FIXING THE "MARRIAGE PENALTY" PROBLEM

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I. INTRODUCTION

One of the vexations of married life in America is the marriage penalty imposed by the Internal Revenue Code. Virtually all married couples pay the marriage penalty. That is, marital partners could expect to reduce their combined income taxes by getting a divorce and entering into a well-crafted support and property-settlement agreement. As a practical matter, few middle- and upper-income couples divorce or fail to marry simply to avoid an extra tax bite.[1] This commitment to marriage must reflect a triumph of love over money,[2] not a failure to

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[1] The literature suggests that the decision to marry or stay married is not affected strongly by the marriage penalty, leaving aside the possible impact of that penalty, in combination with welfare policies, on low-income individuals. *See* David L. Sjoquist & Mary Beth Walker, *The Marriage Tax and the Rate and Timing of Marriage*, 48 NAT'L TAX J. 547 (1995) (finding no effect of marriage penalty on marriage rate); and James Alm & Leslie A. Whittington, *Does the Income Tax Affect Marital Decisions?*, 48 NAT'L TAX J. 565 (1995) (finding strong evidence of a small but statistically significant impact of marriage penalties on the marriage rate). For a somewhat more pessimistic assessment, made prior to publication of the studies cited above, see Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 787 n.59 (1989) (suggesting that the impact of the marriage penalty on the decision to divorce or not to marry is substantially uncertain).

The marriage penalties imposed on some taxpayers by the phase-out of the earned-income tax credit are so substantial relative to income that they have the potential to influence the marriage decision. Empirical evidence that these marriage penalties are discouraging marriage, however, is not available, and speculation on their impact on behavior is of limited value. *See* Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 560 (1995) ("A firm conclusion [that the EITC marriage penalties do not discourage marriage] must await empirical evidence, but at the outset it seems at least as plausible to expect that the EITC (like welfare) has little effect on family structure as to predict a dramatic impact.").

[2] Rawls asserts that family sharing tends to refute the utilitarian premise that individuals always seek to maximizing the sum of advantages to themselves. JOHN RAWLS, A THEORY OF JUSTICE 105 (1971). Cohabitation among welfare recipients is apparently commonplace, suggesting that the strong economic incentives in the welfare system in favor of unmarried status are discouraging low-income partners from marrying. See Robert A. Moffitt, Robert Reville, & Anne E. Winkler, "Beyond Single Mothers: Cohabitation and Marriage in the AFDC Program," 35 Demography 259 (1998). See also Stacy Dickert-Conlin, "Taxes and

seek good tax advice, for few features of the income tax have received as widespread public attention as the infamous marriage penalty.[3]

Marriage penalties have been around since the adoption of the modern income tax in 1913.[4] Most of the significant marriage penalties were temporarily eliminated in 1948 with the adoption of full income splitting for married couples.[5] But major marriage penalties were reintroduced by the 1969 tax act, which abandoned full income splitting in favor of marital joint filing with partial income splitting. Those penalties provoked an explosion of news reports and scholarly writing on tax issues relating to marriage.[6] The 1986 tax act cut back significantly on most marriage penalties, primarily by cutting tax rates substantially. The 1993 tax act increased marriage penalties on high-

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Transfers: Their Effects on the Decision to End a Marriage," 73 J. of Pub. Econ. 217 (1999) (finding "weak support that taxes affect the decision to separate.").

[3] For early articles on the topic, see*, e.g.*, Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971) (describing the marriage penalties introduced by the 1969 tax act and introducing term "marriage penalty"); Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975) (suggesting that the marriage penalty introduced by the 1969 tax act results from a conflict in tax policy goals); Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573 (1977) (offering a principled defense of a marriage penalty free system based on full marital income splitting); Michael J. McIntyre & Robert S. McIntyre, *Tax on Marriage, Should We Get Rid of It, And, If So, How?,* PEOPLE & TAXES, May 1980; Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980) (arguing for the elusive "marriage neutral" tax system); Michael J. McIntyre, *Tax Consequences of Family Sharing Practices Under New York Law: A Critique and a Proposal for Reform*, 49 ALBANY L. REV. 275 (1985) (showing that the "conflict in principles" that allegedly leads to the marriage penalty is actually a conflict in empirical assumptions about the economic consequences that typically accompany marriage) (hereinafter "*NY Reform*"). For more recent pieces, see Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J. L. & POL. 241 (1997); Michael J. McIntyre, *Marital Income Splitting in the Modern World: Lessons for Australia from the American Experience*, *in* TAX UNITS AND THE TAX RATE SCALE, 1-33 (John G. Head & Richard Krever, eds. 1996) (hereinafter "*Modern World*"); Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413 (1996); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993).

[4] This first marriage penalty was caused by granting a personal exemption of $3,000 for a single person and $4,000 (or $2,000 per capita) for a married couple. *See* RICHARD GOODE, THE INDIVIDUAL INCOME TAX 214.

[5] Small marriage penalties existed for some taxpayers after the 1948 tax act and before the 1969 tax act. *See* John Brozovsky & A.J. Cataldo, II, *A Historical Analysis of the "Marriage Tax Penalty*, 21/1 ACCOUNTING HISTORIANS J. June 1994, at 163-87.

[6] *See, e.g.,* Blumberg, *supra* note 3; Bittker, *supra* note 3; McIntyre & Oldman, *supra* note 3.

income married couples[7] and, while lowering marriage penalties on some low-income married couples with children, increased penalties on many other low-income married couples with children. The rejuvenated marriage penalties have provoked a new explosion of scholarly commentary, all critical of the penalties and calling for their elimination.[8]

The Republican majority in Congress has made elimination of marriage penalties a high political objective. Democrats, including President Clinton, have also indicated that they think that the marriage penalties of current law are objectionable. The approach we take in this Article is to isolate the popular issue of marriage penalty relief from more contentious issues, such as major tax cuts and major redesign of the tax system.

We set forth in Section III a proposal for eliminating most marriage penalties for middle- and upper-income taxpayers without changing the basic pattern of family taxation that the United States has followed since 1948 and without raising or reducing the overall income tax burden on Americans.[9] Our proposal requires tax increases on some single individuals and provides tax relief for some married couples. The tax increases and decreases that we recommend, however, are all remarkably modest and are offsetting in the aggregate. The change in the overall distribution of the tax burden among income classes under our proposal is negligible.

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[7] The 1993 penalties were created primarily by the introduction of a new top rate of 39.6% that began at $250,000 for unmarried individuals and married couples filing jointly. The Clinton Administration, in proposing this rate increase, was aware that it was creating marriage penalties and that those penalties could be avoided by having the 39.6% bracket begin for unmarried individuals at $125,000. It chose to impose the penalties, however, rather than face the political problem of explaining why a tax increase that was advertized as affecting only the very rich was kicking in at $125,000 for single taxpayers. One commentator has suggested that the Clinton Administration tolerated large marriage penalties "for the sole purpose of conforming to a specific combination of revenue and distributional targets…." *See* Michael J. Graetz, *Paint-By-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 612 (1995). We would note that lowering the starting point of the single rate schedule would have had an imperceptible affect on distribution tables, due to the very small percentage of single taxpayers reporting income over $125,000.

[8] *See, e.g.,* Christian, *supra* note 3; McIntyre, *Modern World*, *supra* note 3; Zelenak, *supra* note 3; Gene Steuerle, "The Uncertain Support Behind 'Marriage Penalty' Relief," 84 Tax Notes 1539 (Sept. 13, 1999).

[9] As explained in Section II.B.3., the penalties under the earned-income tax credit cannot be eliminated or even mitigated substantially without major changes in the structure of that credit.

Our goal in this Article is to present a plan for eliminating, to the extent feasible, the marriage penalties that the federal income tax system currently produces. This is our only goal. In contrast to some other commentators writing on this topic, we do not combine our proposal with proposals for making other weighty changes in the income tax system, such as cutting taxes substantially or eliminating marital joint filing and returning to the pre-1948 system of separate filing for all individuals. On the contrary, we have designed our reform to be revenue-neutral and to conform to the tax policy principles currently embedded in the Internal Revenue Code ("Code"). We do not discuss the merits of a major tax cut. We discuss separate filing only to explain why its reintroduction would not do much to eliminate marriage penalties.

In Section II, we set the stage for an evaluation of our solution to the marriage penalty problem by discussing the nature and extent of marriage penalties under current law. We show that all married couples currently pay a marriage penalty and that the only way to eliminate the penalty is to return to full marital income splitting. We present a brief conclusion in section IV.

II. MARRIAGE PENALTIES UNDER CURRENT LAW

In Section II.A. below, we define a marriage penalty and explain how we would quantify the marriage penalties produced under current law. Section II.B. describes the three common types of marriage penalties, shows how they could be eliminated in theory, and explains why a solution to the marriage penalty problem arising out of the earned-income tax credit is illusive. In Section II.C. we present our estimate of the magnitude of marriage penalties produced under current law.

A. Defining and Quantifying Marriage Penalties

Kim and Bo are married and have a combined income of $50,000. Their deductible expenditures are moderate, so they elect to take the standard deduction. Under tax rules applicable for 1998, they would pay federal income taxes of $5,625. If they were to divorce and split their income evenly and each of them took the standard deduction, they would each pay federal income taxes of $2,708, for total taxes of $5,416. The reduction in taxes of $209 that they could obtain from getting divorced is popularly called a "tax on marriage" or "marriage penalty."

For Kim and Bo to be subject to a marriage penalty in the above example, each must be taxable on some portion of their aggregate marital income after their divorce. If only one of the former spouses has income, then the other former spouse would be unable to utilize the more generous capita tax deductions for single individuals under the Code. In practice, however, marital partners contemplating divorce can always arrange their affairs so that each of them is taxable after divorce on one-half of their aggregate taxable income through the deduction for alimony.[10] For example, if Bo has earnings of $50,000 and Kim has no independent income sources, then Bo could deflect $25,000 to Kim by getting a divorce and agreeing to pay that amount to Kim as alimony

In many cases, marital partners would each have income for tax purposes after a divorce even without making use of the alimony deduction for income splitting purposes. If both spouses earn a salary in the marketplace, for example, then they would be taxable on their separate earnings after a divorce under well-established case law.[11] Similarly, if the spouses held income- producing property jointly, they would each be taxable after divorce on one-half of the income generated by that property. More generally, marital partners holding income-producing property could reshuffle ownership rights of that property to produce whatever post-marital distribution of property income they desired.[12]

From the discussion above, it should be clear that virtually all marital partners in America who decide to get a divorce could arrange their affairs so that each former spouse would be taxable on about one-half of the aggregate income of the couple after the divorce. Consequently, virtually all married couples are in a position to benefit from the extra per capita deductions and/or lower tax rates provided in the Code to single persons. That is, if a marriage penalty is defined as the extra tax burden that married couples pay over what they would be required to pay as single individuals, then the U.S. tax laws impose a

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[10] *See* I.R.C. §§ 215 and 71 (1994) (providing, in tandem, that former spouses can deflect income for tax purposes from the payor of alimony to the recipient).

[11] Lucas v. Earl, 281 U.S. 111 (1930).

[12] The case-law rule is that income from property is taxable to the person holding the most important ownership right to that property. *See* Michael J. McIntyre, *NY Reform, supra* note 3, at 292. Because property may be owned in many complicated ways, the tax-common-law rules for determining who is the owner of property for tax purposes are quite ornate. For property held by trusts and partnerships, the common law rules have been supplemented or replaced by statutory rules.

marriage penalty on virtually all married couples, not just some subset of marital partnerships, such as some two-earner couples.

The presence of marriage penalties in the tax law gives marital partners an incentive to dissolve their marriage. However, as noted in Section I, few middle- and upper-income married couples appear to have responded to that incentive by getting a divorce. The ineffectiveness of the incentive is not surprising, given the relatively modest size of current marriage penalties and the major effects of marriage on an individual's legal and social circumstances. The collateral effects of marriage and divorce apparently are sufficiently important to married couples that they are unwilling to change their marital status simply to gain the tax benefits currently being offered to them.

Some commentators are highly critical of marriage penalties in the mistaken belief that they have major behavioral consequences.[13] Marriage penalties are objectionable, however, notwithstanding their relatively minor behavioral implications. Absent some strong tax policy reason for imposing higher taxes on married individuals than on otherwise similarly situated single individuals, a marriage penalty is an unfair and discriminatory tax. Most people would object strongly if the tax laws specifically stated that married persons must pay an additional $250 a year in taxes, just as they would object to a special $250 tax on individuals who regularly attended church. Those special levies obviously would discriminate unfairly against the persons required to pay them. The fact that marriage penalties are imposed in a less transparent fashion does not make them less objectionable.

Marriage penalties presumably would be unobjectionable if they could be justified on tax policy grounds and they have no measurable impact on the decision to marry or remain married. Some commentators have offered a tax-policy defense of marriage penalties. They argue that married couples ought to pay higher per capita taxes than similarly situated single individuals on account of the special economies-of-scale benefits that married couples allegedly enjoy. We are not dissuaded from our long-time view that the economies-of-scale argument has no merit. As we have argued in more detail elsewhere, marital partners do not necessarily enjoy above average amounts of economies-of-scale

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[13] *See, e.g.*, Rep. Jerry Weller (R-Ill.), The Republican Response to President Clinton's Weekly Radio Address (Jan. 17, 1998) (claiming that the marriage penalty contributes significantly to the breakdown of the family, with devastating effects on the life prospects of children) <http://www.house.gov/weller/radio.html>.

benefits.[14] Those assumed economic benefits should not be taken into account in fixing income tax burdens, and the size of the marriage penalties imposed on individual married couples do not relate in any systematic fashion to the amounts of their alleged economies-of-scale benefits.[15] In any event, our goal in this Article is to solve what is perceived to be the marriage penalty problem, not to define that problem away.

In computing marriage penalties under current law, we have compared the tax currently imposed on marital partners with the tax that they would pay as single individuals if they took advantage of readily-available mechanisms for equalizing their post-marriage incomes. Not all commentators take this approach. Others calculate marriage penalties on the assumption that marital partners who are getting a divorce to minimize their aggregate taxes would make no changes in the way they owned their income and property after the divorce. Because of this assumption, they are led to conclude that two-earner married couples in which the spouses each have similar earnings are the primary victims of marriage penalties.[16]

We reject the assumption that marital partners who divorce exclusively for tax reasons would fail to reshuffle their ownership rights to income and property so as to minimize their taxes after the divorce. That assumption is unrealistic for at least three reasons. First, it fails to take into account that the dissolution of a marriage contract will itself

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[14] In 1997, about 46 million non-dependents over age 19 were classified as single for tax purposes. That same year, Census reports that only about 25 million people over age 19 lived alone. These figures indicate that at least 45 percent of non-dependent single people (excluding single parents) lived with someone else in 1997. In fact, leaving out the elderly, it appears that 56 percent of non-dependent single people lived with someone else in 1997. Presumably they enjoyed some economies-of-scale benefits from doing so.

The figure above for single non-dependents includes some individuals who didn't actually file returns. The ITEP tax model calculates that there were 7.7 million non-filers among the total of 47.8 people classified as single, non-dependents in 1997 (including 1.7 million under age 20). Of that 7.7 million single, non-dependents who did not actually file tax returns, 5.3 million were elderly. "Non-filers" is somewhat of an arbitrary classification, because many people file simply to get their withholding back.

[15] *See, e.g.*, Michael J. McIntyre, *What Should Be Redistributed in a Redistributive Income Tax? Retrospective Comments on the Carter Commission Report, in* THE QUEST FOR TAX REFORM: THE ROYAL COMMISSION ON TAXATION TWENTY YEARS LATER 197-99 (W. Neil Brooks, ed. 1988).

[16] *See, e.g.*, CONGRESSIONAL BUDGET OFFICE, FOR BETTER OR FOR WORSE 27-29 (1997) (hereinafter "CBO STUDY") (discussing the difficulties of deciding on the proper "benchmark against which to estimate marriage penalties"). Of the long list of possible benchmarks discussed, the CBO does not consider the possibility that divorcing couples would enter into an alimony agreement.

change marital property rights significantly. For example, a divorce typically extinguishes the dower rights of a wife and frequently creates the right of a former spouse to receive alimony and a property settlement. Those who assume that ownership rights to income and property will be the same before and after a divorce are treating marriage as a mere formality rather than a contractual relationship with real legal and economic substance.

Second, the contested assumption is inconsistent with the way couples act when they get a divorce that is *not* motivated primarily by tax considerations. The normal pattern for divorcing couples is to enter into a settlement agreement that adjusts the former spouses' ownership rights to the couples' combined property and income. Often those settlement agreements are designed to minimize taxes. We see no reason to assume that happily married couples untying the marriage knot for tax reasons would be less inclined than antagonistic former spouses to conspire together against the federal fisc.

Third, we believe that the contested assumption is inconsistent with what we understand to be the main purpose for computing marriage penalties. In our view, that purpose is to quantify the amount of the discriminatory tax imposed on married couples as a result of their marital status. The actual behavioral responses of married couples to marriage penalties are not relevant in determining the amount of the discriminatory tax. What is relevant is the amount of the tax savings that married couple *could* obtain if they changed their marital status. In computing that amount, marital partners who are divorcing for tax reasons should not be assumed to be oblivious to the tax advantages of post-marital income splitting.

We recognize, of course, that the income-shifting mechanisms discussed above may have some negative collateral consequences for some couples. It is possible, for example, that a husband who was perfectly willing to support his wife at a particular level might be disinclined to enter into a binding alimony agreement or property settlement. The more likely outcome is that tax planners would develop alimony agreements and property settlements with little binding force except in the short term. In any event, the predictions of commentators about the inclination of couples to engage in post-marriage tax planning is irrelevant in computing marriage penalties, just as the behavioral responses of married couples to the marriage penalties computed without reference to post-marriage tax planning are irrelevant.

B. Major Types of Marriage Penalties

Many features of the federal income tax create potential tax penalties for some married couples. Other commentators have offered extensive lists of those marriage penalties.[17] They can be classified into three major groups. The first, illustrated by the standard deduction, provide greater per capita deductions to single taxpayers than to married taxpayers. The second, illustrated by the rate schedules of current law, impose tax at a higher rate on the per capita income of married couples (assuming marital income splitting) than on single persons.

The third type of marriage penalty, illustrated by the phase-out rules for the earned-income tax credit, phase out some tax benefits more than twice as quickly for married couples than for single taxpayers. Other examples of this type include the phase-out rules for the itemized deductions and exemptions. For our purposes, it is enough to look at some examples of the major types of marriage penalties. The paradigm examples of the three major types of marriage penalties are discussed below.

1. Standard Deduction

The most important "marriage penalty" for the typical married couple—a couple making up to $60,000 a year who does not qualify for the earned income tax credit—stems from the fact that the standard deduction for a married couple is less than the standard deduction for two unmarried individuals. For filing year 1998, two single persons without children are granted standard deductions of $8,500 ($4,250 X 2). A single person and a head of household (generally a single person with a dependent child) are granted standard deductions totaling $10,500 ($4,250 + $6,250). The standard deduction for a married couple, in contrast, is $7,100.[18] That is, two marital partners without children receive a standard deduction that is $1,400 less than the standard deduction given to two single individuals without children, and two marital partners with children receive a standard deduction that is $3,400

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[17] For a list with a clear explanation of how the penalties operate, see CBO STUDY, *supra* note 16, at 15-25.
[18] *See* I.R.C. § 63(c)(2) (1994). The figures in the text have been adjusted for inflation in accordance with I.R.C. § 163(c)(4) (1994).

less than the standard deduction given to a single person without children and a single person with a dependent child.[19]

Consider, for example, two roommates each earning $20,000. For tax year 1998, they will pay taxes on $27,500 of combined income if they are married. They will pay tax on a total of only $26,100, however, if they choose to divorce or not to marry in the first place. The marriage penalty caused by this increase in taxable income is $210.[20]

The marriage penalty illustrated above could be eliminated by giving married individuals the same per capita standard deduction granted to unmarried individuals. Under current law, that result could be obtained by giving married couples without children a standard deduction of $8,500 and either giving married couples with children a standard deduction of $10,500 or reducing the standard deduction for single parents to $4,250 (the same as for singles without children).

The standard deduction serves two distinct purposes in the current income tax. First, it simplifies compliance problems for electing taxpayers and the Internal Revenue Service. Taxpayers who elect the standard deduction do not have to keep track of their deductible expenditures and the Internal Revenue Service's audit obligations are reduced.[21] This purpose cannot explain the marriage penalty except on the assumption that single people typically have larger per capita deductible expenditures than married people. That assumption, however, would almost certainly be counterfactual.[22]

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[19] If an unmarried couple has two or more children, they both might qualify for head-of-household status. In that event, the total of their standard deductions would be $12,500.

[20] In 1998, the difference between one joint standard deduction of $7,100 and two single standard deductions of $4,250 each, for a total of $8,500, was $1,400. Multiplying $1,400 by the 15% marginal tax rate yields $210.

[21] Prior to 1977, taxpayers could claim a standard deduction equal to a percentage of their adjusted gross income, up to a cap. To simplify reporting requirements for average taxpayers, the 1977 tax act eliminated the percentage standard deduction and converted the old caps on the standard deduction into a fixed-amount deduction. *See* Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 102, 91 Stat. 126, 135 (codified as amended at I.R.C. § 63(d)). A percentage standard deduction does not create a marriage penalty; the old caps did produce a marriage penalty, but the penalty only applied to married couples whose income was high enough to cause them to bump again the cap.

[22] For the majority of taxpayers, two of the most important deductions are the deduction for home mortgage interest and the deduction for homeowner real estate taxes. Married couples are more likely to claim these deductions than single individuals because married couples are more likely to be homeowners.

The second purpose of the standard deduction is to provide, in conjunction with the personal exemptions and dependency exemptions, a tax-free amount to families that roughly corresponds to the federal poverty-level amounts for families of different sizes.[23] The official poverty-level figures are computed with very strong assumptions about economies of scale and do not distinguish whether two (or more) people living together are married or not. Nevertheless, many tax policy makers seem to make the implicit assumption that married individuals enjoy economies-of-scale benefits and single individuals do not.[24] Whether that assumption is appropriate in the design of welfare programs is an issue outside the scope of this Article. As noted above, we believe that the potential economies-of-scale benefits should not be taken into account in determining income tax liabilities.

2. Marital Tax Rates

For higher-income couples that typically itemize deductions, marriage penalties mainly reflect the differing rate schedules for single and married persons. Those rate schedules can impose higher taxes on a married person's share of the family income than would apply if the couple were living without the benefit of legal matrimony. Assume, for example, that two unmarried individuals living together as a couple each earn $40,000. The aggregate amount of their income subject to tax probably would not change much by marriage. If they did marry,

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[23] The poverty-level figures were developed in the early 1960s. They were based on the estimated cost of a minimum adequate diet for each type of family. Those cost amounts were multiplied by three to get the poverty-level budget for each family type. At the time, food was estimated to make up about one-third of the budget of the average poor family. The poverty benchmarks are updated annually for inflation by the Census Bureau. The simplistic methodology has remained the same, however, despite the fact that poor families now are estimated to spend only one-seventh of their budget on food. For a history and criticism of the poverty benchmarks, see generally COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION, MEASURING POVERTY: A NEW APPROACH (1995).

[24] The official poverty threshold for a single person in 1998 was $8,300 (with a lower level for the elderly, at $7,818, than the non-elderly, at $8,480). Adding a second person to a household raised the poverty threshold by $2,320, adding a third, by $2,130, a fourth, by $4,060, a fifth, by $3,460, etc., with no discernible pattern. The increments were different for adding children compared to adding adults, with children sometimes more and sometimes less. U.S. Bureau of the Census, *Poverty Thresholds in 1998, by Size of Family and Number of Related Children Under 18 Years*, (visited Sept. 1, 1999) <http://www.census.gov/hhes/poverty/threshld/thresh98.html>.

however, they would pay a higher marginal tax rate on part of their income, leading to a marriage penalty of more than a thousand dollars.[25]

The marriage penalties produced by the marital rate schedule–referred to here as rate-schedule marriage penalties–are a product of the 1969 tax act. From 1948 to 1969, marital partners were each taxed on one-half of their total marital income at the same rates that applied to single people. For example, if Bo had income of $25,000 and Kim had income of $55,000, under the splitting rules they would each have reported gross income of $40,000 (($25,000 + $55,000) ÷ 2). With graduated rates, this full-income splitting result often allowed marital partners to pay less taxes than they would if they were taxable on their separate incomes. For administrative convenience, this income splitting result was obtained by allowing married couples to pay tax on their aggregate incomes under a special rate schedule for married persons. The widths of the tax brackets on the married-couple rate schedule were exactly twice the widths of the tax brackets of the rate schedule applicable to single persons.[26]

The 1969 tax act left the married-couples tax rate schedule unchanged while introducing a more favorable rate schedule for single individuals. The brackets of the new singles schedule were less than half the width of the married-couples schedule. As a result, the married-couples schedule no longer provided the functional equivalent of full

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[25] After itemized deductions and personal exemptions, the couple's total taxable income would be about $61,000. As two single taxpayers in 1998, $50,700 of this would be taxed at 15% and the remaining $10,300 at 28%. But as a couple, only $42,350 would be taxed at 15%, and $18,650 at 28%. The additional $8,350 in the 28% bracket adds $1,086 to the income tax due as a married couple. At joint income levels over $110,000, some marriage penalties are caused by implicit marginal rates due to various phase-outs and disallowances, such as starting points for the personal exemption recapture, the itemized deductions disallowance, and the per-child tax credit phase out. Marriage penalties are also engendered by the break points governing the taxation of Social Security benefits, the dependent-care credit percentages (the credit is 30% of expenses up to $2,400 for one child and $4,800 for two or more children for incomes below $10,000, but falls to 20% for incomes greater than $28,000), the rules governing the Alternative Minimum Tax, and the rules for the elderly and disabled credits, among other items.

[26] Assume, for example, that marital partners are allowed to split their income and that all taxpayers are required to pay tax on a rate schedule that taxes the first $20,000 of taxable income at 10% and all income over $20,000 at 50%. If A and B are married and A has separate income of $10,000 and B has separate income of $40,000, then each would pay tax of $4,500 on income of $25,000, for an aggregate tax of $9,000. This same result would be achieved if A and B were taxable on their aggregate income of $50,000 under a married-couple rate schedule that taxed married couples on the first $40,000 of income at 10% and on income over that amount at 50%.

income splitting. Marital partners could obtain the benefits of the new single rates schedule, but only by getting a divorce and paying taxes on their separate incomes under that new schedule. Thus the marriage penalty. The effect of the revised system was to allow for only partial income splitting between married couples.[27] Marital partners incurred a marriage penalty because the income split that was implicit in the revised joint filing system was less even than the split they could obtain if the spouses were to divorce and file separate tax returns.

To maximize the tax benefits of getting a divorce, married couples need to arrange their affairs so that each spouse will be taxable on about half of their aggregate income after the dissolution of their marriage. They can achieve that result automatically under current law if both spouses are working in the labor market, receive equal earnings, and do not have any other income. Many high-income former spouses can split their income by shuffling their ownership rights to income-producing property. As discussed above, married individuals can always arrange to have equal taxable incomes after divorce by entering into a well-crafted alimony agreement.

In adopting the 1969 tax act, Congress knew that it was creating marriage penalties.[28] It attempted to justify those penalties by alluding to the economies-of-scale benefits allegedly enjoyed by married couples and not enjoyed by single persons. The political reason for imposing those penalties, however, was not to tax economies-of-scale benefits. It was to reduce the so-called marriage bonus created under the prior system of full income splitting.

A marriage bonus is the reduction in taxes that two individuals with unequal incomes obtain from getting married under a joint filing system that allows substantial income splitting between spouses. Assume, for example, that Bo and Kim are unmarried, that Kim has income of $50,000 and that Bo has income of zero. In a full income splitting system with graduated tax rates, Bo and Kim would each become taxable on $25,000 if they got married. Kim's tax bill would go down and Bo's would go up, but their aggregate tax bill probably would go down.[29] Joint filing

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[27] For discussion of how the 1969 act resulted in partial marital income splitting, see McIntyre & Oldman, *supra* note 3, at 1584-85.

[28] *See* STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, 91ST CONG., 2D SESS., GENERAL EXPLANATION OF TAX REFORM ACT OF 1969 223 (Comm. Print 1970).

[29] If both Kim and Bo were in the bottom tax bracket prior to marriage, they would not obtain a rate- schedule "marriage bonus" from getting married. In general, a widening and

with partial income splitting also can produce so-called marriage bonuses, but their frequency and magnitude is reduced. A return to full income splitting would result in some increase in so-called marriage bonuses.[30]

The term marriage bonus is really a misnomer because the "bonus" is fully consistent with the theory underlying marital income splitting. According to that theory, an item of income should be taxed to the person who enjoys its economic benefits. Thus if income is shared equally by a husband and wife, they should each be taxable on one half of that income. The fact that total taxes on two individuals go down when they marry is consistent with the fact that their enjoyment of income becomes more equal after marriage. The term marriage bonus is also a pejorative, biased description of the operation of a set of income-attribution rules. Analysts who think that a particular income-attribution rule is wrong should marshal arguments to support their position. They should not resort to the functional equivalent of name calling.

It is worth noting that a separate filing system produces marriage bonuses similar to those produced in an income splitting system. Assume, for example, that Kim and Bo are subject to tax under a separate filing regime. Kim has earned income of $20,000 and Bo owns assets that generate investment income of $120,000. They decide to marry, and after marriage, they begin to share income in the expected, roughly equal pattern. They realize that they could reduce their taxes if Bo transferred some assets to Kim. That transfer would make Kim taxable on some of the investment income previously taxable to Bo, resulting in lower taxes on the couple. That self-help income splitting produces a marriage bonus in that it causes Kim and Bo to pay less in taxes than they were paying before marriage. Referring to that result as a marriage bonus is inappropriate, because the so-called bonus is consistent with the principles of separate filing. In contrast, the term marriage penalty, although also pejorative, is appropriately used because the imposition of

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flattening of the rate schedules reduces "marriage bonuses" and marriage penalties, as illustrated by the changes in "marriage bonuses" and penalties resulting from the 1986 tax act.

[30] Under current law, marital partners seeking to minimize their taxes and unconcerned about the marital state would not enjoy the "marriage bonus" for long, as they would divorce and split their incomes through the deduction for alimony. That is, they would enjoy a "divorce bonus," not a "marriage bonus."

an extra burden on couples that marry is generally considered to be an improper result.

Many commentators claim that adoption of a separate filing system would eliminate the rate-schedule marriage penalties of current law.[31] In fact, a separate filing system routinely produces marriage penalties as long as alimony is taxable to the recipient and not the payer. Assume, for example, that Bo and Kim are married and are paying taxes in a separate filing system. Bo has separate income of $60,000, and Kim has separate income of $10,000. They could minimize the bite of the graduated tax rates if they got a divorce and Bo began paying alimony of $25,000 to Kim. The amount they would save from that arrangement would constitute a marriage penalty.

A separate filing system also produces other types of rate-schedule marriage penalties. Prior to 1948, Congress attempted to limit opportunities for marital income shifting within a separate filing system through remedial rules applicable to certain trusts and partnerships.[32] Those rules continued in effect after the adoption of marital income splitting in 1948, but with greatly reduced importance. Marital partners generally can circumvent these anti-avoidance rules by getting a divorce.

In summary, joint filing regimes and separate filing regimes can produce marriage penalties and "marriage bonuses." In a separate filing system that employs graduated tax rates, it would be necessary to repeal the deduction for alimony to avoid marriage penalties. It would also be necessary to repeal the various provisions of the Code that limit the use of family trusts, family partnerships, and the like to achieve self-help marital income splitting. A joint filing system, however, can eliminate marriage penalties straightforwardly by adopting full marital income splitting. The systematic favoritism towards marriage produced by a marital income splitting regime is justified in theory and has the important benefit of causing equal-income married couples to pay equal taxes. In contrast, a separate filing system is forced to tolerate self-help marriage bonuses that undermine the equal treatment of similarly situated married couples. Thus, within the context of a graduated

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[31] *See, e.g.,* Zelenak, *supra* note 3, at 342 (asserting, incorrectly, that "[t]he only way to avoid both marriage bonuses and penalties is to abandon marital status as a tax determinant and to require that spouses file separate returns").

[32] Examples are the grantor trust rules of I.R.C. § 671 *et seq.* and the family partnership rules of I.R.C. § 704(e). For example, the income of a trust that was set up by a husband for the benefit of his wife would be taxable to the husband.

income tax and equal treatment of equal-income couples, the only method available for eliminating the marriage penalties of current law is to undo the damage done in 1969 and return to full income splitting.

3. Phase-Out of Earned-Income Tax Credit

With one notable exception, the proposal set forth in Section III would eliminate almost all of the most commonly cited marriage penalties for the vast majority of couples. That proposal would do nothing, however, to alleviate the marriage penalties created by the earned-income tax credit ("EITC"). For low-income taxpayers, the marriage penalties created by the EITC are important and regrettable. Unfortunately, we have not yet devised a method for eliminating those penalties that is consistent with the goals of the credit and with current political realities.

The EITC is a refundable tax credit targeted at low-income workers. Most of the benefits are provided to single mothers with dependent children.[33] The credit is also available, however, to other low-income families and, on a very limited basis, to lower-income taxpayers without dependent children. Taxpayers with incomes over specified income thresholds are not eligible for the EITC. The EITC is phased out at the rate of 15.98 cents for each dollar over $12,260 for taxpayers having one dependent and at the rate of 21.06 cents for each dollar over $12,260 for taxpayers having more than one dependent (at 1998 levels).

The EITC marriage penalty has two causes: (1) the credit is phased out over the same income range for both single individuals and married couples; and (2) the fact that splitting tax custody of children between unmarried parents in larger families can frequently generate larger credits than if the parents are married (and no custody splitting for tax purposes is allowed). Assume, for example, that Jean and Jules are single individuals with two dependent children and are living together as an unmarried couple. Each has wages of $12,260 and no other income. Each of them qualifies for the maximum one-child EITC of $2,271 (in 1998), for a total of $4,542. If Jean and Jules were to marry, their total two-child EITC would fall to only $1,174 due to the phase-out rules, computed on their combined income of $24,520. After taking account of other tax effects, their tax as a married couple would be $3,562 higher than if they remained unmarried.

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[33] In 1999, seventy percent of the total earned income tax credits went to unmarried taxpayers. INSTITUTE ON TAXATION AND ECONOMIC POLICY TAX MODEL (1999).

As the example illustrates, the amount of credit lost through marriage can be very substantial. The incomes shown in the above example reflect full-time wages of about $6 per hour for each member of the couple. A marriage penalty of $3,562 is a huge amount at that income level. For a couple with the same earnings and four children, the marriage penalty in 1998 was a staggering $5,636–equal to 23 percent of total pretax income. This is not only unfair, but it may have an impact on behavior, inducing some single heads of household to decide not to marry.[34]

Overall, almost 13 million couples pay an EITC marriage penalty under current law, with an average penalty of $1,711. In addition, there are an unknown number of unmarried couples that have forgone marriage to avoid the penalty.

The marriage penalty problem under the EITC parallels similar problems in many welfare programs. The EITC was designed in part to correct for some of the perverse incentives in welfare programs.[35] With regard to marriage penalties, however, the EITC has only worsened an already intolerable situation.

EITC marriage penalties were made considerably larger in the 1990 deficit reduction act. Prior to the 1990 act, only couples and heads of household were eligible for the EITC. This meant, in effect, that there could be only one EITC per household, because married couples get only one credit and in any given unmarried household, there can be only one taxpayer who pays more than half the household expenses. The 1990 act, however, extended the EITC to taxpayers with children who file on the rate schedule for singles. Thus, an unmarried couple with two children now can get two EITCs (if both parents meet the income rules).[36]

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[34] The empirical evidence, however, is not yet in. For discussion, *see supra* note 1.

[35] *See* Michael J. McIntyre & C. Eugene Steuerle, FEDERAL TAX REFORM: A FAMILY PERSPECTIVE 36-39 (1996).

[36] It does not appear that the drafters of the 1990 act gave careful consideration to the marriage penalties they were creating when they dropped the head of household requirement. Instead, they were concerned that taxpayers had been ignoring the head-of-household requirement under the prior rules (*i.e.*, they were cheating), and to "solve" that problem, they decided to make the formerly illegal practices legal. In the House report on the 1990 act, the only reference to why the EITC was extended to single filers with children is the following:

> Concerns have been expressed about the complexity of the EITC and potential taxpayer compliance problems. Accordingly, the bill

We made an attempt to eliminate EITC marriage penalties using an income splitting approach similar to what we outline later in this Article–that is, by treating each spouse as having half the family income for EITC purposes, splitting "custody" of children optimally, and letting each spouse calculate the EITC separately. Preliminarily, as simply a tax cut for couples (with no offsets), we found that such a plan would cost a prohibitive $22.1 billion annually, at 1999 levels. Most of the benefits would go to couples making between $30,000 and $60,0000, who now get no EITC because their income exceeds the current limits.[37] On a revenue-neutral basis, we calculated that an EITC income splitting approach would double the total EITC dollars going to couples and would reduce total EITC dollars for unmarried taxpayers (mostly single parents) by 42 percent. The share of total EITC dollars going to unmarried taxpayers would drop from 70 percent under current law to only 40 percent.

Converting the EITC from a program dedicated mostly to low-income single parents to a program mostly benefitting couples is too drastic a policy change for us to suggest in an article focusing on marriage penalty issues.[38] We emphasize, however, that policymakers should not ignore the serious marriage penalties that the EITC creates for millions of families. Some combination of returning to the pre-1990 head-of-household requirement for EITC entitlement and at least partial income splitting might be a helpful approach toward reducing the EITC

> includes modifications intended both to simplify and improve compliance with the EITC.

House Report, Revenue Reconciliation Bill of 1990, H.R. 5835 (1990) at 13.

By allowing a larger EITC for families with more than one child, the 1993 tax act mitigated some of the EITC marriage penalties at income levels below $25,000. That change expanded the penalties significantly, however, at higher income levels.

[37] In doing this analysis, we found an apparent conflict with a Congressional Budget Office statement suggesting that such an approach would cost only $4 billion at 1996 levels. See CBO STUDY, supra note 16 at 53. We checked with the CBO analysts, however, and they confirmed that their figure was hugely low due to a combination of descriptive and modeling errors.

[38] See Alstoff, *supra* note 1, at 560-61

> Further, critiques of the EITC's marital disincentives fail to confront the policy trade offs inherent in designing the EITC or any other redistributive program. Marriage penalties are a virtually unavoidable characteristic of income transfers that tailor benefits to need. Although it is in theory possible to redesign income-tested transfer programs to avoid penalizing marriage, the necessary changes would compromise policy goals that many may find more important than marriage neutrality.

Id.

marriage penalties under current law.[39] Or a complete reworking of the Code's crazy quilt of children's allowances–that now include the EITC, the dependent's exemption, the $500 per child tax credit, and the head-of-household filing rules–might be even more promising.[40] Unfortunately, a comprehensive solution is beyond the scope of this Article. We hope to return to this issue in a later piece.

C. Magnitude of Marriage Penalties

In this Section, we set forth and explain our calculations of the marriage penalties that married couples pay under current (1998) law and contrast our calculations with those made by the Congressional Budget Office ("CBO")[41] in a widely-cited recent study.[42] The CBO study represents a serious effort at quantifying marriage penalties under the current Code.[43] The results of our calculations of marriage penalties differ significantly, from the results reported in the CBO study. The reasons for those differences are discussed below.

To compute marriage penalties and bonuses, analysts must make some assumptions about the features of an alternative tax system—a benchmark system—in which married individuals would file separate

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[39] In 1998, House Ways and Means Committee member Richard E. Neal, D-Mass., introduced H.R. 3995, which would reduce the EITC marriage penalty by providing for partial income splitting in the phase-out rules for married couples. The bill would increase the phase-out of the credit by $ 3,500 for joint filers with qualifying children.

[40] *See* McIntyre & Steuerle, *supra* note 35, at 38-39. *See also* Jonathan Barry Forman, *What Can Be Done About Marriage Penalties*, 30 FAM. L. Q. 1, 12 (1996) (discussing a proposal by Rep. Thomas E. Petri (R-Wis.) for replacing a portion of the EITC with a child tax credit that would be phased out at moderate-income levels).

[41] CBO STUDY, *supra* note 16. For other attempts at measuring the magnitude of marriage penalties, see R. Wayne Counts & Craig G. White, *Lower-Income Families and the Current Marriage Tax Penalty Proposal*, 83 TAX NOTES 1063 (1999); Stacy Dickert-Conlin & Scott Houser, *Taxes and Transfers: A New Look at the Marriage Penalty*, 51 NAT'L TAX J. 175 (1998); Laura Wheaton, *Low-income Families and the Marriage Tax*, 81 TAX NOTES 125 (Oct. 5, 1998); James Alm & Leslie A. Whittington, *The Rise and Fall and Rise…of the Marriage Tax*, 49 NAT'L TAX J. 571 (1996); Daniel R. Feenberg & Harvey S. Rosen, *Recent Developments in the Marriage Tax*, 48 NAT'L TAX J. 91 (1995).

[42] *See, e.g.*, James D. Bryce, Symposium *A Critical Evaluation of the Tax Crits*, 76 N.C. L. REV. 1687, N. 57 (1998); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA L. REV. 129 n. 7 (1998).

[43] Of course, the CBO STUDY gives only a snapshot of the marriage penalties imposed on a couple in any given year. In practice, the circumstances of married couples typically change over time, particularly when and if they have children and one spouse chooses to forgo all or some earnings to stay home with the children. Thus under CBO's mode of analysis, for tax purposes, many couples would prefer to be married in some years and unmarried in others.

returns. On this point, we are in full agreement with the CBO study. According to the CBO study, the marriage penalties and "bonuses" that it computed "are simply the calculated differences between the taxes married couples pay under current law and the taxes they would pay if they had to file individual tax returns given specific assumptions about the division of incomes, itemized deductions, and dependent exemptions between spouses."[44] The CBO calculated the marriage penalties and "bonuses" of current law (1996) by reference to several alternative benchmark systems. The advantage of this approach is that it allows reasonable inferences to be drawn about the relative importance of various features of the current tax system that create marriage penalties.

In calculating marriage penalties and "bonuses," the CBO assumed that married individuals filing separately under its various benchmark systems would compute their separate incomes under the following income-attribution rules:[45]

(1) Marital partners would each be taxable on their own earned income.

(2) Marital partners would determine the amount of investment income that they would be taxable on by employing a splitting formula. Under that formula, the aggregate investment income of the marital partners would be divided between them in proportion to their earnings.

(3) Marital partners claiming itemized deductions would determine the amount of their allowable itemized deductions also by formula. Under that formula, the aggregate itemized deductions of marital partners would be divided between them in proportion to their earnings.[46]

The following example illustrates how these rules would operate. Assume that Kim and Bo are married, that Kim has earned income of $60,000 and Bo has earned income of $20,000, that they have aggregate investment income of $12,000, and that they have allowable deductions

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[44] CBO STUDY, *supra* note 16, at 28.

[45] Income-attribution rules are the rules for linking items of gross income subject to tax to the person taxable on those income items. For discussion of the taxonomy of tax rules, see Michael J. McIntyre, *Implications of Family Sharing for the Design of an Ideal Personal Tax System*, *in* THE PERSONAL INCOME TAX: PHOENIX FROM THE ASHES 145-83 (Richard Bird and Sijbren Cnossen, eds. 1990).

[46] CBO STUDY, *supra* note 16, at 28.

of $8,000. Kim would report earned income of $60,000 and investment income of $9,000, and would claim itemized deductions of $6,000. Bo would report earned income of $20,000 and investment income of $3,000. In lieu of allowable itemized deductions of $2,000, Bo would claim the standard deduction of $4,000.

Using the above income-attribution rules, the CBO developed several benchmark systems, three of which we discuss below. Under what we call Scenario #1, the CBO computed marriage penalties and bonuses on the assumption that married individuals would compute their separate tax liabilities using the current rate schedule for single persons.[47] They would not be allowed to use the more favorable head of household schedule, even if they had a dependent child who would qualify them for using that schedule under current law. Nor would they be allowed to ignore the income of their spouse in computing the earned income tax credit. Under this scenario, the CBO calculated for tax year 1996 that:

(1) If marital partners were *allowed* to compute their separate tax liabilities using the rate schedule currently limited to single individuals, 13.9 million married couples would have been able to reduce their income taxes. The elimination of these marriage penalties would have saved married couples an average of $612 each in taxes for 1996, for a total tax saving of $8.5 billion.

(2) If all marital partners were *required* to file as two single taxpayers, 31.4 million other married couples would have been required to pay additional taxes. The elimination of these so-called marriage bonuses could have cost married couples in additional taxes an average of $1,424 each, for a total cost to them of $44.7 billion.

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[47] In a modified version of Scenario #1, the CBO also calculated marriage penalties and "bonuses" on the assumption that married couples that chose to file separately would be permitted to allocate all itemized deductions to the higher-earning spouse, with the lower-earning spouse taking the standard deduction. Under that rule, married couples favorably affected by separate filing would save an additional $11.4 billion in taxes, whereas the adverse effects on couples of mandatory separate filing would be cut by $0.7 billion. *See* CBO STUDY, *supra* note 16, at 28-29. These revenue effects are probably driven by the fact that this rule would allow many more married couples to take both itemized deductions and a standard deduction. The CBO does not emphasize these results, apparently because it assumed that few people would find it equitable to allow married couples to claim the full amount of their itemized deductions and also to claim a standard deduction.

(3) The net *benefit* to married couples as a group of using the married couples rate schedule instead of each spouse filing separately using the singles rate schedule was $36.2 billion. That is, married couples as a group paid substantially less in federal income taxes than they would have paid if all spouses had filed separate returns under the rate schedule currently available only to single individuals.

Under Scenario #2, the CBO made the same assumptions it made in Scenario #1 except that, for married couples with children, one or both separate filing spouses would be allowed to claim head of household status. Under that scenario, the number of married couples that would have been better off in 1996 from filing separately rather than jointly would have increased from 13.9 million to 17.8 million. At the same time, the number of couples that would have been adversely affected by mandatory separate filing would have declined from 31.4 million to 27.3 million. Total marriage penalties under Scenario #2 would have increased by $8.5 billion, to $17.0 billion, whereas so-called marriage bonuses would have declined to $33.2 billion. According to the CBO, the net benefit to married couples as a group of filing jointly under current law rather than filing separately under Scenario #2 was $16.2 billion. This amount is $20 billion less than the net marriage bonuses under Scenario #1.

Scenario #3 examines marriage penalties and “bonuses” by indulging the assumptions of Scenario #2 plus an assumption that separate filing spouses would be allowed to compute their allowable earned-income tax credit based on their individual earnings. Not surprisingly, this scenario resulted in very large additional marriage penalties. According to the CBO, marriage penalties would be increased for 1996 by $11.8 billion and so-called marriage bonuses would be cut by $0.3 billion. In total, 20.9 million couples would have paid $28.8 billion less in taxes in 1996 under Scenario #3, and 25.3 million couples would have paid $32.9 billion more in taxes.

In summary, by the CBO’s count, the single largest cause of marriage penalties, measured in terms of their dollar value, is the earned-income tax credit, creating total marriage penalties of $11.8 billion. Tied for second place are the more favorable head-of-household filing rules (for couples with children) compared to joint filing and the more favorable single filing rules compared to joint filing, each producing aggregate marriage penalties of $8.5 billion. Notwithstanding these substantial penalties, the CBO concluded that married individuals as a group save

more total dollars by filing jointly than they lose from paying the marriage penalties.[48] That is, according to the CBO study, so-called marriage bonuses outweigh marriage penalties by $4.1 billion.

In calculating the size of the marriage penalties under current law, the CBO defined what it meant by a marriage penalty and specified the features of its benchmark system. In both respects, it made questionable choices, given the policy objectives of its study. Because we used a different marriage penalty definition and specified our benchmark system differently, our results differ significant from the results reached by the CBO.

The CBO defines a marriage penalty from the perspective of two unmarried individuals contemplating matrimony. For such individuals, the prospective marriage penalty is the additional taxes that they would be required to pay each year if they tied the marital knot. This definition is perfectly sensible if the reason for measuring marriage penalties is to determine the extent to which the tax system gives unmarried couples a financial disincentive to marry. That is not our reason for calculating marriage penalties, however, and it does not appear to be the reason why the CBO undertook its study of marriage penalties.

We define a marriage penalty from the perspective of a married couple contemplating the potential tax benefits from getting a divorce — what the CBO characterizes as a "divorce" model.[49] In our view, the primary tax policy objection to marriage penalties is not their potential impact on unmarried couples, but their actual impact on the tax burdens of the much larger number of individuals that remain married.[50] The question we attempt to answer is how much could currently married couples save in taxes by getting divorced.[51] That is, a "marriage penalty"

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[48] CBO's findings were immediately seized on and distorted by Congressional Republicans, whose press releases and speeches in recent years have frequently asserted that "the average married working couple pays almost $1,400 more in taxes" because of the marriage penalty. *See, e.g.,* Rep. Jerry Weller (R-Ill.), The Republican Response to President Clinton's Weekly Radio Address (Jan. 17, 1998) <http://www.house.gov/weller/radio.html>. These misstatements conflict sharply, of course, with CBO's actual finding that the average married couple enjoys a marriage "bonus."

[49] CBO STUDY, *supra* note 16, at 28.

[50] A major objective of the CBO STUDY is to calculate the aggregate marriage penalties actually paid by married couples under current law. The CBO is being inconsistent in defining marriage penalties in terms of the potential burden on unmarried couples and then measuring them with respect to the actual burden on married couples.

[51] In fact, the whole concept of the marriage penalty first gained public attention in the seventies when a few couples notoriously engaged in a ritual of well-timed divorces,

is synonymous with a "divorce bonus" under the definition we have adopted.

Of course the two definitions have a lot in common. Under both definitions, the causes of the marriage penalty are the same. It is the amounts and distribution of the marriage penalties that differ. Those differences are very large.

Under the CBO definition, marriage penalties are an issue primarily for two-earner couples, because an unmarried couple with only one primary earner typically would pay less rather than more in taxes after marriage.[52] Under the definition we have adopted, all married couples pay a marriage penalty because all marital partners are presented with the opportunity under current law to reduce their aggregate taxes after marriage by divorcing and entering into an alimony agreement.[53] That is, almost every married couple now paying income taxes could cut its tax bill substantially by divorcing with a legally binding (but annually renegotiable) separation agreement to split income and deductions in an optimal fashion.[54] We explained in section II.A. why we believe that the computation of marriage penalties and bonuses should take into account

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remarriages, re-divorces, etc., for the stated purpose of cutting their taxes. In some of these cases, the IRS actually challenged the admittedly tax-motivated divorces as "shams." *See* Boyter v. Comm'r, 668 F.2d 1382 (4th Cir. 1981) (successfully challenging legal significance of a divorce obtained in Haiti in late 1975 followed by remarriage in Maryland in early 1976 and a divorce obtained in late 1976 in the Dominican Republic followed by remarriage in Maryland in early 1977); *see also* Rev. Rul. 76-255, 1976-2 C.B. 40 (1976).

[52] Many other analysts have seen marriage penalties as primarily an issue for two-earner couples in which each spouse earns a significant share of the total family income. *See, e.g.,* Bruce Bartlett, *The Marriage Penalty: Origins, Effects and Solutions*, 80 TAX NOTES 1341 (1998) (stating marriage penalties result only when both spouses have earned income and that single-earner couples never pay a penalty and in fact always get a bonus from the Code); Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997) (stating marriage penalties are the greatest where there are two wage earners; marriage bonuses are the greatest where there is only one wage earner).

[53] Each of the authors has written extensively, and critically, about the many arguments that have been put forward over the years in support of more favorable treatment of two-job couples versus one-job couples. Many of the arguments in support of two-job couples, particularly those based on theories about trying to tax the "imputed income" of stay-at-home spouses, logically apply with at least equal force to single people, although they are rarely invoked on behalf of singles.

[54] Alimony is deductible by the payer and taxable to the recipient. I.R.C. §§71, 215. There do not appear to be any strong legal limitations on the ability of spouses to craft whatever alimony agreement they prefer and to renegotiate that agreement to suit their needs at a later time. Expenses eligible for itemized deductions can easily be allocated by agreement.

the income splitting opportunities available through the alimony deduction.[55]

The main difference between our basic benchmark system and the one employed by the CBO is in the choice of the income-attribution rules and deduction-allocation rules that would apply to married individuals filing separate returns. The CBO rules, summarized above, would require marital partners to split their unearned income and deductions by formula. Our basic benchmark system employs the income-attribution rules and deduction rules of current law. Marriage penalties calculated under our approach are larger because the CBO approach would deprive spouses of the tax-planning benefits that unmarried couples can obtain under current law by shifting ownership rights and rights to deductions.

Our basic benchmark system is proper if the reason for calculating and aggregating marriage penalties is to measure the extra amount in taxes that married couples pay on account of their decision to stay married. That is, we have chosen our basic benchmark system for the same reason we adopted a divorce model in defining marriage penalties.

In crafting its basic benchmark system, the CBO was not assuming that marital partners would flunk Tax Planning 101. It apparently was motivated by a political judgment that Congress, if it enacted a marital separate filing rule, would not permit marital partners the opportunities for self-help tax reductions that they were able to obtain under pre-1948 law.[56] This judgment may or may not prove to be correct. We do not believe, however, that the magnitude of marriage penalties under current law should depend on the political judgment of the analysts calculating them.[57]

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[55] None of the proposals currently before Congress for dealing with the marriage penalty would repeal the alimony deduction. The Armey/Shelby flat-tax proposal, which was proposed as a replacement for various federal taxes, including the income tax, called for repeal of the alimony deduction. The apparent goal was improved administrative compliance. The flat-tax proposal is now moribund. For discussion of the problems that would be created for former spouses from repeal of the alimony deduction, see McIntyre & Steuerle, *supra* note 35, at 47-48.

[56] *See* CBO STUDY, *supra* note 16, at 28 (asserting that these assumptions "would more likely reflect possible changes that Congress might make to alter the tax treatment of married couples" than an assumption that marital partners would be allowed to file separately and take advantage of tax planning opportunities currently available to unmarried couples).

[57] The CBO apparently believes that Congress would not be so irresponsible as to reinvent the pre-1948 system of full separate filing, given the horrendous administrative problems

We also note that the CBO's benchmark system would itself create marriage penalties. That is, if Congress were to enact that benchmark system, marital partners with uneven amounts of earned income and significant amounts of unearned income could save significant amounts in taxes by getting a divorce and shuffling their property rights to their income-producing property. To measure the magnitude of the marriage penalties under the benchmark system, analysts would need to create an improved benchmark system. We suggest that the improved benchmark system would be the one we have used here to calculate marriage penalties.

We have calculated marriage penalties using our basic benchmark system, our definition of marriage penalties, and the additional assumptions that the CBO indulged in what we have labeled Scenario #1 above. That is, our calculations assume that marital partners would be permitted to file separate returns using the singles rate schedule of current law. We have not computed marriage penalties under Scenario #2 (allowing married couples with children to use the head-of-household schedule) or Scenario #3 (allowing married individuals to compute their EITC as if they were unmarried).

Under our version of Scenario #1, marital partners who got a divorce would always be able to report equal taxable incomes after the divorce, for reasons discussed above. The distribution of tax burdens under that scenario, therefore, would be exactly equivalent to the distribution of burdens that would arise in a tax system that allowed for full marital income splitting and generally gave equal per capita tax benefits to similarly situated single and married individuals. Full splitting would be achieved by using the singles rate schedule of current law as the basic rate schedule and constructing a rate schedule for married couples with tax brackets exactly twice as wide as the singles brackets.

In Table 1, below, we set forth the results of our simulation under our version of Scenario #1 for tax year 1998. The potential tax savings shown in that table are large. They reflect the magnitude of the tax penalties imposed under current law. Alternatively, they can be seen as the potential divorce bonuses that married couples could obtain from severing their marriage bond. We calculate that the federal government

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and tax-avoidance opportunities it would create. Other analysts, however, are prepared to believe that Congress would so act, and have urged it to do so. *See, e.g.,* EDWARD J. MCCAFFERY, TAXING WOMEN 5 (1997). We would hope that Congress would act responsibly and refuse to adopt either version of separate filing.

would lose more than $42 billion annually if it eliminated marriage penalties by following our version of Scenario #1. The median tax cut in our simulated divorce scenario ranges from $38 for couples making $10-$20,000, to $233 in the $40-50,000 range, up to $7,599 for couples making more than $200,000.

In doing our simulation, we set the following items for couples at double the current single amounts: the rate-bracket widths, the standard deduction (including the add-on per person standard deduction for the elderly and the blind), the personal exemption recapture starting points, the itemized deductions disallowance starting points, the per-child tax credit phase out, the break points governing the taxation of Social Security benefits, the dependent care credit rate phase-down table, the rules governing the Alternative Minimum Tax, and the rules for the elderly and disabled credits.[58] Our estimate of potential divorce bonuses can be considered understated, in that we do not change the combined filing rules for the earned-income tax credit (Scenario #3).

Table 1
Elimination of Certain Marriage Penalties
Combined with a $42 Billion a Year Tax Cut
By Making the Married Tax Brackets Double the Width
of Current Single Brackets (etc.)

	Married Taxpayers			
Income Group	**% of Mar. Returns**	**Tax Cut $-billions**	**Average Tax Cut**	**% of Total Cut**
<$10,000	3.4%	$ –0.0	$ –5	0.0%
$10-20,000	10.3%	–0.2	–38	0.5%
$20-30,000	14.0%	–0.8	–105	2.0%
$30-40,000	11.9%	–1.2	–175	2.8%
$40-50,000	12.2%	–1.6	–233	3.9%
$50-75,000	23.3%	–7.8	–587	18.4%
$75-100,000	11.6%	–7.6	–1,151	18.0%
$100-200,000	9.5%	–8.4	–1,535	19.7%
$200,000+	3.4%	–14.7	–7,599	34.7%
ALL	**100.0%**	**$ –42.4**	**$ –741**	**100.0%**

[58] For technical reasons, we did not adjust the $3,000 limit for capital losses.

Our estimate of the marriage penalty or potential "divorce bonus" is accurate in measuring what particular couples are forgoing today by refusing to sever their marriage bonds. Like the CBO simulations discussed above, our version of Scenario #1 compares what married couples pay now compared to what they would pay if certain marriage penalties were eliminated and overall federal taxes were reduced substantially. Table 1 simply shows that taxes would be lower if taxes were lower–a claim that is true, but not edifying. It does not indicate how much married couples should expect to save under a reformed Code that eliminated most marriage penalties and raised the same revenue as current law.

In a revenue-neutral tax reform, taxes would need to be raised on some taxpayers to make up for the revenue lost by eliminated the tax on marriage. Because married couples pay about three-quarters of all income taxes, they certainly would be required to pay a significant part of the offsetting tax increase. If the tax increase were apportioned pro rata among taxpayers with respect to the amount they were currently paying, married individuals could expect to pay approximately three-quarters of that tax increase.

Suppose, for instance, that the cost of marriage penalty relief is covered by simply imposing a six or seven percent surtax on all taxpayers. Then what might start off as a $42 billion a year gross tax cut for married couples would end up as only about a $13 billion net cut for them–accompanied by a $13 billion tax increase on unmarried taxpayers. Under the slightly more sophistical revenue-neutral solution to the marriage penalty presented in Section III, the typical married couple making $50,000 a year would pay about $117 less in taxes, whereas the typical single taxpayer would pay additional taxes of about $67 a year.

As the example above illustrates, revenue-neutral policy changes to get rid of the marriage penalty would provide far less tax relief to married couples as a group than the sum of all the tax cuts that individual married couples could obtain if they decided to divorce. That is, the "tax on marriage" is much less than the sum of its parts. The results shown in Table 1, therefore, should not be interpreted as reflecting the changes in tax burdens that would result from adoption of full marital income splitting. On the contrary, they reflect the potential tax savings available to married couples from self-help income splitting under the partial splitting system of current law.

Some commentators have asserted that adoption of full marital income splitting would favor the wealthy.[59] That claim is potentially correct in the context of a major tax reduction tilted toward the well off, as Table I illustrates. But in the context of revenue-neutral reform, income splitting need not be a windfall to the wealthy, as the tax reform plan presented in section III demonstrates. In other words, those who see income splitting as favoring the rich apparently are envisioning the type of tax change shown in Table 1, in which adoption of marital income splitting is combined with a large tax cut. But it is the tax cutting part of that approach that favors the wealthy, not the adoption of marital income splitting. As the following section shows, income splitting can be implemented with no change in either revenues or the overall distribution of the tax burden.

III. PROPOSED SOLUTION

A. General Plan

Our basic proposal for fixing the marriage penalty is to tax married couples as if each spouse were a single person earning half the total family income. This "income splitting" approach would not be a radical step—after all, as noted earlier, it was the law in the U.S. from 1948 until it was repealed in 1969. The arithmetic for achieving full marital income splitting is considerable more complicated than in 1969, however, due to the many phase-out rules that Congress has added to the Code over the past 15 years.

Marital income splitting makes the reasonable assumption that married partners share the total family income about equally, with the result that each individual spouse has about the same ability-to-pay taxes as a single person with half the family income.[60] Current law, in

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[59] *See, e.g.,* Neil Brooks, *The Irrelevance of Conjugal Relationships in Assessing Tax Liability*, *in* TAX UNITS AND THE TAX RATE SCALE 35, 36 (John G. Head & Richard Krever, eds. 1996)

> In Canada, and my impression is in Australia as well, one type of group that perennially raises the issue of moving to a system of family taxation is the type that represents high-income single-earner families, such as law and other professional associations. The rich men traditionally represented by these groups stand to gain a good deal from a system of family taxation. In Canada, for example, lawyers and other individuals earning $100,000 a year could save over $10,000 annually in taxes if they were allowed to split their incomes for tax purposes with their non-income-earning spouses.

Id.

[60] *See* Michael J. McIntyre, MODERN WORLD, *supra* note 3, at 2:

contrast, randomly assumes marital income-sharing splits of between 60-40 and 80-20 in most cases, an approach that is hard to defend on any logical or empirical basis.

Undoing what was done in 1969–and returning to the pre-1969 system of income splitting for married couples–combines several compelling advantages. Those advantages include the following:

(1) Full marital income splitting is the only system that can eliminate most of the marriage penalties for middle- and upper-income taxpayers. Our proposal does not eliminate the EITC marriage penalties, but neither does any other proposal under consideration. Adoption of a separate filing system would further complicate the problem of fixing the EITC marriage penalties because the EITC is family based and must remain so to achieve its policy goals.

(2) Our plan requires married couples with equivalent incomes to pay the same amount in taxes. This goal–that equal-income couples pay equal taxes–has been a pillar of the federal income tax for over half a century and appears to have widespread popular support. In a separate filing system, couples with equal incomes can pay widely different amounts of tax.

(3) Using marriage as the bright-line test for sharing makes an income splitting system easy to administer. Almost all taxpayers are fully familiar with their marital status. A separate filing system can be complex to administer, due to the need to policy intra-marital transactions conducted for tax-avoidance purposes.

(4) Marital income splitting has a firm underpinning in tax policy principles, combining respect for married and unmarried persons as individuals with conformance to the most commonly recognized pattern of income sharing within a marriage.

> The case for marital income splitting rests on one normative proposition and one empirical proposition. The *normative proposition* is that *the proper taxpayer on income is the person who enjoys the benefits of that income through personal consumption or savings.* This proposition may be referred to as the "benefit principle" or the "enjoyment principle."...The *empirical proposition* is that *marital partners typically share approximately equally in the material benefits financed by income derived through their marital partnership.*

B. The Arithmetic

Using the Institute on Taxation and Economic Policy Tax Model, we have designed a plan to eliminate the marriage penalty while minimizing dislocations among taxpayers. At 1998 levels, our plan would incorporate the following features.

(1) *Tax Rates.* Our plan adjusts the tax rate brackets by raising the 28 percent starting point for married couples from $42,350 to $46,000. The other married brackets are kept about the same. The width of the brackets of the rate schedules for singles and head of household are set equal to half the new married brackets. See Table 2 for details.

Table 2
Rate Schedules, Current Law and Revised (Revenue Neutral) Plan

Income ($)	Rate	Plus tax of ($)	Income ($)	Rate	Plus tax of ($)
Married Filing Jointly, Current			*Married Filing Jointly, Revised*		
——	15%	——	——	15%	——
42,350	28%	6,353	46,000	28%	6,900
102,300	31%	23,139	102,000	31%	22,580
155,950	36%	39,770	155,000	36%	39,010
278,450	39.6%	83,870	280,000	39.6%	84,010
Single, Current			*Single, Revised*		
——	15%	——	——	15%	——
25,350	28%	3,803	23,000	28%	3,450
61,400	31%	13,897	51,000	31%	11,290
128,100	36%	34,574	77,500	36%	19,505
278,450	39.6%	88,700	140,000	39.6%	42,005
Head of Household, Current			*Head of Household, Revised*		
——	15%	——	——	15%	——
33,950	28%	5,093	23,000	28%	3,450
87,700	31%	20,143	51,000	31%	11,290
142,000	36%	36,976	77,500	36%	19,505
278,450	39.6%	86,098	140,000	39.6%	42,005
Married Filing Separately, Current			*Married Filing Separately, Revised*		
——	15%	——	——	15%	——
21,175	28%	3,176	23,000	28%	3,450
51,150	31%	11,569	51,000	31%	11,290
77,975	36%	19,885	77,500	36%	19,505
139,225	39.6%	41,935	140,000	39.6%	42,005

(2) *Standard Deductions.* Our plan increases the married standard deduction from $7,100 to $8,200. It cuts the singles standard deduction modestly, from $4,250 to $4,100, which is one-half the amount provided under our plan for married couples. And it cuts the head of household standard deduction significantly, from $6,250 to $4,100. The result under our plan is to give the same per capita standard deduction of $4,100 to married couples, singles, and heads-of-household. In addition, we equalize the extra per-person standard deduction for the elderly and blind at $950. The per capita amounts under current law are $850 for married persons and $1,050 for unmarried persons.

(3) *Phase-Out Rules.* The phase-out starting points under current law for the personal exemption, itemized deductions, and child tax credit are modified significantly under our plan. For married couples, the starting point for the phase out of the *personal exemption* is increased from $186,800 to $200,000. It is decreased for singles and heads of household to $100,000, from $124,500 and $155,650, respectively. For married couples, we increase the starting point for the disallowance of *itemized deductions* to $140,000, from $124,500 under current law. We cut the starting point for singles and heads of household to $70,000, from $124,500 under current law.

With respect to the *child tax credit*, we make no change in the phase-out starting point for married couples, which is $110,000 under current law. We lower the starting point for the per-child tax credit for singles and heads of household to half the $110,000 married amount. That is, we reduce the starting point to $55,000, from $75,000 currently.

We do not attempt to adjust for all features of current law that can produce a marriage penalty. The most important omission is our failure to adjust the phase-out rules for the earned income tax credit.[61] The other omissions are of relatively minor significance.[62] The adjustments that we do propose for the standard deductions and phase-out rules are presented in Table 3.

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[61] We discuss the reasons for this important omission in Section II.B.3.

[62] In addition to the EITC omission, our plan does not adjust: the thresholds for the taxation of Social Security benefits, the table for computing the dependent-care credit rate, the Alternative Minimum Tax, the elderly and disabled credit rules, and the $3,000 limit on annual capital loss deductions. The plan could be refined to make some of these adjustments.

Table 3 Standard Deductions and Phase-Out Rules, Current Law and Revised (Revenue Neutral) Plan		
Tax Provision	**Current Law**	**Revised**
Standard Deduction:		
Married Couples	$7,100 ($3,550 per capita)	$8,200 ($4100 per capita)
Singles	$4,250	$4,100
Head of Household	$6,250*	$4,100
Extra Standard Deduction, Elderly and Blind:		
Married Couple	$1,700 ($850 per capita)	$1,900 ($950 per capita)
Unmarried	$1,050	$950
Phase-Out Starting Points of Personal Exemptions:		
Married Couples	$186,800	$200,000
Singles	$124,500	$100,000
Heads of Household	$155,650	$100,000
Phase-out Starting Points of Itemized Deductions:		
Married Couples	$124,500	$140,000
Singles	$124,500	$70,000
Heads of Household	$124,500	$70,000
Phase-Out Starting Points of Child Tax Credit:		
Married Couples	$110,000	$110,000
Singles	$75,000	$55,000
Heads of Household	$75,000	$55,000

The distributional impact of the revised system is modest on typical married and single taxpayers. The typical married couple, making $50,100, would get a tax cut of $117. The typical single taxpayer without children, making $18,900, would pay $19 more in taxes. The amount and direction of these changes is consistent with our position that the distribution of tax burdens under current law is skewed somewhat in favor of single taxpayers.

The typical single parent (head of household), making $20,500, does not pay any taxes under current law and would not under our plan. At that income level, a head of household would get a tax refund, due to the refundable feature of the earned-income tax credit. Under our plan, the net tax refund drops by $204, from $1,011 to $807. That reduction is comparable to a tax increase of around one percent of income. Giving equal per capita standard deductions to all taxpayers is necessary to

prevent marriage penalties. It is also sound tax policy, given the objectives of the standard deduction.[63]

The reduction in the standard deduction for single parents is the one feature of our plan that might be viewed as unduly harsh. We recommend that reduction reluctantly, and only after exploring methods of giving compensating relief to all low-income families through a reformed earned-income tax credit or through the dependency deduction. We concluded that any offsetting tax relief for single parents should await more fundamental reform of the EITC. Recent tax legislation has treated low-income single parents quite favorably, but without giving adequate attention to the impact on marriage penalties of tax relief directed specifically at single parents. Our proposal for some reduction in the head-of-household standard deduction might be seen as a technical correction to that legislation.[64]

In aggregate terms, married couples would pay $13.3 billion less in taxes under our plan. Single taxpayers would pay $6.8 billion more, and heads-of-households would pay $6.6 billion more. Eighty-four percent of the tax increases on singles and 69 percent of the tax increases on heads of household would be paid by the upper 20 percent of these taxpayer groups. Chart 1 shows the impact of the revised system on unmarried taxpayers (single individuals and heads of household) and married taxpayers across the income spectrum.

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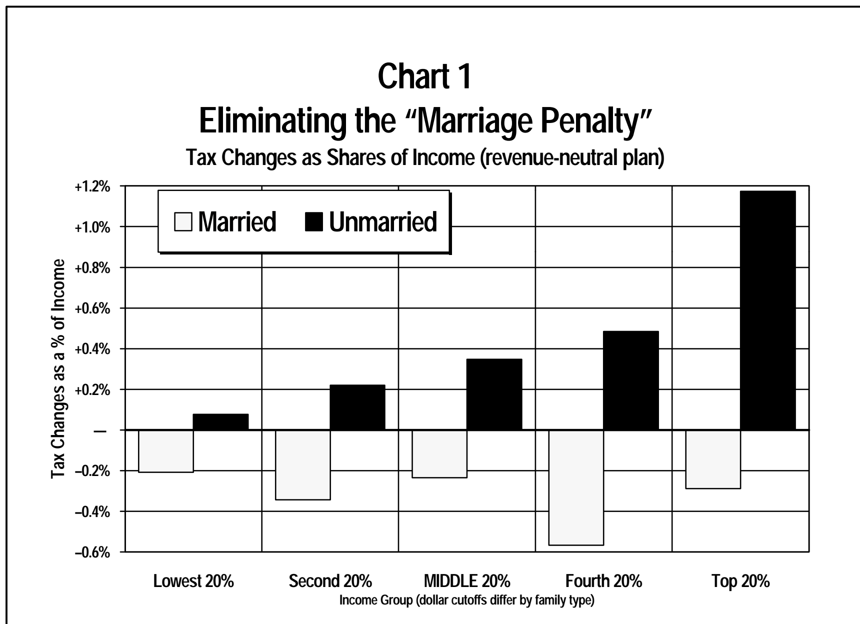
[63] For discussion of those objectives, *see supra* Section II.B.2.

[64] No one should oppose our plan simply because it recommends that single parents lose their more favorable standard deduction. Retention of the larger standard deduction for head of household filers would not have a major impact on the integrity of our plan. That step would not be cost-free, but the costs would be relatively small. There would be a modest revenue loss, and marriage penalties would be revived for some couples with children.



For the vast majority of couples, our program eliminates almost all of the most commonly cited marriage penalties with one notable exception: the marriage penalties created by the earned-income tax credit. As noted earlier, the earned-income tax credit marriage penalty issue is very important, but we have not yet devised a solution for it.[65] The distributional impact of our plan relative to current law is summarized in Table 4.

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[65] *See supra* section II.B.3.

Table 4
Effects of Plan to Eliminate the Marriage Penalty
By treating married couples as two singles, each with half the family income
(Brackets, Deductions, Phase-outs, Etc. Are Adjusted to Be Revenue-neutral)

Income Group	*Income Range*	*Average Income*	*% with Cut*	*Average Tax Cut*		*Tax Cut/ Income*
				Tps w Cut	All	
Lowest 20%	Less than $26,000	$ 17,300	23.8%	$ –151	$ –36	–0.2%
Second 20%	$26,000 – 42,000	33,700	71.0%	–163	–116	–0.3%
Middle 20%	$42,000 – 60,000	50,100	67.0%	–175	–117	––0.2%
Fourth 20%	$60,000 – 85,000	70,500	78.8%	–507	–400	–0.6%
Next 15%	$85,000 – 163,000	110,500	92.6%	–532	–493	–0.4%
Next 4%	$163,000 – 409,000	236,400	86.5%	–761	–659	–0.3%
Top 1%	$409,000 or more	1,086,000	88.1%	–695	–613	–0.1%
ALL			66.3%	$ –351	$ –232	–0.3%

Income Group	*Income Range*	*Average Income*	*% with Hike*	*Average Hike*		*Tax Cut/ Income*
				Tps w Hike	All	
Lowest 20%	Less than $9,600	$ 6,400	17.7%	$ +28	$ +5	+0.1%
Second 20%	$9,600– 15,500	12,500	50.3%	+55	+28	+0.2%
Middle 20%	$15,500 – 23,000	19,300	76.4%	+88	+67	+0.3%
Fourth 20%	$23,000 – 36,000	28,600	83.1%	+167	+139	+0.5%
Next 15%	$36,000 – 63,000	45,800	92.6%	+586	+543	+1.2%
Next 4%	$63,000 –129,000	81,000	95.3%	+980	+935	+1.2%
Top 1%	$129,000 or more	317,000	89.7%	+4,148	+3,722	+1.2%
ALL			63.4%	$ +318	$ +202	+0.8%

Income Group	*% of all Returns*	*Net Tax Change $billion*	*% with Tax Cut*	*Avg Tax Cut, Tps with*	*% with Hike*	*Avg Tax Hike, Tps with*	*Average Change All Tps*
<$10,000	12.9%	$ +0.1	1%	$ –76	17%	$ +30	$ +5
$10-20,000	21.0%	+0.7	6%	–113	46%	+71	+26
$20-30,000	17.8%	+0.6	19%	–152	53%	+104	+26
$30-40,000	11.2%	+1.2	36%	–166	43%	+332	+83
$40-50,000	9.4%	+1.6	45%	–165	37%	+584	+140
$50-75,000	14.0%	–0.6	54%	–385	22%	+771	–36
$75-100,000	6.2%	–2.3	79%	–527	12%	+957	–297
$100-200,000	5.0%	–1.3	82%	–551	11%	+2,150	–218
$200,000+	1.8%	+0.2	74%	–786	11%	+5,957	+93
ALL	100.0%	$ ––	31%	$ –351	34%	$ +318	$ ––

C. Comparison of Our Plan to Current Congressional Proposals

Our proposal for ending the marriage penalty is similar in concept to several legislative proposals in Congress. We look briefly here at three of those proposals. The first, H.R. 3734,[66] was sponsored by Reps. Jerry Weller (R-Ill.), David McIntosh (R-Ind.), Wally Herger (R-Cal.) and Bob Riley (R-Ind.). The second is included in H.R. 2488,[67] the major tax-cut bill approved by the House and Senate on August 5, 1999. The third, H.R. 2020,[68] was introduced by Rep. Nancy L. Johnson, R-Conn. These three proposals are based on a partial return to the pre-1969 system of taxing married couples as if each spouse were a single person earning half the total family income.

H.R. 3734, would have increased the married tax brackets and the married standard deduction to double the singles amounts. Unlike our plan, H.R. 3734 did not adjust other marriage penalty-causing tax provisions.

H.R. 2488, the tax-cut legislation approved by the House and Senate on August 5, 1999, would increase the standard deduction for couples to double the single amount, although that change would not be fully phased in until 2005. It would raise the starting point for the 28 percent tax bracket for couples to double the single amount, with the change phased in between 2005 and 2008. Finally, it would raise the top of the phase-out for the EITC for couples by $2,000, starting in 2006. President Clinton has announced that he will veto the bill, due to what he considers its excessively large tax cuts. The bill is expected to be sent to President Clinton in September.[69]

H.R. 2020 is the least ambitious of the three bills. It would increase the married standard deduction to double the current single standard

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[66] H.R. 3734, "The Marriage Tax Elimination Act," has apparently been withdrawn by its sponsors in favor of more limited legislation, H.R. 6, which is similar to the marriage-tax provisions of H.R. 2488.

[67] TAXPAYER REFUND AND RELIEF ACT OF 1999.

[68] Tax Relief for Working Americans Act of 1999. Cosponsors include W&M colleagues Amo Houghton, R-N.Y., Dave Camp, R-Mich., Phil English, R-Pa., and Mark Foley, R-Fla. Companion legislation was introduced in the Senate as S. 1160 by Sen. Charles E. Grassley, R-Iowa; it is cosponsored by Dianne Feinstein, D-Calif.

[69] *See* Ryan J. Donmoyer, *Congress Clears and Keeps Its $792 Billion Tax Cut*, 84 TAX NOTES 807 (1999) (reporting that the bill is "doomed" because of President Clinton's promise to "refuse to sign any plan that signs away our commitment to America's future.") Apparently it was the tax cut part of the bill, not the marriage penalty relief, that doomed the bill.

deduction. This change would reduce marriage penalties primarily for middle-income families.

Although there are some similarities between our plan and the Congressional proposals, there are also some fundamental differences. Rather than adjusting both the married and unmarried rules to maintain current revenues and progressivity, H.R. 3734's sponsors would combine marriage penalty relief with a huge tax cut, mainly benefitting those at the top of the income scale. Thus, their bill would simply cut taxes on married couples without any offsets. Two-thirds of their proposed $31 billion a year tax cut would go to the upper 20% of married couples, with average incomes of $184,000 each. A comparison between our plan and H.R. 3734 is provided in Table 5.

Table 5
Effects of Eliminating the Marriage Penalty
Average Married Tax Cuts Under Two Approaches

Married Income Group	**Income Range**	**Average Income**	**Tax Cuts, 1998**	
			H.R. 3734	**Our Plan**
Lowest 20%	Less than $26,000	$ 17,300	$ –44	$ –36
Second 20%	$26,000 – 42,000	33,700	–143	–116
Middle 20%	$42,000 – 60,000	50,100	–144	–117
Fourth 20%	$60,000 – 85,000	70,500	–685	–400
Next 15%	$85,000 – 163,000	110,500	–1,047	–493
Next 4%	$163,000 – 409,000	236,400	–2,259	–659
Top 1%	$409,000 or more	1,086,000	–10,884	–613

Notes: Tax cuts under H.R. 3734 are not offset, and therefore entail a $31 billion dollar a year reduction in government revenues. The smaller net tax cuts for marrieds under our revenue-neutral plan are offset by higher taxes on unmarried taxpayers. The tax increase on the typical unmarried taxpayer is $67.

Rep. Johnson's proposal, H.R. 2020, is far less costly than H.R. 3734– only about $6.5 billion a year. Like our plan, it is not distributionally tilted toward the top of the income scale. But it leaves much of the marriage penalty in place.

H.R. 2488 provides marriage penalty relief at a level somewhere between the two other Congressional plans. It would provide that relief only at the end of a long phase-in period. Its distributional effects would be mixed. It provides some relief at the low end of the income scale and substantial relief at the top. Its revenue consequences would be substantial, about $19 billion a year in forgone tax revenue at 1999 levels by fiscal 2008.

In summary, our plan eliminates almost all of the marriage penalties affecting middle- and upper-income taxpayers. It is revenue neutral and distributionally neutral. It requires small tax increases on most unmarried taxpayers. H.R. 3734 provides substantial marriage penalty relief, but at a heavy cost in forgone revenue and distributional inequity. It is much more a tax cut for upper-income taxpayers than a marriage tax relief measure. The other two proposals fail to provide a comprehensive solution to the marriage penalty problem.

IV. CONCLUSION

Our analysis demonstrates that the marriage penalty is generally not as intractable a problem as many have claimed. Eliminating the marriage penalty does not require major tax reductions, or a shift in tax burdens in favor of the well-to-do, or abandoning the progressive income tax. All that is required is a modest adjustment in the *relative* tax burdens of married and unmarried taxpayers. We highlight the fact that only relative burdens need to be adjusted by formulating a revenue-neutral plan. Most of the competing plans combine marriage penalty relief with a major tax cut for the well-to-do. We do not address here the issue of upper-income tax reductions, except to insist that commentators should not conflate that issue with marriage penalty relief.

Many commentators have been mislead by the reports of huge aggregate marriage penalties into believing that any revenue-neutral reform would necessarily entail very large tax reductions for married taxpayers with very large tax increases on others. As we have noted above, however, the marriage penalty is far less than the sum of its parts. Under any plausible revenue-neutral reform that eliminated the marriage penalty, the married persons receiving tax relief from elimination of the penalty also would have to pay most of the offsetting tax increases required to pay for the cost of that relief. As our simulation illustrates, the net effect of the tax cut and the tax hike is likely to be small in most cases.

The plan we have devised eliminates most marriage penalties, other than those created by the earned-income tax credit rules. Reforming the EITC to eliminate tax biases against marriage is very important, but the problem is complex and we have not yet been able to solve it. Our plan does not require major increases or decreases in taxes for most taxpayers, although most taxpayers would have their taxes go up or down by some modest amount under our plan. Any revenue neutral plan that seeks to implement a policy change must make some changes in relative tax burdens; otherwise, the reform would be pointless. We can note that if our plan were adopted, it would by the first tax reform in memory that did not add to the complexity of the Code.

We do not delude ourselves into thinking that our plan for fixing the marriage penalty problem will meet with universal approval. We expect that some people who detest the income tax might want to keep the marriage penalty around, in hopes that it will help discredit the income tax in the minds of some taxpayers. We expect that some supporters of separate filing do not want the problem solved unless it is solved through the elimination of the joint filing rule of current law. As we have noted above, separate filing systems have their own marriage penalty problems. Most separate filing advocates, however, think otherwise. At least some of them might not want to see public support for joint filing strengthened through the elimination of its one unpopular feature. Finally, those who hope to use marriage penalty relief as an excuse for high-income tax cuts will not be pleased with our plan, since we show that there is no logical connection between these two objectives.

For those who genuinely want to solve the marriage penalty problem, however, our plan should have considerable appeal. Those who favor marital joint filing should see our plan as an appropriate fix to a major flaw in the current system of family taxation. Even those who do not particularly like joint filing should favor a principled and effective joint filing system over a defective one. For those who disbelieve some of the stories about huge federal surpluses in our future, our plan allows them to support tax justice for married couples without supporting a tax cut they do not think the country can afford. Our plan should also be reassuring to those who want parents to marry and provide a secure environment for their children and who fear that marriage penalties are discouraging marriage. For us, our plan is appealing because it is fair and simple, and because it fixes a problem that has been allowed to fester for far too long.