard-deduction/other-deduction-questions/other-deduction-questions [https://perma.cc/4A2S-9L9T].

earnings, which this Article has argued should be individualized. That is why the following observations are necessarily general and reserve extended consideration of deductions and credits for future work on how to make this system fairer for de facto couples and other relationships.

In short, the tax brackets are progressive, but the design of allowances for non-business expenses is often regressive.[284] That is because a deduction would be worth more to a higher-income taxpayer.[285] And a non-refundable credit is worth nothing to a taxpayer with no taxable income.[286] The purposes of the non-business provisions of the Code could be achieved more fairly with refundable credits; indeed, UBI could replace many of them. When the Code does not utilize refundable credits to implement a spending program, the identification of the correct taxpayer (or taxpayers) becomes more acute. An intermediate approach would be to cap the value of non-business deductions (a 25% rate, for example, could generally approximate a middle-income tax rate) and be flexible about assignment of deductions from one spouse to another.

Moreover, the purpose and theoretical perspective vary by deduction or credit.[287] If we work within something resembling the tax system that we have, the question resembles: "How can we be more neutrally unfair?" Zelenak has outlined workable limits on assignment of deductions as well as phase-outs, though focused on marriage neutrality as an overriding goal.[288] Anthony Infanti also has addressed this issue, drawing from Canadian insights.[289] These approaches are important as a matter of horizontal equity and relationship neutrality (which goes beyond married couples neutrality).

However, one might reluctantly consider flexibility in this area because of the more overwhelming considerations involving vertical

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284. *See* STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 134–38 (1973) (criticizing tax subsidies the value of which are dependent upon a taxpayer's income).

285. *See id.*

286. *See id.*

287. *Policy Basics: Tax Exemptions, Deductions, and Credits*, CTR. ON POL'Y & BUDGET PRIORITIES (Nov. 24, 2020), https://www.cbpp.org/research/federal-tax/tax-exemptions-deductions-and-credits [https://perma.cc/ZQ8U-VVP6]; *see also* Alstott, *supra* note 6, at 758 ("We might—and should—go further in examining the implications of the new individualism for tax policy and the welfare state. References to marriage and family occur frequently throughout the Code, and a thorough review would revisit them to ask whether formal marriage represents a sound distinction in light of the purposes of the provision.").

288. *See* Zelenak, *supra* note 7, at 391–401.

289. *See* Infanti, *Decentralizing Family*, *supra* note 7, at 660–62.

inequity. If UBI is a more important anchor, more flexibility in computing non-business credits and deductions might be acceptable, with the purpose being to keep the allowances from being useless in the hands of a person with no taxable income.[290] Although universal credits would be preferable,[291] in the near term, it is easy to imagine that politics may only allow a surrogate for UBI through deductions and credits that depend on the income of the taxpayer or a spouse. If political feasibility is the limiting factor, reasonable minds could differ as to whether to compromise on allowances that approximate a goal of UBI but depend on income.[292]

CONCLUSION

Troubleshooting how to tax individuals and families has proved to be a thorny federal income tax challenge. With a reversion to more marriage penalties coming in 2025, which will impact many taxpayers, Congress has an opportunity to rethink marriage penalties and bonuses.

This Article has offered an egalitarian perspective on the taxable unit. An egalitarian approach requires taxing the income of individuals, not groups. Fairness would be just one of the benefits. Eliminating the joint return would also mitigate disincentives for labor market participation by secondary earners. Even though the cost savings and imputed income of couples and families may be important, the income tax is an awkward vehicle to address these differences. Consumption and wealth taxes may be better at addressing imputed income by looking to economic results rather than statuses as a proxy for ability to pay tax.

Non-business tax deductions and credits raise distinct complications. Abolishing the joint return, and thereby elevating progressivity as a tax norm, is just a start. Blurring the lines between taxpayers to accommodate portability of non-business exemptions, deductions, and credits for one-earner married couples can be accommodated with reasonable equity if the value of non-business deductions is capped. Although future work would be necessary, it seems quite likely that such

290. *See supra* text accompanying notes 189–193 (explaining the importance of adequate resources to enabling free choice under egalitarian approach to distributive justice).

291. *See* Fleischer & Hemel, *supra* note 154, at 680–81 (proposing UBI, per individual, without adjustment or phase-out for family size).

292. *Cf.* Solum, *supra* note 155, at 1452 ("Reduced to a slogan, my claim could be put as follows: both fairness and consequences, but neither welfarism nor deontology.").

benefits could be extended, without insurmountable administrative difficulty, to one-earner de facto families.[293]

293. *See* INFANTI, *supra* note 7, at 89–94 (describing Canadian approach which recognizes "common-law partners").