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# Marriage and the Income Tax Yesterday, Today, and Tomorrow: A Primer and Legislative Scorecard

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*Ann F. Thomas*

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# Marriage and the Income Tax Yesterday, Today, and Tomorrow: A Primer and Legislative Scorecard

*Ann F. Thomas\**

## INTRODUCTION

Over the past three years, in the 105<sup>th</sup> Congress and the first session of the present 106<sup>th</sup> Congress, members on both sides of the aisle introduced bills that offered a wide range of solutions to the much discussed problem of marriage penalties in the federal income tax. These proposals vary substantially in concept and in impact, representing a sometimes-inconsistent array of ideas about the taxation of married couples. Some attempt a more comprehensive reversal of the marriage penalty — the term now used to describe the additional income tax burden that most dual income couples bear when they are married. Other bills confine themselves to addressing only one of the many features of the penalty issue. But the various congressional initiatives to reduce marriage penalties all have a significant point in common. All of the anti-penalty proposals would preserve marriage bonuses — the income tax cut experienced predominantly by sole earner couples who are married. Indeed, some of the anti-penalty legislation would likely augment total marriage bonuses even more than it would reduce total marriage penalties.

This article examines the trends in the proposals for income tax marriage penalty relief introduced in the 105<sup>th</sup> and 106<sup>th</sup> Congresses and the different concepts of the unit of taxation for couples that these proposals represent. Part I is a primer on income tax marriage penalties and bonuses, for readers unfamiliar with the technical and historical sources and the political background for the current proposals. Part II examines the anti-penalty bills introduced in the 105<sup>th</sup> and the first session of the 106<sup>th</sup> Congress, including the vetoed Taxpayer Refund and Recovery Act of 1999, and develops a frame of reference for analysis of the policy content of the bills that

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\* Associate Professor of Law, New York Law School. The author would like to thank Richard C.E. Beck and William P. LaPiana, colleagues at New York Law School, for their comments and Kim C. Arestad, NYLS '99, for her assistance in compiling the anti-penalty bills in the 105th Congress for use as materials for the Symposium.

can also be used to assess trends in future congressional proposals for marriage penalty relief. Four tables mapping the trends in sponsorship support for proposals over the three years, which are described in Part II, can be found in the Appendix. Part II itself includes a table scoring the scope and marriage penalty relief impact of the various proposals. In conclusion, this article suggests that as a cross section of attitudes among policy makers toward the taxation of married couples, the anti-penalty proposals of the 105<sup>th</sup> and 106<sup>th</sup> represent two different and apparently parallel trends.

The proposals evidence consistent support for traditional marriage values and a strong preference for the sole earner married couple family structure. Support for the traditional family structure of sole earner and homemaker is apparent in the tendency to favor solutions that would have a broad impact in reducing the tax for married couples in general rather than focussing more narrowly on techniques for reversing marriage penalties. But at the same time, proposals are being advanced to allow married couples to elect to be taxed, in part, as individuals and these ideas have won significant bipartisan support. This trend suggests that there is now substantial uncertainty among policy makers about the fairness of imposing the joint return on all married couples and a questioning of the tax equity imperatives that have linked marriage and the joint return since 1948.

The anti-penalty bills are noteworthy not only for their place in the contemporary history of the theory of the unit of taxation, but they obviously also belong to the real time world of developing tax policy. To date, none of these proposals have been enacted into law. In the 105<sup>th</sup> Congress, anti-penalty provisions gained enough support to be included in major bills in each chamber.<sup>1</sup> In the 106<sup>th</sup> Congress,

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<sup>1</sup> House Bill 4579, the Taxpayer Relief Act of 1998, which was introduced by House Ways and Means Committee Chairman Bill Archer (R-TX) and passed in the House on September 26, 1998, included as section 101 of the bill a provision that would have eliminated the marriage penalty effect in the standard deduction for both joint filers and married separate return filers. See <<http://THOMAS.loc.gov/>> (visited Nov. 4, 1999). Also in the 105<sup>th</sup> Congress, on June 10, 1998 the Senate agreed to add an anti-penalty amendment proposed by Senator Phil Gramm (R-TX) to the Universal Tobacco Settlement Act, S. 1415, 105<sup>th</sup> Cong. (1997). See S. Amdt. 2689, 105<sup>th</sup> Cong. (1998); see also 144 Cong. Rec. S6012, S6031 (June 10, 1998). Gramm's amendment was "to eliminate the marriage penalty reflected in the standard deduction, to ensure the earned income credit takes into account the elimination of such penalty." *Id.* The tobacco

provisions identified as offering marriage penalty relief had a significant place in the Taxpayer Refund and Relief Act of 1999, the \$792 billion Republican sponsored tax cut bill vetoed by President Clinton on September 23, 1999. Marriage penalty relief proposals also figured in the Democratic alternative tax cut bills that failed to supplant the Republican bill.<sup>2</sup> Income tax marriage penalty relief is already on the list of campaign promises of the leading presidential candidates Gore, Bush, Bradley and McCain.<sup>3</sup> With penalties being reported by the Congressional Budget Office as exceeding \$28 billion a year for joint filers, the issue remains one of lively interest to taxpayers, politicians and tax scholars.<sup>4</sup> The anti-penalty proposals presented in the 105<sup>th</sup> Congress and the first session of the 106<sup>th</sup> remain of current interest.\*

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settlement bill itself did not pass. See <thomas.loc.gov/> (visited Nov. 4, 1999). For a discussion of House Bill 2488, the Taxpayer Refund and Relief Act of 1999, vetoed by President Clinton on September 23, 1999, see *infra* notes 281-84, 302-308 and accompanying text.

<sup>2</sup> Although representing only \$9.337 billion of the \$155.863 billion tax cut projected over the first five years of the amendments proposed by the bill, the impact of the marriage penalty relief provisions would have risen to \$112.881 billion by the year 2009, representing 14.25 percent of the ten year projection of \$792 billion. Compare JOINT COMM. ON TAXATION, SUMMARY AND REVENUE ESTIMATES FOR CONFERENCE AGREEMENT ON H.R. 2488, TAXPAYER REFUND AND RELIEF ACT OF 1999, reprinted in BNA TEXT SUPP. August 6, 1999 at S-31-32 & 42-43, pts. I & XV [hereinafter 1999 JOINT COMM. CONF. BILL SUMMARY AND REVENUE ESTIMATES]. See text accompanying notes 262, 266-267, 270 and 275 for discussion of minority views and proposals.

<sup>3</sup> See George W. Bush Presidential Campaign Website, (visited Nov. 7, 1999) <<http://www.gerogewbush.com>>; Al Gore Presidential Campaign Website, (visited Nov. 7, 1999) <<http://www.algore2000.com>>; Bill Bradley Presidential Campaign Website, (visited Nov. 24, 1999) <<http://www.billbradley.com>>; Jim McCain Presidential Campaign Website, (visited Nov. 24, 1999) <<http://www.mccain2000.com>>. McCain's materials call the marriage penalty "obscene." *Id.*

<sup>4</sup> CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX, xiv-xv (1997) [hereinafter CBO STUDY]. An aggregate marriage penalty of \$32 billion is projected for all married persons including those using the status of married filing separately. See I.R.C. § 1(d)); CBO STUDY, tbl. C-4.

\* As this article goes to press, President Clinton, in his State of the Union address on January 27, 2000, has for the first time called for legislation to reduce the income tax marriage penalty. In the same speech, he also stressed the importance of reducing the Earned Income Tax Credit [EITC] marriage penalty, linking it to his welfare reform efforts and pointing to the necessity of "making sure that it rewards marriage just as it rewards work." President Clinton's support makes it very likely that some form of

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marriage penalty relief will be enacted in the Second session of the 106th Congress. The President's proposal takes an approach not seen in any of the anti-penalty bills in the past three years although it shares certain features with a number of them. A brief and necessarily preliminary analysis follows.

The Clinton Administration has not yet proposed specific language for the legislation that it will seek but the summary of the proposal released by the White House before the President's speech indicates that the Clinton Administration will call for an increase in the standard deduction for two-income married couples to double the amount allowed an unmarried individual. The total increase for dual income married couples would be \$2,150 and would reduce the income tax marriage penalties of 9.1 million couples. A separate increase in the standard deduction of \$500 for single-income married couples and \$250 for single filers will also be sought. The reported revenue cost (loss) for all three increases is \$45 billion over 10 years. The summary did not include any information about the President's EITC marriage penalty relief plan although a general EITC increase costing \$21 billion is described. See The White House, Office of Press Secretary, *President Clinton's Tax Agenda for Community, Opportunity, and Responsibility*, January 27, 2000, reprinted in 2000 TAX NOTES TODAY 19-16, (2000).

The President's proposal for a doubled deduction for dual income couples has a substantially more efficient marriage penalty relief focus than did the across the boards doubling for all joint return filers that was in the Republican tax cut bill that the President vetoed on September 23, 1999. It represents an important step toward recognizing the economic significance of individual incomes of spouses. While it is paired with a general increase in the standard deduction, the Clinton proposal directs more resources toward removing an important structural source of marriage penalties.

But the Clinton proposal would leave much of the marriage penalty intact and apparently would have no impact on the majority of the 20.9 million marriage penalty couples. Structured as a "below the line" deduction through I.R.C. § 63 (1999), an increase in the standard deduction does not provide any relief from the phaseout marriage penalties based on adjusted gross income [AGI] found in numerous provisions, including the exclusion for social security old age benefits and the child tax credit. Further, it would not help couples who itemize deductions. Restricting marriage penalty relief to couples who elect the standard deduction may be a surrogate for imposing an income ceiling on such relief, as did the Moynihan dual earner deduction proposal in 1999. However, relying on the standard deduction for this purpose produces erratic and presumably unintentional results. There are significant geographic as well as income differences in taxpayer use of the standard deduction. Although only about 18% of filers itemize in Texas, a state with low taxes, New Yorkers, who live in a high state tax environment, itemize at twice that rate, with about 36% itemizing. Moreover, approximately 2.8 million low income returns (under \$30,000 AGI) itemize in order to deduct medical expenses. Restructuring the marriage penalty relief deduction for two income couples as an "above the line" adjustment through I.R.C. § 62 (a) (1999) would make it available to all marriage penalty couples and also reduce most phaseout marriage penalties. (The Gramm proposals in 1998 used such a structure.) Of course such a restructuring would increase the revenue cost.

One important detail in the President's proposal for a dual income deduction that requires immediate clarification is whether community property law is to apply in determining the income of each spouse. All married couples in community property

## I. MARITAL STATUS AND THE INCOME TAX

For the vast majority of adult couples in the United States, marital status is a significant determinant of federal income tax liability. But while the impact of marital status on taxation is felt by upwards of 50 million American couples, both married and unmarried, the changes in taxation that changes in legal marital status produce are neither uniform nor unidirectional.<sup>5</sup> Marriage no longer confers a tax cut on the large majority of couples as it did in the past.<sup>6</sup>

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states are dual income couples for federal income tax purposes according to *Poe v. Seaborn*, 282 U.S. 101 (1930), because that marital property regime gives each spouse an equal interest in all income of the marriage. The dual earner deduction in the 1980s and the recent proposals to re-enact it specified that community property laws would be disregarded in determining each individual spouse's earnings. Unless the legislation for the dual income standard deduction repudiates the *Poe v. Seaborn* principle for both earnings and property income, the old community property controversy will be re-opened and married couples in the common law states will again be paying higher taxes than those in the community property law states.

<sup>5</sup> See CBO STUDY *supra* note 4, at tbl. C-4 (showing for 1995 that 48.52 million married couples had either penalties or bonuses and 2.35 million unmarried couples would have had penalties or bonuses if they had filed joint returns). Statistical and quantitative data on marriage penalties and bonuses used in this article is largely drawn from the important study of marriage penalties and bonuses published in 1997 by the Congressional Budget Office. See *id.* The study was undertaken at the request of then-Congresswoman Barbara Kennelly (D-CT) of the House Ways and Means Committee while the CBO was under the directorship of Dr. June O'Neill, an economist with substantial expertise in the taxation of marriage and of women. The 1997 CBO study is regarded as the authoritative source of quantitative information about the incidence, distribution and magnitude of marriage penalties and marriage bonuses and is relied upon in the literature. It also draws together the results of the ground breaking economics research of the 1990s on the behavioral impact of marriage penalties and marriage bonuses. In addition, the CBO study provides generic revenue estimates for five different proposals to reduce income tax marriage penalties.

Dr. O'Neill gave the keynote address at the New York Law School Journal of Human Rights Symposium, the publication of which includes this article. See June O'Neill, *Keynote Address: Marriage Penalties and Bonuses in the Federal Income Tax*, 16 N.Y.L. SCH. J. HUM. RTS. 119 (1999). Symposium panelists Diana Furchtgott-Roth and C. Eugene Steuerle also contributed to the CBO Study. See *Preface to CBO STUDY*.

<sup>6</sup> See CBO STUDY, *supra* note 4, at 37-46 and tbl. 18 (showing 64% of married couples with bonuses in 1969 and 48% in 1996). Different simulations included in the CBO study produce different estimates for the current period. See, e.g., *id.* at tbl. C-4 (showing 39% of all married couples had bonuses and 49% had penalties in 1995); also *id.* at Summary tbl. 1 (showing in 1996, 51% of joint return filing married couples had bonuses and 42% had penalties). However, the trend toward a higher proportion of



Indeed, for as many as 47 percent of joint return filers in a recent year marriage meant an increased tax burden. These are the marriage penalty couples; the income tax marriage penalties that they paid in 1996 alone are estimated to have ranged between \$28.8 billion and \$42 billion. At the same time, about 49 percent of joint return filing couples found that marriage reduced their taxes. These marriage bonus couples saved about \$32 billion in federal income taxes in 1996 simply because they were entitled to file joint returns.<sup>7</sup>

The distinguishing characteristic of marriage penalty couples is that each of the spouses has some individual income. Typically this means that both husband and wife are working in paid employment.<sup>8</sup> The more the incomes of the two partners are in parity, the more likely the couple is to trigger marriage tax penalties. Couples in which the wife earns at least half as much as the husband does, and vice versa, are the most likely to experience marriage penalties. In 1996 some 90 percent of the joint returns in this category showed marriage penalties and the couples filing those returns paid a total of \$15 billion in additional tax because they were married. About two-thirds of dual earner couples with less equal incomes also incurred marriage penalties in that year. Overall, the Congressional Budget Office (CBO) study that is the leading source of quantitative information on the subject indicates that 76 percent of all two earner joint return couples paid marriage penalty taxes in 1996.<sup>9</sup>

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penalty couples and a lower proportion of bonus couples is well documented. *E.g.*, James Alm & Leslie A. Whittington, *The Rise and Fall and Rise . . . of the Marriage Tax*, 49 NAT. TAX J. 571 (1996).

<sup>7</sup> See CBO STUDY *supra* note 4, at tbl. 4. Five different measures of marriage penalties and bonuses are presented in Table 4. The statistics used in the text are drawn from the "Broader Measure" and the "Basic Measure." Differences arise from the assumptions made about the basis on which the married couples would be able to report their incomes as unmarrieds, including such issues as allocation of children, choice of itemized or standard deduction and presence or absence of Earned Income Tax Credit, as well as head of household provisions in the Internal Revenue Code. The CBO's basic measure allocates itemized deductions between the spouses proportionately, and its broader measure gives all itemized deductions to the high earner and claims a standard deduction for the low earner. *See id.* at 29, 30.

<sup>8</sup> *See id.* at tbl. 7, p. xv. The CBO simulation reported here assumed all income was from earnings but extended its observations to incomes generally.

<sup>9</sup> *Id.* at tbl. 7, pp. 35-36. Table 7 shows 27.5 million joint returns (or married

While the marriage of two wage earners tends to result in marriage tax penalties, the pairing of a wage earner and a fulltime homemaker produces marriage tax bonuses. Marriage bonus couples tend to be couples in which the spouses have very unequal money incomes. Married couples in which only one of the spouses works in paid employment receive the greatest share of marriage bonuses. Although these sole earner couples represented only 44 percent of joint returns filed, more than three-quarters of them received marriage bonuses in 1996. Indeed, in 1996 the 19.4 million sole earner marriage bonus couples saved a total of \$28.5 billion by reason of their marital status.<sup>10</sup> Overwhelmingly, sole earner married couples in the United States are couples in which it is the husband who is the market earner and the wife who is the homemaker.<sup>11</sup> In 1996 a total of 25.3 million couples received marriage bonuses and 20.9 million paid penalties.<sup>12</sup>

For the 2.7 million reported unmarried adult couples in the United States in 1995, the penalty and bonus profiles are somewhat different. About 56 percent were likely to have owed more income tax if they had been married and 33 percent would have owed less. Overall, marital status is estimated to affect the tax liability of about 89 percent of unmarried couples. Of the 54.7 million married couples, the CBO Study projected that 88 percent are affected by marital status, experiencing either penalties or bonuses.<sup>13</sup> Thus marriage penalties and marriage bonuses can be said to have an impact on some 50.7 million adult couples, or more than 100 million individuals.

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couples) in the two earner categories, with 20.9 million paying marriage penalties.

<sup>10</sup> See *id.* at tbls. 7-8, p. 35.

<sup>11</sup> See *id.* fig. 5, at 37 (showing that in approximately 25 % of married couples the husband was the sole earner and in 5% the wife was the sole earner; hence in more than 80% of sole earner couples, the husband was the earner).

<sup>12</sup> See *id.* at tbl. 7.

<sup>13</sup> These statistics are for 1995 and are drawn from the CBO 1997 Study. The CBO Study defines unmarried couples as unmarried adults self-identified as partners in the March 1996 Current Population Survey and notes that 3 percent of the unmarried couples so identified were same-sex couples. See *id.* at tbl. 2, n.18, p. 13. The CBO Study gives two different totals for the number of unmarried couples. Tables C-1 and C-4 show 2,650,000 unmarried couples in 1995 and table 2 reports 2,700,000, also in 1995. See *id.* at tbls. 2 & C-4.

Marriage penalties and marriage bonuses are important for several reasons. With increasing intensity since 1993, the marriage penalty effects of the federal income tax have been criticized on behavioral, feminist, moral and religious grounds. Observers have questioned whether penalties and bonuses of the magnitude now being seen are affecting marriage decisions and other life choices involving work and family, especially for women. The empirical research on these questions is mixed at this time, although beginning to show that marriage penalties are affecting marriage behavior. For many policymakers and taxpayers, the idea that the tax system discourages marriage and perhaps encourages divorce is politically unacceptable and morally repugnant. But marriage penalties and marriage bonuses are also important for another reason. As the value laden vocabulary in which the issue is now universally discussed indicates, something is going on in the taxation of married couples that we are finding to be anomalous and inconsistent with our ideas of fairness in taxation.

In order to evaluate this policy debate and the numerous legislative initiatives in the three most recent Congresses aimed at reducing or eliminating the marriage penalty, some background in the technical aspects of the issue is necessary. The combined effects of many provisions of the Internal Revenue Code impose the regime of marriage penalties and marriage bonuses. It derives from a number of tax policy decisions, including the long standing policy choice to tax married couples on a unitary basis through the income splitting joint return. The sections that follow provide an overview of the statutory sources of the marriage penalty and the marriage bonus in the federal income tax and the development of the joint return.<sup>14</sup>

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<sup>14</sup> There is an extensive tax literature that discusses marriage penalties and bonuses. The trends and major contributions in this body of scholarship are discussed *infra* at notes 78-89 and 153-58. Marriage penalty and marriage bonus effects are also seen in the Social Security system and numerous other transfer programs at the federal and state levels. See, e.g., Symposium: Panel IV: *The Social Security System and Women Today*, 16 N.Y.L. SCH. J. HUM. RTS. 217 (1999); Symposium: Panel V: *Social Security Reform: The Impact on Women*, 16 N.Y.L. SCH. J. HUM. RTS. 253 (1999); Eugene Steuerle, *The Uncertain Support Behind 'Marriage Penalty' Relief*, 84 TAX NOTES 1539 (1999). For a discussion of the joint and several liability consequences of joint return filing, arguably a penalty that particularly burdens women, see Amy Christian, *Unintended Consequences of Marriage Penalty Relief: The Effect on the Married Couple's Choice of Filing Status*, 16 N.Y.L. SCH. J. HUMAN RIGHTS 172 (1999).

*A. The Mechanics Of Marriage Penalties And Bonuses — The Joint Return*

There is, of course, no actual marriage tax, nor marriage penalty and bonus section or subtitle in the Internal Revenue Code. The technical source of both marriage penalties and marriage bonuses in the income tax is what might be called the joint return system for the taxation of married couples. Its central feature is the joint return itself, which requires husband and wife to aggregate their incomes and compute their tax liability on a more or less unitary basis.<sup>15</sup> The

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Different than the marriage penalties and bonuses discussed here are the singles penalties. Singles penalties are measured by the income tax benefits that are allowed all couples whose marriages are recognized for tax purposes and denied all couples whose marriages or domestic partnerships are not so recognized. One of the more apparent examples of this is I.R.C. section 1041 (1999), a provision which allows spouses to transfer or exchange property incident to divorce without recognition of gain or loss. Couples who are not treated as married for tax purposes generally are subject to tax on property settlements in palimony situations. Another potentially sizable, but as yet unmeasured, singles penalty exists in the area of employee benefits and fringe benefits. Substantial amounts of income are excluded as employee benefits or fringe benefits by numerous sections of the Internal Revenue Code. For example, the tax the expenditure budget shows that the tax saved (revenue lost) by the exclusion of employer paid medical insurance premiums and medical care costs (pursuant to I.R.C. §§ 105 & 106 (1999)) was \$ 76.2 billion for 1999. The tax saved/revenue lost from the exclusion that I.R.C. section 119 (1999) creates for employer provided meals and lodging in 1999 was \$ 680 million. See *Tax Expenditure Chapter from the President's Fiscal 1999 Budget*, 78 TAX NOTES 911, 922, tbls. 5-2 (1998). Many of the statutory exclusions of employee benefits and fringe benefits encompass the value of benefits given to the employee's spouse. See, e.g., I.R.C. § 119 (a) (1999) (excluding from gross income food and lodging provided by employer "to [the employee], his spouse, or any of his dependents"); I.R.C. § 105 (b) (1999) (excluding from gross income reimbursement of amounts attributable to medical care for "taxpayer, his spouse, and his dependents"). Same-sex couples and other couples who cannot marry are taxed on the value of employee benefits extended to partners, an increasingly common practice in some parts of the United States and now in the European Union. See Kate Hilpern, *Tide Begins to Turn in Favour of Gay Employees: Discrimination on the Grounds of Sexuality May Soon be a Thing of the Past*, THE INDEPENDENT (London), Oct. 31, 1999, at 3 (discussing the trend among employers toward extending benefits to same sex partners even when not required by law). I would like to thank my colleague Arthur Leonard for bringing this issue to my attention.

For purposes of measuring the impact of marriage on taxation, the excluded spousal employee benefits and fringe benefits would be a consistent enhancement of the tax benefits of marriage. At an individual level, such tax benefits may be seen to outweigh marriage penalties for particular couples.

<sup>15</sup> See I.R.C. § 6013 (a), (d) (3) (1999).

Internal Revenue Code's joint return system is further reflected in the distinctions made between joint return filers and other taxpayers in the progressive tax rate tables, the standard deduction, the rules for utilization of personal exemptions, the taxation of social security benefits and certain transfers of property, as well as in a growing array of credits and deductions that utilize income-based phaseouts, including, notably, the earned income tax credit ["EITC"].<sup>16</sup>

Once a couple is married, husband and wife cannot escape the marriage penalty and marriage bonus effects of the joint return system.<sup>17</sup> While married couples are not literally obligated by the Internal Revenue Code to file a joint return, the only alternative available to them, unless they are divorced or legally separated, is the filing status of "married individuals filing separate returns."<sup>18</sup> Married persons are not permitted to use either of the two filing statuses applicable to unmarried people — the "unmarried individual" status and the "head of household" status assigned to unmarried taxpayers with dependents in the home.<sup>19</sup>

The married separate filing status is generally a more onerous version of the joint return status on which it is based. Its primary advantage to taxpayers is that it permits couples to avoid the joint and

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<sup>16</sup> See, e.g., I.R.C. §§ 1 (rate tables); 63 (standard deduction); 151(a) (personal exemptions); 86 (partial exclusion of old age benefits); 21 (child care credit); 24 (child credit); 25A (education credits); 267 (losses, etc. in transactions between related taxpayers); 1041 (transfer of property incident to divorce); I.R.C. § 32 (1999) (earned income tax credit). See also, CBO STUDY, *supra* note 4, at 15-26; *Hearing on the Marriage Penalty Before the House Comm. On Ways and Means*, 105th Cong. (1998) (statement of David Lifson, Vice Chair, Tax Executive Comm., American Institute of Certified Public Accountants).

<sup>17</sup> The words "husband and wife" are used advisedly here. The Internal Revenue Service recognizes only formal, legally valid male-female marriages for tax purposes. See, e.g., Ronnie Cohen & Susan B. Morris, *Tax Issues from 'Father Knows Best' to 'Heather Has Two Mommies'*, 84 TAX NOTES 1309 (1999).

<sup>18</sup> Divorced or legally separated spouses are not considered married. See I.R.C. § 7703 (1999).

<sup>19</sup> I.R.C. § 1 (a)-(d) (1999) specifies the rate tables applicable to each of the four filing statuses. The CPI adjusted version of these tables applicable for 1999 can be found *infra* note 42. For the definition of head of household see I.R.C. § 2 (b); for marital status rules see I.R.C. §§ 2(b)(2), (c), & 7703 (1999).

several liability imposed by the joint return.<sup>20</sup> The tax brackets for married persons filing separately are half as wide as those for joint return filers,<sup>21</sup> the standard deduction for this status is also half the amount allowed a married couple,<sup>22</sup> and married couples who file separately are disqualified from using many tax deductions and credits, including the child and dependent care credit.<sup>23</sup> In terms of marriage penalties and bonuses, separate filing by a married couple would typically turn a marriage bonus into a marriage penalty or simply increase the marriage penalty that would otherwise be imposed by the joint return.<sup>24</sup> No more than five percent of married couples

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<sup>20</sup> For married couples in the common law jurisdictions, the choice of the married filing separately status can insulate a spouse from the joint and several liability for tax on the other partner's income that attaches when a joint return is filed. See I.R.C. § 6013(d)(3) (1999). For married couples who are residents of community property law states, filing separate returns does not eliminate tax liability for shared marital income. A statement declaring the intention to end the marital community is required as well. See I.R.C. § 66 (1999); Richard C.E. Beck, *Joint Return Liability and Poe v. Seaborn Should Both Be Repealed*, 49 TAX NOTES 457, 464-66 (1990). The primary advantage of the married filing separate returns status for the Treasury may be that it provides a basis for distinguishing the joint return system of the federal income tax from the joint return system of the Wisconsin income tax that the U.S. Supreme Court held unconstitutional in *Hooper v. Tax Commission of Wisconsin*, 284 U.S. 206 (1931). See Ann F. Thomas, *Taxing Women's Lives: Taxation and the Economic Identity of Married Women* (Nov. 1999) (unpublished manuscript, on file with the author).

<sup>21</sup> Compare I.R.C. § 1(a) and (d) (1999).

<sup>22</sup> The standard deduction specified in the Internal Revenue Code for joint return filers is \$5,000; it is \$2,500 for married filing separately. Again unmarried individual filers are assigned yet another amount — \$3,000. These are the statutory values, unadjusted for the Consumer Price Index [hereinafter CPI]. Compare I.R.C. §§ 63 (c) (2) (A), (C) and (D) (1999).

<sup>23</sup> See, e.g., I.R.C. § 21 (1999); see also Christian, *supra* note 14 for a fuller description of the penalty effects of the choice of the married filing separately tax status and the impact of this status on women.

<sup>24</sup> For example, the ceiling of the bottom bracket of 15% is \$36,900 for joint returns; \$18,450 for married filing separately; \$22,100 for unmarried. (These are the statutory amounts provided in I.R.C. § 1 (1999), without adjustment for inflation). See *infra* note 42 (containing the 1999 tax rate tables with CPI adjustment.) A sole earner spouse with taxable income of \$40,000 in the married filing separately status, would have a tax of \$8,802. By filing a joint return, the tax on the same \$40,000 would be reduced to \$6,403. An unmarried individual with \$40,000 of taxable income would owe \$8,327. Here the joint filer has a marriage bonus, as compared to the unmarried sole earner, and the married separate filer who pays the most tax of all three, has a marriage penalty

made use of the married separate filing status. Professor Amy Christian estimates that in 1993, some 95 percent of married couples filed joint returns.<sup>25</sup>

The joint return system is then the necessary focus if the taxation of married couples is to be understood. The five key elements of the statutory framework of the joint return system are described below: 1) the standard deduction; 2) the personal exemptions; 3) the income tax rate tables; 4) the earned income tax credit; and 5) phaseouts.

### 1. The Standard Deduction

The standard deduction, which is an important factor in determining tax liability for all individuals, is also an important part of the joint return system. Its design and its function in the taxation of couples illustrate how distinctions based on joint return filing status create marriage penalty and marriage bonus effects. After determining adjusted gross income [AGI], taxpayers are permitted certain deductions in arriving at taxable income, the amount that will be the basis for computing their personal tax liability. In addition to personal exemptions, taxpayers generally may choose to claim either the permitted itemized deductions or the standard deduction.<sup>26</sup> Some 70 percent of tax returns use the standard deduction.<sup>27</sup>

In 1999, the standard deduction for married couples filing a joint return is \$7,200 and the standard deduction for unmarried individuals is \$4,300.<sup>28</sup> An unmarried wage earner might view the

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instead. A dual earner couple with \$20,000 of income a piece would have the same total tax on a joint return or filing separately (\$3,201.50 times 2 or \$6,403). If they were allowed to file as unmarried individuals, their tax burden would be only \$3,000 each or \$6,000 total. Their marriage penalty is not increased or reduced by separate filing after marriage. But any division of income between the two spouses other than an equal split tends to increase tax unless there is an unusual matching of spousal income and, for example, medical expenses that become deductible when the absolute dollar amount of the 7.5% floor diminishes by reference to the lower income of one spouse. *See*, I.R.C. § 213 (1999).

<sup>25</sup> *See* Christian, *supra* note 14.

<sup>26</sup> *See* I.R.C. §§ 1, 62, 63 (1999).

<sup>27</sup> *SEE* CBO STUDY, *supra* note 4, at 15.

<sup>28</sup> I.R.C. section 63(c)(2) provides for standard deductions of \$5,000 and

\$2,900 difference between his smaller deduction and the larger deduction given to married couples as a tax benefit that they have and he would like to get.<sup>29</sup> This potential tax reduction would indeed become real for him, if he got married and the wife with whom he filed a joint return had no income of her own. As husband and wife, the sole earner and his spouse would enjoy, in effect, a tax bonus. The amount of the tax bonus would depend on his marginal tax bracket. If as an unmarried filer, this \$2,900 of income would have been subject to tax at the rate of 28 percent, marriage has saved him \$812 in tax, in effect a marriage tax bonus.

If the new wife has income of her own, however, and it exceeds \$2,900, the marriage bonus would turn into a marriage penalty.<sup>30</sup> In their unmarried state, the taxpayer and his partner are each permitted a standard deduction of \$4,300. If they each have at least that much income, they are able to use their combined standard deductions to exclude a total of \$8,600 from taxation. Marriage reduces the combined standard deductions of the dual income couple from \$8,600 to \$7,200, a difference of \$1,400. Hence marriage imposes tax on \$1,400 more of their income than was taxed before. If this previously untaxed \$1,400 is placed in the 28 percent bracket by their joint return, the dual income couple will have a marriage tax penalty of \$392. The term marriage penalty thus refers to increases in tax that occur when a couple changes from filing as two unmarried taxpayers to filing a joint return. This example and the one in the

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\$3,000, respectively, for joint filers and unmarried individuals but allows adjustments for CPI which have brought the joint filer and unmarried individual standard deductions for 1999 to the levels stated in the text. I.R.C. section 63(c)(2) tracks all four filing statuses of section 1, providing a different standard deduction for unmarried persons who are heads of household (\$4,400 in the statute and \$6,350 with the CPI adjustment) and a fourth one for married persons filing separate returns (\$2,500 in the statute and \$ 3,600 with the CPI). See Rev. Proc. 98-61, 1998-52 IRB 18, for the 1999 amounts with CPI adjustments.

<sup>29</sup> A comparison of the unmarried individual standard deduction of \$3,000 with the standard deduction of \$2,500 allowed a married person filing separately shows that the unmarried individual status has the advantage if a joint return is not filed by the married taxpayer. See *supra* note 22 and accompanying text.

<sup>30</sup> They have neither penalty nor bonus if the wife has an individual income equal to \$2,900. These examples assume that there is \$2,900 of additional income to deal with after giving effect to any applicable personal exemptions for the wife.



preceding paragraph are typical as well as illustrative. Sole income couples experience marriage bonuses and dual income couples with relatively equal incomes tend to incur marriage penalties.<sup>31</sup>

The penalties and bonuses do not occur because the sole earner and dual earner married couples filing joint returns are distinguished from each other in any way. The same standard deduction is allowed to all joint return filers; no distinction is made between married couples in that sense. If in one couple, one spouse earns \$50,000 and the other spouse has no income at all, the joint return will treat this couple as having adjusted gross income of \$50,000, just as it will treat a married couple in which each spouse earns \$25,000 as having adjusted gross income of \$50,000. The joint return requires husband and wife to aggregate their incomes and only takes notice of the sum and not the parts. Assuming their personal exemptions are the same, these two couples will have equal taxable incomes as well, after the joint filers' standard deduction is applied. That in one couple there is only one earner and there are two earners in the other couple is inconsequential to the joint return computations and the determination of the applicable standard deduction. Indeed, this homogeneity of tax outcomes for married couples with different income configurations but the same aggregate income is the essence of the joint return. But the existence of individual incomes within the marriage, the factor that the joint return ignores, is the essence of the marriage penalty/marriage bonus phenomenon.

Looking again at the standard deduction examples, it can be seen that the penalties and bonuses discussed above were the result of the proportional relationship between the amount of the standard deduction for joint filers and the amount of the standard deduction for unmarried individuals. The relationship between the two can be most simply described as being more-than-one, but less-than-two.

For the sole earner couple, it is the "more-than-one" part of the relationship that causes the marriage bonus when the joint return status can be used. In the unmarried status, the couple gets to use one standard deduction for an unmarried individual and no more. The sole earner claims and uses his "one" to offset some of his income. But

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<sup>31</sup> See, e.g., CBO STUDY, *supra* note 4, at tbl 2.

the standard deduction of the non-earner partner (assuming she has no other income) cannot be used by either of them. She has no income to reduce and she cannot transfer her unused deduction to him except by marriage. The married joint filers' standard deduction at present is 1.67 times greater than that allowed an unmarried individual.<sup>32</sup> Marriage allows the sole earner to use about 67 percent of what would have been the non-earner's individual standard deduction.

For the dual earner couple, it is the "less-than-two" part of the relationship between the standard deductions for the joint return and the unmarried individual that causes the penalty. The married couple's deduction is larger than the standard deduction allowed to one unmarried individual, but it is smaller than the two deductions that the dual earners could claim as two unmarried individuals with equal incomes. To dual earners the joint filers' deduction represents only about 84 percent of the total of the two deductions that they could claim if unmarried.<sup>33</sup> The more-than-one, less-than-two relationship between filing statuses means that marriage adds to the sole earner couple's useable tax deductions and takes away a portion of the deductions that dual earner couples would be able to use if they were filing as unmarried individuals.

## 2. Personal Exemptions

In addition to the standard deduction, the Internal Revenue Code generally allows taxpayers to claim a personal exemption that also reduces the amount of income subject to tax. At present the amount of the personal exemption, after giving effect for inflation adjustments, is \$2,750.<sup>34</sup> The amount of the personal exemption does not vary with marital status, but marriage can change its value significantly. The impact of the joint return system on personal exemptions is seen in the utilization rules that vary with marital status. Further, marital status also has an impact on the phaseout of the

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<sup>32</sup> See I.R.C. § 63 (1999). The ratio is constant between the statutory amounts (5,000/3,000) and the CPI adjusted amounts (7,200/4,300).

<sup>33</sup> See I.R.C. § 63 (1999). Two unmarried individual standard deductions would add up to \$8,600 and the joint return deduction is \$7,200 ( $7,200/8,600 = .8372$ ).

<sup>34</sup> See Rev. Proc. 98-61; I.R.C. § 151 (1999).

personal exemption that is set at different income levels for joint return filers and those in the unmarried filing statuses.

Each tax return filer is permitted one personal exemption for himself or herself and additional personal exemptions for qualifying dependents, including children. Hence an unmarried individual with no dependents is allowed one personal exemption. Each partner in a dual earner couple is allowed one personal exemption when filing in the unmarried status. Filing a joint return does not alter their entitlement to the same two personal exemptions. Both joint filers are individuals "computing taxable income," which is the statutory basis for the taxpayer's claim to the personal exemption.<sup>35</sup> Thus for the dual earner couple, marriage appears to impose no penalties on the utilization of their personal exemptions.

For a sole earner couple, the joint return confers a marriage bonus in the form of an extra personal exemption. In an unmarried sole earner couple, the earner uses his own personal exemption in the normal course; the non-earner's personal exemption goes unused because she has no income. But the joint return aggregation concept allows the married non-earner to transfer her personal exemption to the marital unit, as she did with a portion of her individual standard deduction. Marriage converts the valueless personal exemption of the non-earner into an additional personal exemption that can be applied to reduce the sole earner's taxable income. The value of the transferred personal exemption will be measured by the marginal rate at which this \$2,750 would have been taxed to the sole earner in his unmarried filing status. From this point of view, the marital status differential for the utilization of personal exemptions appears to have only a positive effect, all marriage bonus. The relationship between the joint return status and the unmarried individual status here is that more than one and up to two individual personal exemptions may be used in the joint return, depending on whether the aggregate income of the couple can absorb both exemptions.

But another way to think about this marriage bonus is that it is a tax incentive or tax subsidy to the married couple to continue to have one spouse out earning in the labor force and the other at home,

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<sup>35</sup> See I.R.C. § 151 (a) (1999); *see also* I.R.C. § 6013 (a) (1999).

engaged in home production, which is a valuable but untaxed economic activity.<sup>36</sup> Looked at from this point of view, the marriage bonus that the transfer of the non-earner's personal exemption creates contains in it a tax disincentive to enter or remain in paid employment. The issue that the transfer of the standard deduction and the personal exemption from the non-earner to the marital unit poses is the apparent cost of recapturing these tax benefits.

If the non-earner begins to work, her income will either be seen as being fully subject to tax without the benefit of these reductions, or as recapturing these valuable income exclusions that her husband has been using. Whichever way it is viewed, the highest marginal tax rate applicable to the first earner's income, the rate at which his last dollar of income is taxed, would seem to apply to the first dollar of income that the former non-earner now produces. There is considerable concern about the impact of this tax disincentive on married women, who are still much more likely to be the non-earner spouse in the marriage, engaged for longer or shorter periods in fulltime homemaking or child rearing.<sup>37</sup> The transfer of her tax benefits to her husband through the joint return, in effect, imposes a higher effective tax rate on all of her income when she re-enters paid employment.<sup>38</sup>

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<sup>36</sup> Home production is a term that economists use to describe the value of goods and services created within the household for consumption by members of the household. Tax theory generally describes this economic income as imputed income although it may be barter to the extent that there is an exchange between household members. By long tradition it is not taxed in the federal income tax. For a thorough discussion of the exclusion from income of the value of housework, see Nancy Staudt, *Taxing Housework*, 84 GEO. L. J. 1571 (1996) (arguing that the productive and political value of women's housework should be taxed in order to make its value more visible).

<sup>37</sup> See CBO STUDY, *supra* note 4, at pp. xv, xiv; see also discussion of secondary worker issue and sources, *infra* note 39.

<sup>38</sup> During the 1990s, both the United Kingdom and the Netherlands adopted individual taxation for husbands and wives but included mechanisms that permit the transfer of personal exemptions between the spouses. The Netherlands adopted its new system as part of an effort to remove tax disincentives to market employment for married women. At the time, the labor force participation of married Dutch women was reported to be the lowest in Northern Europe. The Netherlands now allows the transfer of personal tax exemptions within the common household, defined as a registered adult household of more than 18 months duration. See HETTIE A. POTT-BUTER, FACTS AND FAIRY TALES ABOUT FEMALE LABOR, FAMILY AND FERTILITY 1, 25-34, 256 (1993); COMPARATIVE

For example, if she could earn \$10,000, with her \$2,750 personal exemption and the \$2,900 of standard deduction that she appeared to bring to the marriage, these earnings would result in a taxable income of \$4,350. If the aggregated taxable income of this married couple put them into the 28 percent bracket on the joint return, her income would bear a tax of \$1,218. The simpler and probably more conventional view of her new \$10,000 income is that it comes in on top of her husband's income, and is fully subject to tax at the applicable marginal rate at that level. Assuming that this aggregation of incomes does not push the new \$10,000 into a higher bracket, it would bear a tax of 28 percent or \$2,800. By contrast, if she were unmarried and could use her full standard deduction of \$4,300 as well as her personal exemption and the unmarried individual rates, her tax would be only \$443. This is an example of what is commonly called the secondary earner or stacking problem.

Both marriage bonus and marriage penalty outcomes can be seen in the phaseout formula applicable to personal exemptions since 1988.<sup>39</sup> The Internal Revenue Code now limits many credits, deductions and exclusions through the application of means tested phaseout rules. Phaseouts limit the use of these tax benefits to particular income categories but also have the result of raising the

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INCOME TAXATION: A STRUCTURAL ANALYSIS 274 (Hugh J. Ault ed., 1997). In the United Kingdom, husband and wife each receive a personal exemption, which is not transferable, and a married couple's exemption, which can be shifted. The U.K. Treasury announced its new tax system of transferable allowances as a program that would enable wives to stay out of the labor market without losing tax benefits. The new U.K. system ended the longstanding rule that made the husband the taxpayer for the marital unit. See CHANCELLOR OF THE EXCHEQUER, GREEN PAPER: THE REFORM OF PERSONAL TAXATION chap. 2 (March 1986); INLAND REVENUE, IR 80 INCOME TAX AND MARRIED COUPLES (Nov. 1997) (instruction for taxpayers) (on file with author). In 1997, press reports described the anticipated announcement by the government of John Major of a plan to extend the transferability of allowances to include the transfer of the personal exemption from a non-earner spouse to the earner spouse as a "radical plan by the Conservatives" and a tax reform "encouraging couples to marry and also giving a strong fiscal incentive for married women to stay home and look after their children." Robert Preston, *Tories Plan Radical Tax Break: Married Women Would Get Incentive to Stay at Home*, FINANCIAL TIMES (London), April 2, 1997, at § 1, p.1.

<sup>39</sup> See I.R.C. § 151 (d) (3) (1999) and STAFF OF THE JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, JCS-10-87, at 23 (1987). [Hereinafter 1986 JOINT COMM. GENERAL EXPLANATION].

effective tax rates for upper income taxpayers without altering the stated rates in the tax tables.<sup>40</sup>

In the current year, the phaseout of the personal exemption begins at \$126,600 for an unmarried individual filer and is completed at \$249,100. Following the pattern of more-than-one, but less-than-two, the phaseout for joint return filers starts at \$189,950 of aggregated adjusted gross income and the exemptions are eliminated entirely at \$312,450. In other words, the joint return phaseout begins at 1.5 times the income at which the unmarried individual starts to reduce her personal exemptions. For a sole earner couple this represents a marriage bonus. But it also creates a marriage penalty for dual earners. The partners in an unmarried equal earner couple with a combined income of \$312,450 — the point at which the personal exemption has been reduced to zero for the joint return — would still have 75 percent of their personal exemptions.<sup>41</sup> Indeed, for dual income married couples, if the income of each of the spouses is in the range of \$95,000 to \$126,600, the joint return will result in the reduction of personal exemptions that would have remained intact if the spouses had been able to file as two unmarried individuals.

### 3. The Rate Tables

When the progressive tax rate tables of the federal income tax are added to the picture, the marriage penalty and marriage bonus effects for dual income and sole income couples become more pronounced. Current law encompasses five stated marginal tax rates: 15 percent, 28 percent, 31 percent, 36 percent and 39.6 percent. Tax tables ordaining the income levels, or brackets, at which these marginal rates apply are assigned to each of the filing statuses. The

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<sup>40</sup> See JOINT COMM. ON TAXATION, PRESENT LAW AND ANALYSIS RELATING TO INDIVIDUAL EFFECTIVE MARGINAL RATES, JCB-3-98, at 93-102 (1998) [hereinafter 1998 EFFECTIVE MARGINAL RATE STUDY].

<sup>41</sup> See Rev. Proc. 98-61, 1998-52 IRB 18, § 3.08, for the personal exemption phaseouts for 1999. The unmarried equal earner couple with \$156,225 each of adjusted gross income will have reduced their two personal exemptions by about 24%. The phasesout occurs at the rate of 2% per \$2,500 in excess of adjusted gross income of \$156,225 over the threshold of \$126,600 applicable to them. See I.R.C. § 151(d)(1) (1999).

brackets are different for the different filing statuses, except at the top rate.

The marginal tax brackets for joint return filers are more generous than those assigned to other taxpayers. The more-than-one, less-than-two relationship between the joint return and the unmarried individual filing statuses seen in the standard deduction is largely maintained. Except in the top two rates when they converge, the breakpoints for the joint return brackets are set at income levels that are higher than, but not twice as high as those for unmarried individuals.<sup>42</sup> The two examples presented below demonstrate how

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<sup>42</sup> Section 1 of the Internal Revenue Code provides different rate tables for each of the four income tax filing statuses. Section 1(f) requires an annual cost of living adjustment. I.R.C. § 1 (1999). Rev. Proc. 98- 61, 1998-52 IRB 18, announced the adjustments and tables for 1999. They are as follows:

TABLE 1 – § 1 (a). MARRIED INDIVIDUALS FILING JOINT RETURNS AND SURVIVING SPOUSES

If taxable income is:	The tax is:
Not over \$43,050	15% of the taxable income
Over \$43,050	\$6,457.50 plus 28% of
but not over \$104,050	the excess over \$43,050
Over \$104,050	\$23,537.50 plus 31% of
but not over \$158,550	the excess over \$104,050
Over \$158,550	\$40,432.50 plus 36% of
but not over \$283,150	the excess over \$158,550
Over \$283,150	\$85,288.50 plus 39.6% of
	the excess over \$283,150

TABLE 2 – § 1(b). HEADS OF HOUSEHOLDS

If Taxable Income Is:	The Tax Is:
Not Over \$34,550	15% of the taxable income
Over \$34,550	\$5,182.50 plus 28% of
but not over \$89,150	the excess over \$34,550
Over \$89,150	\$20,470.50 plus 31% of
but not over \$144,400	the excess over \$89,150
Over \$144,400	\$37,598 plus 36% of
but not over \$283,150	the excess over \$144,400
Over \$283,150	\$87,548 plus 39.6% of
	the excess over \$283,150

TABLE 3 – § 1(c). UNMARRIED INDIVIDUALS (OTHER THAN SURVIVING SPOUSES AND HEADS OF HOUSEHOLDS)

If Taxable Income Is:	The Tax Is:
Not Over \$25,750	15% of the taxable income
Over \$25,750	\$3,862.50 plus 28% of

the joint return system is expressed in the present structure of the tax rate tables.

Married couples filing a joint return are assigned a rate schedule that allows the first \$43,050 of their aggregated taxable income to be taxed at the 15 percent rate. But for unmarried individuals, the 15 percent bracket ends at \$25,750 and the 28 percent bracket begins at \$25,751. This means that for the sole earner, marriage and the joint return will pull an additional \$17,300 out of the 28 percent bracket and into the 15 percent bracket. For a sole earner with taxable income of \$50,000, marriage will reduce income tax liability from \$10,653 to \$8,404 — a marriage bonus of \$2,249.<sup>43</sup>

On the other hand, a dual earner couple with \$25,000 each of taxable income finds that marriage adds \$903.50 to their tax burdens. Computed using the tax brackets for unmarried individuals, each partner would owe tax of \$3,750. Adding their tax bills together would show a total liability of \$7,500 for the couple. But, if taxed on the basis of a joint return, like the sole earner couple above, they

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but not over \$62,450	the excess over \$25,750
Over \$62,450	\$14,138.50 plus 31% of
but not over \$130,250	the excess over \$62,450
Over \$130,250	\$35,156.50 plus 36% of
but not over \$283,150	the excess over \$130,250
Over \$283,150	\$90,200.50 plus 39.6% of
	the excess over \$283,150

TABLE 4 — § 1(d). MARRIED INDIVIDUALS FILING SEPERATE RETURNS

If Taxable Income Is:	The Tax Is:
Not Over \$21,525	15% of the taxable income
Over \$21,525	\$3,228.75 plus 28% of
But not over \$52,025	the excess over \$21,525
Over \$52,025	\$11,768.75 plus 31% of
But not over \$79,275	the excess over \$52,025
Over \$79,275	\$20,216.25 plus 36% of
But not over \$141,575	the excess over \$79,275
Over \$141,575	\$42,644.25 plus 39.6% of
	the excess over \$141,575

<sup>43</sup> Applying the table 3 rate schedule for unmarried individuals, the tax due on taxable income of \$50,000 would be \$3,863 + 28% (50,000-25,750) or \$10,653. Applying the table 1 rate schedule for joint return filers, the tax due on \$50,000 would be \$6,458 + 28% (50,000- 43,050), or \$8,404. See *supra* note 42.



would instead owe \$8,404.<sup>44</sup> Filing as unmarried taxpayers would keep the entire income of each partner within the 15 percent bracket. The joint return, which requires them to aggregate their incomes, pushes \$6,950 of income into the 28 percent bracket.

The breakpoints for the four bottom tax rates are consistently higher for joint return filers than for unmarrieds, allowing more of the aggregated income of married taxpayers to be taxed at lower rates. These wider brackets — the more-than-one factor — reduce tax for sole earner couples. But the penalty effects of the less-than-two factor are also seen. Although joint return brackets are wider than those for unmarried individuals they are still not capacious enough to contain twice the income allowed to unmarried individuals in each marginal bracket.

The 15 percent bracket ends at \$25,750 for unmarrieds and at \$43,050 for joint filers, placing 1.67 times more income into this bracket for married couples than for unmarried individuals. Similarly, the ceiling of the 28 percent bracket for unmarried individuals is \$62,450, while joint filers do not reach the top of their 28 percent bracket until taxable income exceeds \$104,050. Again, married joint filers are allowed 1.67 times more income before they are exposed to the next (higher) level of tax rates.<sup>45</sup> These ratios are similar to the ratio between the standard deduction for joint return filers and the standard deduction for unmarried individuals.

For the 31 percent rate, the breakpoint for the joint return is still higher but the top of the bracket is only 1.217 times that of the 31 percent bracket ceiling for unmarrieds. At this point the bonus effect of the rate tables begins to shrink and the penalty effect becomes more dominant. This shift is even more apparent in the 36 percent bracket, which begins at \$130,250 for unmarried individuals and at \$158,550 for joint filers. In effect, the marginal differences between the brackets for joint returns and unmarried individuals ends at \$158,551 of taxable income, which both tax rate schedules place in the 36 percent bracket. In all filing statuses, except married filing separately, the 39.6 percent rate starts applying at the same amount taxable

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<sup>44</sup> See *supra* note 42.

<sup>45</sup> Compare tbl. 1 and tbl. 3, *supra* note 42.

income — above \$283,150. For the married separate filing status, the 39.6 percent rate starts at \$141,575, half the joint return breakpoint.<sup>46</sup>

Only penalty effects are seen in the top bracket. If two unmarried individuals each had \$283,150 of taxable income, their individual tax burdens would be \$90,200.50, or \$180,401 combined. If they filed a joint return and aggregated their incomes as required, their joint tax would be \$197,416 a marriage penalty of \$17,416 for each year in which they were married and lucky enough to have this income. A sole earner with the same \$566,300 of taxable income who filed as an unmarried individual would owe a total of \$202,328, representing \$90,201 on the first \$283,150 and \$112,127 on the second \$283,150. If she and her spouse filed a joint return, the tax for this sole earner couple would be only \$197,416, but the \$4,912 marriage bonus arises entirely in the taxation of the income below the \$283,150 mark. The second \$283,150 bears a tax of \$112,127 in the joint return as it would in the unmarried individual return.<sup>47</sup>

The \$17,000 that the dual earner couple with individual taxable incomes of \$283,150 pays in the example above for the privilege of being married is a large amount of money by any standard. However, this is not the most onerous marriage penalty that the joint return system creates. If the two high-income spouses share this additional tax burden, it would amount to 3 percent of taxable income for each. Although the incidence of this tax may be hard to defend, the federal income tax has imposed even greater tax burdens on very large incomes within the past fifteen years. But marriage penalties that can grow to 8 to 10 percent of adjusted gross income for minimum wage earners simply seem unconscionable.<sup>48</sup>

#### 4. The Earned Income Tax Credit

Unusually severe marriage penalties can occur in connection with the earned income tax credit. The earned income tax credit is a refundable tax credit “intended to provide tax relief to low-income working individuals with children and to improve incentives to

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<sup>46</sup> Compare tbls., *supra* note 42.

<sup>47</sup> Compare tbl. 1 and tbl. 3, *supra* note 42.

<sup>48</sup> CBO STUDY, *supra* note 4, at 17-23.

work.”<sup>49</sup> In large measure the tax relief that it provides is compensation for social security and other flat rate payroll taxes collected from the earnings of minimum wage workers; it applies at income levels so low that regular federal income tax typically is not incurred. But these refundable credits are also clearly social welfare transfer payments to the working poor.<sup>50</sup> Nonetheless, earned income credits should be considered in assessing income tax marriage penalties and bonuses. Unlike most of the other social welfare payment systems, this one is included in the Internal Revenue Code and governed by the tax law’s concepts of income.<sup>51</sup> In particular, the explicit use of the joint return and the concept of unitary taxation of married couples in the determination of earned income tax credits make this regime very much a part of the joint return system.

Earned income credits can be very substantial. The maximum credit payment of \$3,816 is available to qualified working families with earned incomes between \$9,540 and \$12,460 and two or more children. At the bottom of this income range, receiving the full credit would represent a 40 percent increase in disposable income. Working parents with one qualified child in the home can also qualify for credits. The maximum for the one child family is \$2,312 and is applicable when income is within the \$6,800 to \$12,460 range. The credits begin to phase out for all working parents at incomes above \$12,460. The credits reach zero at the \$30,580 income level for families with two or more children and at \$26,928 for the one child unit. Childless adults with earned incomes in the range of \$4,530 to \$5,670 can also qualify for up to \$347 of credits which are phased out completely at \$10,200.<sup>52</sup>

The income tests described above are applied to married couples on a completely unitary basis. The aggregated incomes of the married couple and the individual income of the unmarried person are both tested against the same income, or perhaps need, standard to determine eligibility for the EITC. The standard deduction, the tax

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<sup>49</sup> 1986 JOINT COMM. GENERAL EXPLANATION, at 27.

<sup>50</sup> See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 533–544 (1995).

<sup>51</sup> See CBO STUDY, *supra* note 4, at 17–23.

<sup>52</sup> See Rev. Proc. 98-61.

rate tables and most of the other credits require the married couple to aggregate income but then moderate the impact of the unitary income theory of married couples by adopting breakpoints that treat the married couple as more-than-one unit, although generally less-than-two units. The earned income tax credit (EITC) does not make use of different income tests for taxpayers of different marital statuses. The same income floors and phase-out ceilings are applied to all taxpayers, married joint filers and unmarried individuals or heads of household alike. For purposes of determining eligibility for and the amount of the earned income credit, the married couple as a unit is equated to the unmarried individual.<sup>53</sup>

In the earned income credit, the relationship between the joint return filing status and the unmarried individual filing status is not the more - than - one, less - than - two relationship seen in the tax rates and the standard deduction, but simply a one - to - one relationship. Thus, a married couple with earned income of \$11,000 and one child is eligible for an earned income tax credit of \$2,312. An unmarried individual who also has \$11,000 of earned income and one child is entitled to the same refundable credit of \$2,312.<sup>54</sup> The marriage penalty potential in this structure is substantial.

If the unmarried mother with one child and minimum wage level earnings of \$11,000 mentioned above marries a father with his own \$11,000 of earned income and his own child, they will suffer a marriage penalty equal to 12.8 percent of their newly aggregated adjusted gross income of \$22,000. As unmarried parents, neither owed any regular federal income tax (after giving effect to personal exemptions and standard deductions) and each was entitled to an earned income tax credit of \$2,312. While they were unmarried, their combined refundable earned income tax credits equaled \$4,624. Marriage reduced their total refundable credits to \$1,807. They lost \$2,817 in earned income credits, about 60 percent of what they had.<sup>55</sup>

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<sup>53</sup> Consistent with this unitary view, married persons are only eligible for the earned income tax credit at all if they file joint returns. See I.R.C. § 32(d) (1999).

<sup>54</sup> See I.R.C. § 32 (1999); see also Rev. Proc. 98-61, § 3.03.

<sup>55</sup> This example was computed using the following assumptions. Each unmarried parent had one child and qualified for the head of household standard deduction (\$6,350) as well as two personal exemptions, eliminating taxable income for

In addition to the obvious marriage penalty potential here, there is also a marriage bonus opportunity that arises from the positive impact of increases in the number of children in the household on the available credits. If a childless sole earner whose income is within the maximum credit range marries the non-earner father of two children, they can qualify for the \$3,816 credit.<sup>56</sup> Indeed, as long as the marriage does not result in aggregate income that exceeds the phase out threshold, the marriage of a low-income parent and a low-income non-parent may increase rather than decrease credits. But the income range within which credit increases could occur or within which credit decreases could be avoided by dual earner couples is very small in reality. The phaseout for the credit begins at \$12,460 for families with children and at \$5,670 for childless households. The minimum wage earning mother of two children who has an income of \$9,540 is entitled to the maximum credit. If she marries a man whose earned income is more than \$2,920, she will start to lose her credits.<sup>57</sup>

An even more drastic EITC marriage penalty was found to exist in an example developed by the Congressional Budget Office. Computed on the basis of 1996 conditions, the CBO found that for a

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the adjusted gross incomes of \$11,000. At \$22,000 of joint return adjusted gross income, the married couple with two children would have taxable income of \$1,800 and tax of \$270. They can offset the \$270 with the new nonrefundable child credit of \$500 per child. I.R.C. § 24 (1999). While unmarried the two parents would each be entitled to an earned income tax credit of \$2,312 or \$4,624 in total. Married, they would compute their credit as follows:  $3,816 - 21.06\% (22,000 - 12,460) = \$1,807$ . See I.R.C. § 32(a)(2) (1999); Rev. Proc. 98-61. This example is based on an illustration in the CBO Study that found a larger marriage penalty based on 1996 rates and without giving effect to the child credit which was not enacted until 1997. See CBO STUDY, *supra* note 4, at 21. Tax analyst Laura Wheaton runs the same example and finds a smaller penalty because she gives both children to one spouse and does not use two head of household deductions. Laura Wheaton, *Low-Income Families and the Marriage Tax*, 81, 125 (1998). It seems just as valid to compare the married earned income credit couple to two unmarried heads of household for two reasons. First, households and families composed of adults with children from different marriages are common today. Second, if we assume that taxpayers respond to tax incentives and disincentives as strong as those found with the earned income credit, it does not seem unreasonable to assume that they would try to optimize their tax outcomes by making use of existing tax benefits. Further, the CBO report also used two heads of household in a number of its simulations.

<sup>56</sup> See I.R.C. § 32 (1999); accord Wheaton, *supra* note 55, at 126.

<sup>57</sup> See Rev. Proc. 98-61, 1998-52 IRB 18, § 3.03.

couple in which each spouse had earned income of \$11,610 and there were four or more children, marriage caused a tax penalty of more than 25 percent of income. Filing as an unmarried parent with two children, each spouse would have had an earned income tax credit of \$3,556. If they married, their aggregate credit was reduced to \$1,111. The marriage penalty for this couple was \$6,001, representing about 25.8 percent of joint adjusted gross income.<sup>58</sup> This couple's marriage penalty would be slightly increased to about 26 percent if the rates and limitations for 1999 were applied.<sup>59</sup>

In essence, in the earned income tax credit, the joint return is used to aggregate incomes of husband and wife and then tax the aggregated sum under the same ability-to-pay tests applied to an unmarried individual. This use of unmoderated unitary taxation of married couples is reminiscent of the pre-1948 mandatory joint return idea, which was repeatedly advanced as a general solution to the community property and income shifting controversies, but never adopted in the federal income tax.<sup>60</sup>

### 5. Phaseouts

Phaseouts are another source of income tax marriage penalties and bonuses that are growing in number and importance even as Congress is beginning to consider relief proposals. At an accelerating pace since the 1986 tax reform, Congress has been enacting new deductions and non-refundable tax credits for individuals. A

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<sup>58</sup> CBO STUDY, *supra* note 4, at 23. The CBO study also describes the potential for a marriage bonus in the earned income tax credit, which could occur when a low income non-parent forms a sole earner marriage with the parent of a qualifying child. *Id.* at 20.

<sup>59</sup> Using 1999 rates and adjustments, there is no taxable income in either the married or unmarried scenario. The only issue is the limitation on the earned income credit. With adjusted gross income of \$23,220, there would be \$10,760 above the \$12,460 phaseout threshold amount. Applying the phaseout percentage of 21.06% to the \$10,760, and subtracting the product from the maximum credit of \$3,816 produces an earned income credit of \$1,550, which is \$6,082 less than the total credits the two parents could have had as two unmarried heads of households. See I.R.C. § 32 (1999); see also Rev. Proc. 98-61.

<sup>60</sup> See *infra* notes 109-110 and accompanying discussion of mandatory joint returns.

substantial number of these provisions are limited in their application to taxpayers within specified income ranges through the mechanism of phaseouts based on adjusted gross income. By using income limits and the phaseout mechanism, Congress has been able to enact new and popular targeted tax cuts at lower revenue costs. This increasingly utilized technique allows not only programmatic targeting but also income class targeting. Arguably it increases progressivity by excluding upper income taxpayers. Typical examples are seen in the new education tax breaks and the child credit. Older and equally problematic phaseout penalties are found in the exclusion for social security old age benefits and the dependent care tax credit, applicable to working parents. A recent congressional study confirms that because of special deductions and phaseouts very few taxpayers can determine their effective tax rate from the tax tables alone.<sup>61</sup>

The new phaseouts have added visibility to the issue of marriage penalties and bonuses. But some of the older phaseout provisions continue to have a wide impact.<sup>62</sup> With few exceptions, the phaseouts follow the familiar pattern of treating joint return filers as more than one unmarried taxpayer but less than two. Generally, the income ceiling for joint return filers is set at an amount that is greater than but not twice the amount of income allowed an unmarried filer. Hence phaseouts introduce both marriage penalties and marriage bonuses.

The 105<sup>th</sup> Congress in 1997 made two noteworthy additions to the list of phaseouts. The first is the child tax credit. The child tax credit awards a \$500, non-refundable tax credit per child. The phaseout for this credit begins at \$110,000 of adjusted gross income for joint return filers but at \$75,000 for unmarried parents, creating both a marriage bonus in the phaseout of \$35,000 for sole earner

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<sup>61</sup> 1998 EFFECTIVE MARGINAL RATE STUDY, *supra* note 40 at 93-95.

<sup>62</sup> There are now some 60 different provisions in the Internal Revenue Code that can contribute to marriage penalties and marriage bonuses. See *Hearing on the Marriage Penalty Before the House Comm. on Ways and Means*, 105th Cong. (1998) (statement of David Lifson, Vice Chair, Tax Executive Comm., American Institute of Certified Public Accountants [AICPA]). The AICPA testimony noted that it had found "at least 63 provisions in the Internal Revenue Code where tax liability depends on whether a taxpayer is married or single." *Id.* In addition, the AICPA identified 18 different phaseout tests in 18 different provisions of the Internal Revenue Code. *Id.*

couples and a marriage penalty of \$40,000 for dual earner couples.<sup>63</sup> The other newcomer that makes use of phaseouts based on marital status is the deduction for interest on student loans. The phaseout for this deduction begins at \$40,000 for unmarried individuals and at \$60,000 for joint return filers.<sup>64</sup> Like the child credit phaseout, it confers a marriage bonus on sole earner couples and a marriage penalty on dual earner couples, following the pattern of a more generous benefit for the joint return filers that is still less than twice the allowance for unmarried individual filers.

Another important provision in the penalty/bonus arena is the child care credit for working parents, which has long embodied numerical limits and income tests based on unitary income. Both of these features create marriage penalties. The child care credit sets \$10,000 as the income ceiling for the maximum credit of \$1,440 applicable when the working parent or parents have two qualified children. Although this maximum is not attainable by either married or unmarried parents under present conditions, the \$10,000 income ceiling for it is also the beginning of the phasedown of the credit rate from 30 percent to 20 percent.<sup>65</sup> Like the earned income credit, the income test for the child care credit is applied to married couples on an unmodified unitary basis — the same income ceiling that is applied to the unmarried individual is also applied to the joint return of the two working parents. The marriage penalty created can be seen in the example of the dual earner couple who each has \$15,000 of income. If unmarried, the child care credit rate applicable to each of them would be 27 percent. If married, with \$30,000 of aggregate income, the credit rate would be reduced to 20 percent.<sup>66</sup> Further, the amount of creditable child care expenditures is fixed by the statute and capped at \$4,800 for each taxpaying unit, whether married or unmarried. An unmarried couple in which each partner has two children may be able to qualify for twice the child care credit that they could receive if

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<sup>63</sup> See I.R.C. § 24(b)(2) (1999).

<sup>64</sup> See I.R.C. § 221(b)(2) (1999).

<sup>65</sup> See I.R.C. § 21 (1999). See also Symposium: Panel III: *Women, Child Care and Tax Treatment*, 16 N.Y.L. SCH. J. HUM. RTS. 203, 204 (remarks of Ann F. Thomas).

<sup>66</sup> See I.R.C. § 21(a)(2) (1999).



married.<sup>67</sup>

Marriage penalties and bonuses are also created by the individual retirement account (IRA) provisions. Unlike the other provisions of the tax law described in this section, the rules governing eligibility for the tax benefits of IRAs can create substantially different tax outcomes for married couples with the same aggregate incomes. Recent amendments allow sole earner married couples to create a homemaker's IRA and use tax deductible payments to fund it, even when their joint return income exceeds the levels at which dual earner married couples may be disqualified.<sup>68</sup> The income tax differences that can result are substantial. But even more noticeable is that two lower income earners, whose combined efforts are required to bring them into the middle income range, lose the opportunity to use tax deferrals to enhance their retirement income security when a sole earner couple with more than twice the income continues to have such tax benefits available to them.

For unmarried individuals, the basic version of the IRA allows a deduction of up to \$2,000 for contributions to retirement savings accounts, provided the taxpayer is not an active participant in any other qualified plan for the year. There are no income limits for the IRA deduction unless the taxpayer is an active participant in another qualified pension plan during the year. Contribution deductions for unmarried individuals who are active participants in other plans begin to phaseout at a modified adjusted gross income of \$31,000. For a married taxpayer who is also an active participant in a qualified plan, the phaseout starts at \$51,000 of joint income.<sup>69</sup> Hence two unmarried workers who each earn \$30,000 and are each included in a pension plan at work, whether it is generous or stingy, may continue to claim a deduction for whatever they can manage to put aside for retirement

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<sup>67</sup> See I.R.C. § 21 (1999).

<sup>68</sup> See *infra* notes 71-72 and accompanying text; CBO STUDY, *supra* note 4, at 25 (describing penalty and bonus effects of IRAs before the changes in law described here).

<sup>69</sup> See I.R.C. § 219(a), (b), & (g) (1999). A new joint return income test for deductible contributions by one spouse when the other spouse is an active participant in an employer pension plan was added in the Tax Relief Act of 1997. See Tax Relief Act of 1997, Pub. L. No. 105-206, § 6005(a)(1)(A), 111 Stat. 788.

savings, up to \$2,000 each. But marriage will reduce their permitted IRA deduction from \$2,000 each to \$200 each.<sup>70</sup>

On the other hand, marriage and the availability of the higher income threshold for joint returns, will enable the sole earner of \$60,000 who also participates in her employer's pension plan to qualify for a \$200 IRA contribution deduction, providing there is no other income. On the basis of marital status, the sole earner became eligible for a deduction of \$200 when she had had none as an unmarried person. The dual earner couple whose aggregate income is the same as the sole earner couple's is allowed two deductions of \$200 each, for a total of \$400. Marriage causes them to lose a total of \$3,600 in IRA contribution deductions. Until recently this result seemed to justify ascribing a one couple, one pension goal to the IRA retirement savings incentives.

However, since 1998, sole earner couples like this one have been permitted to create a spousal IRA for the non-earner spouse and make up to \$2,000 in deductible contributions for the year to his account.<sup>71</sup> Thus a married couple with \$60,000 of aggregate income can end up with IRA contribution deductions of \$2,200 if it is a sole earner couple, and \$400 of deductions if it is a dual earner couple, assuming all the earners are pension plan participants. Moreover, the

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<sup>70</sup> The phaseout formula reduces the contribution deduction by 10% for every \$1,000 that adjusted gross income exceeds the statutory amount. The reducing ratio is described in the statute as the ratio of the excess of adjusted gross income over the statutory amount for the year to \$10,000 (going up to \$20,000 for joint returns in the year 2007). The statute includes a schedule of increases for the beginning of the phaseout that bring it up to \$50,000 for unmarrieds and \$80,000 for marrieds in the year 2007. See I.R.C. § 219(g) (1999). The IRA deduction is particularly valuable because it is an unreduced "above the line" adjustment to income. See I.R.C. § 62(a)(7) (1999).

<sup>71</sup> See I.R.C. § 219(g)(7) (1999). Before 1997, the spousal IRA gave rise to only \$250 in contribution deductions. The amendments bringing it up to \$2,000 were the result of an effort to give homemakers their own pensions. Rep. Nancy R. Johnson (R-CT) and Senators Kate Hutchinson (R-TX) and Barbara A. Mikulski (D-MD) introduced identical bills on January 26, 1995, described in their official titles as an amendment "to allow homemakers to get a full IRA deduction." The substance of these bills was included in the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, sec. 1427, § 219(c), 110 Stat. 1755, 1802. Rep. Johnson described the impact of the bill as enabling a non-working spouse to make deductible contributions "just as working spouses do under current law." Johnson's bill was entitled the Homemaker Relief Act of 1995. See H.R. 708, 104th Cong. (1995). See also S. 287, 104th Cong. (1995).

full IRA deduction is available to the spouse of a sole-earner pension-plan participant at much higher income levels, up to joint return income of \$150,000.<sup>72</sup> It is unlikely but not impossible that the pensions of the husband and wife who both earn \$30,000 would together match the pension benefits that the sole earner of \$60,000 will receive. It is certain that the employer provided pensions of the dual earners of \$30,000 each will not produce anything like the level of income security that the earner of \$150,000 will have from her pension. The spousal IRA contribution deduction creates a sizable income tax marriage bonus for sole earner couples and the spousal IRA itself creates a pension for the spouse engaged in home production rather than market work, as it was intended to do.<sup>73</sup> These outcomes are the result of the policy choice to recognize differences in the income configurations of the sole earner couple and the dual earner couple, a choice that that joint return system generally rejects.

Another noteworthy phaseout penalty has its impact on the elderly. Much of the focus of the controversy is on the impact of penalties and bonuses on the work force participation decisions of married women. However, the marriage penalty has also long been identified as a disincentive to marriage for the retired elderly who live on fixed incomes.<sup>74</sup> A widow and widower each of whom has some

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<sup>72</sup> This is the newly adopted ceiling for individuals whose spouse is an active participant and applies to dual earners as well when only one is a pension plan participant. See I.R.C. §§ 219(c), (g)(7) (1999).

<sup>73</sup> The Roth IRA, a retirement savings program that creates tax-free retirement benefits but is funded by after tax contributions, went into effect starting in 1998. It also allows a spousal IRA for a non-earner spouse. Income ceilings do apply, phasing out at \$160,000 for joint return filers and \$110,000 for unmarrieds. There is a unitary income ceiling of \$100,000 applicable to married couples and unmarried individuals in determining eligibility for roll over of other IRAs into a Roth IRA. See I.R.C. § 408A (1999); Treas. Reg. § 1.408A-3, 1.0408-4 (1999).

<sup>74</sup> See, e.g., Meylinda Dovel Wilcox, *Love and Money, Senior Style*, Kiplinger's PERSONAL FINANCE MAGAZINE, Oct. 1996, at 83 (reporting that "for many in the social security set, matrimony is out, pragmatism is in" because marriage can mean loss of spousal social security benefits and increased income taxes); Gail Levin Richmond, *Taxes and the Elderly: An Introduction*, 19 NOVA L. REV. 587 (1995). The new exclusion of capital gains from the sale of the principle residence which was intended to remove tax disincentives to the sale of what for many Americans represents the greater part of their assets, contains a sizable marriage bonus and a widow's penalty. Joint return filers can exclude up to \$500,000 of gain but for unmarried individuals, including widows

income in addition to their social security benefits may face a marriage penalty peculiar to their part of life, in addition to the general marriage penalties in the standard deduction and the tax rate tables. The extent to which social security old age benefits are taxable in current law depends upon the amount of income from other sources that the taxpayer has. For married couples, individual incomes must be aggregated and reported on a joint return in order to qualify for the most beneficial outcome under the exclusion formula. The formula is based on income tests that allow joint return filers more than an unmarried individual is allowed but much less than twice as much. The ratio is closer to 1.36.<sup>75</sup>

### *B. Measuring Penalties and Bonuses*

These then are the mechanics of the taxation of married couples and the tax law rules that give rise to the more prominent marriage penalties and bonuses.<sup>76</sup> The actual impact of marital status on any particular couple is determined by the couple's individual circumstances and which of a myriad of provisions could be applicable to them in a given year. Individual examples therefore may be illustrative of structural sources of penalties and bonuses but cannot convey the magnitude of the issue very well.<sup>77</sup> Broader

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and widowers who no longer qualify as surviving spouses, the exclusion is reduced by half, to \$250,000. See I.R.C. § 121 (1999).

<sup>75</sup> See I.R.C. § 84(c) (1999). The base amount for married joint filers is \$34,000; for unmarried individuals it is \$25,000.

<sup>76</sup> See CBO STUDY, *supra* note 4, at 25 (finding most significant sources of bonuses and penalties for low incomes are standard deduction, non-earners personal exemption and earned income credit; for high incomes, tax-brackets are described as the primary source of bonuses and penalties).

<sup>77</sup> The actual marriage penalty or marriage bonus to which any given couple is subject depends upon which of the many provisions that now carry penalty and bonus consequences will be applicable to them in the tax year in question. There is much variation between individuals. One taxpayer may, for example, claim the child care credit while another makes use of the social security old age benefit exclusion formula and a third uses both, the child care credit also being applicable to expenses in connection with the care of other dependents, including an elderly spouse or sibling in the household who suffers from Alzheimer's. See I.R.C. § 21(b)(1) (1999) (qualifying individual includes a spouse or dependent who is "physically or mentally incapable of caring for himself"). Of course, for any given couple, marriage penalties and marriage bonuses may change from

statistical analysis and more generalized estimates such as those reported in the 1997 Congressional Budget Office report are necessary for an understanding of the economic and social impact of marriage penalties and bonuses as well as the revenue implications of proposed changes.<sup>78</sup> These simulations more clearly indicate the magnitude and distribution of marriage penalties and bonuses, both of which vary significantly across income classes and racial groups.<sup>79</sup>

From the point of view of the fisc, the joint return system is a revenue loser. The latest estimates, which are for 1996, show total marriage penalties of about \$28.8 billion and marriage bonuses of some \$32.9 billion.<sup>80</sup> These numbers indicate that if the joint return were repealed and all married couples were required to file as if unmarried, total federal income tax liability, and likely, revenue, would go up by \$4.1 billion. Average penalties and bonuses give some indication of the substantial size of these shifts for the individuals. Penalties averaged \$1,380 and bonuses \$1,300; some 20.9 million married couples paid penalties and 25.3 million received

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year to year as the individual incomes change in absolute amount and relative to each other and different choices are made about claiming the standard deduction or itemizing.

<sup>78</sup> The key issues in measuring marriage penalties and bonuses are division of earnings, income from investments and deductions and also the filing status that are used in the unmarried comparison model. Accord Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 381-401 (1994) (discussing choices to be made in the design of a mandatory separate filing system). The primary measure ("basic measure") in the CBO simulations assigned earnings to the earner, deductions to associated income and investment income in proportion to earned income. The standard deduction was used when it exceeded itemized deductions. In constructing the unmarried taxpayer model for comparison to the joint return filer, the presence or absence of children in the household can be significant because it may enable the parent to use the head of household filing status and its more generous rate tables and standard deduction. The CBO basic measure used head of household status for both partners when the presence of two or children would make it applicable, producing larger penalties and smaller bonuses than are seen when the unmarried individual status is the standard for comparison. The earned income credit was also allowed to both where applicable. Both choices seem reasonable if one of the goals is to understand existing tax incentives and disincentives. See CBO STUDY, *supra* note 4, at 27-29, see also *supra* notes 6, 7, & 55.

<sup>79</sup> See *infra* note 95 and accompanying text for discussion of impact of race on distribution of marriage penalties and bonuses. For a fuller discussion of this issue: see Dorothy Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287 (1999).

<sup>80</sup> CBO STUDY, *supra* note 4, at tbl. 4 (basic measure).

bonuses.<sup>81</sup>

The largest average penalty and bonus amounts were seen at income levels above \$100,000, not very surprising since the higher marginal rates at that level would magnify the impact of deductions gained or lost as a result of filing status. But the amounts are themselves noteworthy. At this level, the average penalty was \$2,640 and the average bonus was \$2,970, representing 1.4 percent and 1.2 percent of adjusted gross income, respectively.<sup>82</sup>

In comparison, at the lowest end of the income scale, the impact of penalties and bonuses is much greater although the average dollar amounts are smaller. For joint returns with adjusted gross income below \$20,000 average penalties were \$770 and bonuses \$680. But in this income range such amounts represent a more significant portion of income. The average penalty for incomes below \$20,000 represented the loss of 7.6 percent of adjusted gross income. The average bonus represented a gain to disposable income of 5 percent of adjusted gross income. From the earned income credit example discussed above, it is easy to see how marriage penalties as large as 8 percent and even larger could be created for very low-income people. It is more difficult to find a distributive justice or social policy goal that is served by such outcomes.

About 70 percent of joint returns for 1996 reported aggregate adjusted gross income in the range of \$20,000 to \$100,000. In this middle range, the picture of marriage penalties and bonuses is more complex and a significant shift occurs at the \$50,000 mark.<sup>83</sup> Joint return filers with incomes between \$20,000 and \$50,000 received the largest share of both penalties and bonuses measured by income class in the study. This income group paid some 38.5 percent of the penalties and other married couples in the same income range received about 41 percent of the bonuses.<sup>84</sup> The number of couples with bonuses predominated and their average bonus was \$870, equal to 2.6 percent of income. Marriage penalty couples in this income

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at tbl. 6.

<sup>83</sup> *Id.* at tbls. 5, 6.

<sup>84</sup> *Id.* at tbl. 6.

category paid penalties that were substantially greater, \$1,190 on average, representing some 3.2 percent of income.<sup>85</sup> In the \$50,000 to \$100,000 income category, the penalty couples outnumbered the bonus couples by 1.8 million but the bonus couples received \$2.4 billion more in bonuses than the penalty couples paid in penalties.<sup>86</sup> Average bonuses jump to \$1,880 at this income level and represent a larger share of income — 2.8 percent — than they do for couples in the \$20,000 to \$50,000 range. Penalties, which average \$1,240 cost about 1.7 percent of income.<sup>87</sup>

Overall, almost 60 percent of bonuses are received by joint returns with adjusted gross incomes above \$50,000, an income group that includes only 44 percent of joint return filing couples. Almost 62 percent of the penalties are paid by this income group as well. The dollar amount of average penalties and bonuses rises with income, from bonuses of \$680 at incomes below \$20,000 to bonuses of \$2,970 at levels above \$100,000. Penalties follow the same pattern: averaging \$770 at the bottom and \$2,640 at the top. On the other hand, penalties and bonuses become proportionately smaller as income rises, indicating that couples with lower aggregate incomes may be affected more profoundly in both directions than are couples with higher incomes and larger dollar amounts of penalties and bonuses.<sup>88</sup> One measure of the severity of the marriage penalty for low-income families is that for those with incomes below \$20,000, marriage penalties averaged 7.6 percent of income while the average penalty for couples with more than \$100,000 of income was 1.4 percent of income.<sup>89</sup>

### *C. Change and Context*

The marriage penalties and bonuses described and quantified above arise from many different provisions of the federal income tax

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<sup>85</sup> *Id.* at tbl. 6.

<sup>86</sup> *Id.* at tbl. 6.

<sup>87</sup> *Id.* at tbl. 6.

<sup>88</sup> *Id.* at tbl. 32.

<sup>89</sup> See Wheaton, *supra* note 55, at 125-26.

statute. More fundamentally, they all arise from the joint return, which treats the married couple as one taxpaying unit, disregarding the income configuration within the marriage and looking at aggregated income only. The unitary view of married couples is adhered to more or less rigorously in specific provisions, more often moderated by treating the married couple as being more-than-one individual taxpaying unit but less-than-two. This approach to the taxation of married couples, typified by the standard deduction, simultaneously creates the potential for marriage bonuses and marriage penalties. The one provision that looks within the joint return to take individual income characteristics of spouses into account in order create a marriage bonus, the individual retirement account provisions, exacerbates its marriage penalties because it applies a more stringent aggregation of incomes requirement to dual earners.

When presented with the tax outcomes described here, many people find income tax marriage penalties and marriage bonuses to be unfair or distasteful or irrational, as the terminology of the discussion suggests. One of the Republican Presidential candidates this year has called marriage penalties “obscene,” an assessment that no doubt would have been shared by the feminist legal scholar whose path breaking 1971 critique on this subject was entitled *Sexism in the Code*.<sup>90</sup> Writing in a law journal a generation ago, Grace Blumberg described the income tax law as perpetuating a pattern of work disincentives for married women “inconsistent with the principle of sexual equality enunciated in title VII” and arguing for the “social and political desirability of neutral taxation for married women.”<sup>91</sup> But it is necessary to go beyond the mechanics of the taxation of married couples to understand fully the choices that current tax policy reflects. An important part of this analysis lies in the realm of tax theory, in the relationship between the aggregation of income idea of the joint return and the progressivity of the income tax, a problem that is discussed in

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<sup>90</sup> See John McCain Presidential Campaign Website, (visited Nov. 7, 1999) <<http://www.mccain2000.com>>; see also Grace Blumberg, *Sexism in the Code: A Comprehensive Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971).

<sup>91</sup> Blumberg, *supra* note 90, at 49, 95.



the next section which also traces the historical development of the joint return.

Another aspect of the fairness question that underlies the discussion of marriage penalties and bonuses is that increasing numbers of married couples are paying what they have come to regard as extra taxes. The profound changes in the labor force participation rates of married women have very significantly altered the incidence of marriage penalties and bonuses over the past 30 years. The structural choices in the income tax law that produce different tax outcomes on the basis of marital status have come to have a different meaning for increasing numbers of married women and their husbands.

The extent to which increases in marriage penalties can be attributed to the increased labor force participation of married women was demonstrated in a 1996 study by Alm and Whittington described in the CBO report. The study examined what the marriage penalty and marriage bonus effects would have been for married couples in 1969 had current income tax law applied to their joint returns. Only about 30 percent of married couples in 1969 would have been penalty couples if present tax law had applied to them, while 64 percent would have been marriage bonus couples. But this study found that by 1996 the two groups were almost equal: some 47 percent paid marriage penalties and some 48 percent received bonuses.<sup>92</sup> The proportion of penalty couples during this period increased by more than 50 percent while the percentage of bonus couples declined to about three quarters of its prior level.

The period during which this shift occurred saw massive changes in the work force participation of married women. Almost 52 percent of working-age married couples in 1969 were sole earner couples, however, by 1995 the percentage of sole earner joint returns had diminished to less than 40 percent. During these two and one half decades, the increase in dual earner couples with relatively equal incomes has been even more dramatic. The 1969 data shows that in only 17 percent of married couples did each spouse contribute at least

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<sup>92</sup> See CBO STUDY, *supra* note 4, at tbls. 16, 18 (reporting on the James Alm & Leslie Whittington study, *The Rise and Fall and Rise . . . of the Marriage Tax*, 49 NAT. TAX J. 571 (1996)).

one third of earnings, the measure of parity in incomes that is associated with the greatest incidence of marriage penalties today.<sup>93</sup> But by 1996, some 33.9 percent of working age marriages were in this category — almost a doubling over a twenty-six year period — and some 90 percent of them were also marriage penalty couples.<sup>94</sup> The conclusion is clear. Holding the tax law and its penalty and bonus producing provisions constant, a comparison of the married couples of 1996 with the married couples of 1969 demonstrates that it is the entry of married women into paid employment that created the conditions in which penalty and bonus effects are felt. The decline of the sole earner marriage has resulted in the growth of marriage penalties.

Significant as these trends in the paid employment and earnings of married women are, they do not represent the patterns seen in all groups over the past thirty years. Married African-American women were already in the labor force in greater proportions than were White women in 1969 and hence were more likely to have been in marriage penalty couples even then.<sup>95</sup> Today, married Black women are still more likely to be in a dual earner marriage than a White woman although the gap has narrowed substantially since the middle of the century. But there are other differences as well. A higher proportion of African-American wives earn at least half as much as their husbands do. Professor Dorothy Brown attributes these different patterns of marriage and employment to a number of factors, including the smaller proportion of African-American men in the highest salary quartiles. Whatever the reasons, the effect on marriage bonuses and penalties is rather direct. With fewer sole earners among black couples eligible to file joint returns, disproportionately fewer marriage bonuses are seen and more penalties paid.<sup>96</sup>

Fairness is one of the criteria by which a tax system is judged.

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<sup>93</sup> See *supra* note 9 and accompanying text.

<sup>94</sup> See CBO STUDY, *supra* note 4, at tbls. 16, 18 compare *supra* note 9.

<sup>95</sup> See CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN tbl. 2.1 (1990) (showing a 50% labor force participation rate for married women of Color in 1970 and a 38.5% rate for married White women in the same census).

<sup>96</sup> See Brown, *supra* note 79.

Fairness in taxation is generally understood to mean that taxpayers with equal ability to pay should pay equal amounts of tax.<sup>97</sup> This is a rule of practical politics as much as it is a tenant of moral philosophy. Taxes that are perceived as being unfair can only be extracted with great effort and at great cost. Taxes are only collectible when they are accepted as being reasonably, although perhaps not perfectly, equitable. Little inequities should be expected and generally will be ignored. Larger inequities are more difficult to ignore, even when they may not be purposeful. When many taxpayers are subjected to outcomes that they view as unfair, the integrity of the entire tax system may be in question. Tax theorist Michael Graetz has concluded that marriage penalties are a particular threat to the income tax. He finds that "the American public rightly loses respect for the law" when it is seen to so widely require couples "to pay higher taxes solely because they have married."<sup>98</sup> This observation, and indeed the current discussion of marriage penalties, may suggest that ideas about the standards for measuring fairness in the taxation of married couples are changing in the United States.

#### *D. Development of the Joint Return System*

The very discussion of marriage penalties and bonuses proceeds from a premise that is antithetical to the joint return — the idea that fairness in taxation requires the recognition of the individual income characteristics of husband and wife. The joint return of today is the instrument of quite a different vision of tax equity — the goal of equal taxation of married couples with equal incomes. It came into the income tax in 1948 and its development since then has been surprisingly haphazard for an issue of such fundamental importance to a tax system as the design of the unit of taxation. Both the theory and the practice of the joint return are under attack today in the debate

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<sup>97</sup> See, e.g., MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 31 (3d ed. 1995) (note introducing criteria for evaluating taxes).

<sup>98</sup> MICHAEL J. GRAETZ, *THE DECLINE (AND FALL?) OF THE INCOME TAX* 7, 39-40 (1997) (arguing that tax compliance and perception of consistency of tax system with moral values and social norms are linked).

over marriage penalties and marriage bonuses.

### 1. The Choice of the Joint Return

The adoption of the new joint return filing status in 1948 represented the explicit tax policy choice to make the equal taxation of married couples with equal incomes the governing principle in the taxation of marriage. The new joint return, which required husband and wife to aggregate incomes, ended several controversies concerning the taxation of married couples. It largely erased the disparities in the taxation of married couples in the two different marital property regimes, ending the long controversy over the impact of community property law. It also ended what the Treasury saw as a larger problem of widespread tax evasion in which wives were the foils of tax shirking husbands.<sup>99</sup>

Prior to the 1948 joint return husband and wife were treated as separate individuals in the income tax except to the extent that they were required to share a married couple's personal deduction.<sup>100</sup> The

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<sup>99</sup> Several sources support the conclusion that Treasury's concerns about tax avoidance by married couples went beyond the community property issue. The central theorist of the 1948 joint return, Harvard Law School Professor Surrey, argued that inequities in taxation of married couples resulted if couples with different income configurations but the same total incomes did not bear the same tax burden. In Surrey's analysis the outcome is inequitable whether the difference arises from marital property law, the division of income producing property or family partnerships. He describes his per capita joint return proposal as "equalizing the tax treatment of married couples regardless of the character of their income or their geographical location." Stanley S. Surrey, *Family Income and Federal Taxation*, 24 TAXES 980, 982-84, 987 (1946). Accord Boris Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1397, 1416 (1975) (discussing the Senate Finance Committee Report in 1948). In its attacks on income splitting through family partnerships in the 1930s and 1940s, the IRS treated wives who worked full time in the family business as making no separable economic contribution. See also Carolyn Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, Legal History Program, Working Papers, Series 2, May 1987, 30-63 (history of family partnership cases).

<sup>100</sup> The relationship between the individual and married couple's personal deduction varied over the years between 1913 and 1948. When the married couple's deduction was greater than the unmarried person's, a sole earner couple had a marriage bonus to that extent. The dual income couple suffered a marriage penalty whenever the married couple's deduction was less than twice the individual's. See Symposium: Panel II: *Observing Money, Marriage and Taxation*, 16 N.Y.L. SCH. J. HUM. RTS. 127, at 127-28 (1999) (remarks of Ann F. Thomas quantifying the amount of marriage penalty and

same progressive tax rate schedule applied to everyone, so although aggregation of income by married couples was permitted on a voluntary basis, it generally was disadvantageous, exposing income to higher rates than would apply if each spouse reported individual income only.<sup>101</sup> However, in this system of individual taxpayers, disaggregating income could be very advantageous. If, for example, a spouse with \$10,000 of income in the 50 percent marginal surtax bracket could shift that amount to a spouse whose marginal tax rate on this sum would be only 25 percent, half the tax otherwise due would be saved. Tax brackets were often quite high in this era; during both world wars, they rose above 70 percent.<sup>102</sup> But even at lower rates, many taxpayers sought what Stanley Surrey (the tax theorist who was the architect of the 1948 joint return) called "the thrill that comes from sliding down a progressive rate scale."<sup>103</sup>

In 1930 married couples living in the eight community property law states succeeded in establishing the right to split their incomes from all sources into two equal shares when filing their individual income tax returns. Their theory was that community property law gave the wife an interest in half the marital community even though the husband earned, controlled and managed all property and income during the marriage. The Supreme Court sustained this

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marriage bonus in 1913). See, e.g., Tariff Act of October 3, 1913, 38 Stat. 114, 168 (codified as I.R.C. § IIA (1913)); see also GLADYS BLAKEY & ROY BLAKEY, *THE FEDERAL INCOME TAX* tbl. 20 (1940) (compiling the personal exemptions for married and unmarried taxpayers and dependents from 1913 through 1939).

<sup>101</sup> A married couple was permitted to file a different kind of joint return between 1918 and 1948 but its primary benefits were that it allowed losses of one spouse to offset gains of the other and, if combined adjusted gross income was greater, a large charitable contribution might be possible. See Bittker, *supra* note 99, at 1400, n.20. The Internal Revenue Service tried to compel joint return filers accept joint and several liability for tax due for the year but was unsuccessful until Congress enacted an authorizing provision in 1938. See Beck, *supra* note 20, at 458-59.

<sup>102</sup> See BLAKEY & BLAKEY, *supra* note 100, at tbls. 20-21; GRAETZ & SCHENK, *supra* note 97, at 9. Prior to the Internal Revenue Code of 1954, the tax rates were a composite of the normal tax and the surtax.

<sup>103</sup> See Surrey, *supra* note 99, at 980. The 1948 joint return was widely called the Surrey Plan and generally traced to his 1946 proposal, originally delivered as a speech at the Thirty-ninth Annual Conference of the National Tax Association, published in *Taxes*. See e.g., Bittker, *supra* note 99, at 1412-1414.

view in *Poe v. Seaborn* in 1930.<sup>104</sup>

This ruling meant that a sole earner husband in, for example, a community property law state such as Texas paid tax on half his salary and his wife reported and paid tax on the other half, whether or not she ever saw or controlled a penny of it. By contrast if they lived in Indiana, which was a common law state, he alone would have been the taxpayer on all of his earnings. If he earned \$15,000 and the rate schedule required a 20 percent tax on the first \$10,000 and a 30 percent tax on the next \$5,000, he would have owed \$3,500 in tax, living in Indiana. But living in Texas, the total tax was reduced to \$3,000. The Texas sole earner and his wife each reported income of \$7,500, keeping the entire amount in the 20 percent bracket. Each paid a tax of \$1,500. Indeed, they could each report up to \$10,000 in the bottom tax bracket. The tax brackets for married couples in community property states functionally were twice as wide as those stated in the statutory tax rate schedule.

In the same year another development in tax jurisprudence confirmed that the vast majority of married couples in the United States — those living in the common law states — were to be required to pay tax on the basis of those statutory rates and could not split income from salaries. The Supreme Court ruled that the Internal Revenue Service was correct in its view that the earner of income could not by private contract or agreement between the spouses shift any portion of his personal service income to his wife. Spouses in the 40 common law states could make tax-effective transfers of income from property but only if they also transferred ownership and control of the property to the other spouse.<sup>105</sup>

By 1948 several states had adopted community property law in order to allow their residents to take of advantage of the *Poe v. Seaborn* exception and reduce their taxes. Other states were reluctantly considering doing the same but many called on Congress to solve for them what was described as the problem of geographic

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<sup>104</sup> See *Poe v. Seaborn*, 282 U.S. 101 (1930); see also Bittker, *supra* note 99, at 1399-1408 (discussing pre-1948 taxation). Tax rates in the example in the text are not actual 1930 tax rates.

<sup>105</sup> See *Lucas v. Earl*, 281 U.S. 111 (1930); Bittker, *supra* note 99, at 1399-1408.

disparity in taxation. They looked to Congress to spare them the difficult choice between reducing taxes and giving wives rights that the legislatures only vaguely understood in the property of their husbands.<sup>106</sup>

Several solutions were available to Congress, including conforming the tax treatment of earned income, one way or the other, for the two marital property regimes.<sup>107</sup> Another possibility was to amend the federal income tax statute to specify that community property law would not determine the identity of the taxpayer, perhaps establishing actual control of income rather than vested interest as the test. Congress had not yet tried this approach in the income tax statute but there was reason to think that the Supreme Court would accept such a legislative decision fully.<sup>108</sup>

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<sup>106</sup> Much of their reluctance came from concern about changing the substance of marital property rights and the possibility that it might give wives control over the property or income of their husbands. A few states repealed their new community property statutes after very brief experience. See Jones, *supra* note 99, at 15-28. The Senate Finance Committee asserted that the 1948 joint return would produce "substantial geographical equalization" in taxation. Bittker, *supra* note 99, at 1412 (quoting Senate Finance Committee).

<sup>107</sup> See Jones, *supra* note 99, at 62-68. Professor Jones reports a 1948 proposal to allow income splitting on the basis of a marital partnership agreement and finds that it would have had the effect of reversing *Lucas v. Earl*. *Id.* See also discussion of *Lucas v. Earl* and *Poe v. Seaborn* in Bittker, *supra* note 99, at 1400-1408 (noting inconsistencies and suggesting that a different result in *Lucas v. Earl* would have improved tax equity).

<sup>108</sup> The emphasis that the Supreme Court put on control of income by the husband in *United States v. Robbins*, 269 U.S. 315 (1926), in assessing the California marital property regime can be read as an invitation to Congress to speak to the issue and delineate the impact that it wished to see community property law have on taxation. But when *Poe v. Seaborn* reached the Court four years later, Congress had still not spoken to this question although the issue had been debated. See Thomas, *supra* note 20. While Surrey blames the Supreme Court for inconsistency in *Poe v. Seaborn* and *Lucas v. Earl*, he also acknowledges that "the judicial process is not the appropriate medium, and that a legislative solution is required." Surrey, *supra* note 99, at 984. By 1945 the Supreme Court had already sustained the efforts of Congress to reduce the tax benefits of community property in estate and gift taxation. As Professor Bittker suggests, the prospects of the Court sustaining legislation to reverse the impact of community property in the income tax were also good. Bittker, *supra* note 99, at n.60. But the political prospects for enactment of such legislation were poor; Surrey noted in 1946 that "the community property forces are adding to their congressional strength." Surrey, *supra* note 99, at 984.

The solution to the community property problem that the Treasury had promoted during the Franklin Delano Roosevelt administration was simply to require married couples to file a common return in which husband and wife aggregated their incomes. The tax due on this mandatory joint return was to be determined by using the same rate tables that applied to unmarried taxpayers. For sole income couples in common law states the mandatory joint return would not have changed anything, but it would have ended the income splitting tax benefits of the community property law regime. The mandatory joint return would also have imposed large marriage penalties on dual earner and other dual income couples. This was in a sense its purpose; the Treasury regarded the husband as the real economic owner of the income and any arrangement that attributed his income to anyone else as tax avoidance.<sup>109</sup> The mandatory joint return was shouted down in 1941 and 1942.<sup>110</sup>

The version of the joint return adopted in 1948 went quite in the opposite direction. Although it required income aggregation, it also allowed income splitting. In effect it made the tax outcome of community property law applicable to all married couples in all marital property systems. To determine their tax liability on the joint return, husband and wife added their individual incomes together, divided the total in half and then computed the tax on one-half their

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<sup>109</sup> See Surrey, *supra* note 99, at 980, 984 (describing husband as source of earned income and capital accumulation and later, noting with approval judicial efforts to "build a wall around the husband with a variety of anti-avoidance rules").

<sup>110</sup> For another description of the mandatory joint return proposal see Surrey, *supra* note 99, at 984. Women's groups including the National Federation of Business and Professional Women and the General Federation of Women's Clubs vigorously opposed the mandatory joint return. See Jones, *supra* note 99, at 66-67; GENERAL FEDERATION OF WOMEN'S CLUBS CONVENTION RESOLUTION ON MANDATORY JOINT INCOME TAX (1942-1948) (copy on file with author). One opponent of the 1948 income splitting joint return described the rejection of the mandatory joint return in the following terms: "Every time the mandatory joint return issue has been raised, hosts of gold-plated suffragettes have descended on Congress to reenact their epic drama regarding women's rights, and claim that all will be lost if ever a wife must file a joint return with her husband and thereby be relegated to "economic slavery." The real issues thereby muddled, various moralists and misled church groups joined the battle and a deafening thunder of cries about marriage, morals, economic serfdom, and the like killed any further relevant determination or any action." *Hearings on Reduction of Individual Income Taxes before Sen. Comm. on Finance*, 80th Cong. 279 (1948) (statement of Paul J. Foley).



aggregated income. They doubled the amount of tax on the one-half to determine the tax due on the whole on their joint return.<sup>111</sup> Married joint filers and unmarried individual filers used the same graduated rate schedule so the effect of the joint return was to give married couples the use of tax brackets that were twice as wide as those for unmarried individuals.<sup>112</sup>

The Republican controlled 80<sup>th</sup> Congress enacted the income-splitting joint return<sup>113</sup> as part of a massive tax cut. It was the cornerstone of the third tax cut bill that the 80<sup>th</sup> Congress passed. President Truman vetoed all three bills, but the popularity of the new income-splitting joint return helped attract the votes to over-ride the President's third tax cut veto.<sup>114</sup> The campaign slogan of the Republicans in the 80<sup>th</sup> Congress was "Had Enough?" and it spoke to their conservatism and their intention to reduce government spending and block the Democratic President's liberal and expensive domestic programs.<sup>115</sup> The principle of unitary taxation of married couples, also pursued in the failed mandatory joint return proposals, was enacted at the cost of the loss of considerable progressivity in the income tax.<sup>116</sup>

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<sup>111</sup> Revenue Act of 1948, Pub. L. No. 471, sec. 301-303, §§ 12, 23(aa)(1)(A), (aa)(4), & 51(b), 62 Stat. 114-15 (passed April 2, 1948, over presidential veto). See also Jones, *supra* note 99, at 2.

<sup>112</sup> For example, if the lowest bracket taxed income up to \$4,000 at the rate of 10%, and income above that amount at 20%, a married couple with \$8,000 income filing the income splitting joint return would pay \$800 tax while an unmarried person with the same income paid \$1,200. The 1948 joint return puts \$4,000 into the 10% bracket, calculates tax of \$400 and doubles it to find a total tax of \$800. In effect the splitting and doubling allows \$8,000 to be taxed in a bracket intended to be \$4,000 wide.

<sup>113</sup> Professor Jones uses the term "income splitting joint return" to describe the 1948 enactment and this article adopts this very useful and informative term as well. Jones, *supra* note 99, at 1.

<sup>114</sup> *Id.* at 2, 63-68 (providing a detailed account of the Revenue Act of 1948).

<sup>115</sup> See ALAN BRINKLEY, *THE UNFINISHED NATION: A CONCISE HISTORY OF THE AMERICAN PEOPLE* 787 (1997).

<sup>116</sup> It was part of the tax reduction bill that Congress enacted over the veto of President Truman and it carried an estimated revenue loss of \$803.5 million. See Jones, *supra* note 99, at 63-64; Bruce Bartlett, *The Marriage Penalty: Origins, Effects and Solutions*, 80 TAX NOTES 1341, 1343, tbl. 3 (1998) (describing impact of the Revenue Act of 1948: "almost every married couple saw a sharp reduction in their marginal tax rate").

But income aggregation advocates like Treasury Tax Legislative Counsel Stanley Surrey regarded at least part of the tax cut as well spent because it introduced a better system: the system of equal taxation of married couples with equal incomes. He described it as the “one bright spot” in the tax bill that his administration had vetoed.<sup>117</sup> The Treasury regarded the husband as “providing both the dollars of income and the accumulation of capital producing additional dollars of income.”<sup>118</sup> Any doctrine or arrangement that moved taxable income (and tax liability) away from the husband was viewed as a tax avoidance device. According to Surrey, the Treasury’s leading tax theorist at the time, “normally, the husband pays income tax” on all of “these dollars.”<sup>119</sup> Aggregating the incomes of husband and wife correctly collected the income into one taxpaying unit rather than allowing it to be divided between two units in a manner he regarded as artificial. The new joint return established this important principle. The tax cut aspects were part of the cost of establishing the principle. Moreover, Surrey indicated that he did not think full income splitting should be a permanent feature of the tax rates.<sup>120</sup>

## 2. Income Theory and the Joint Return

Whatever political and practical ends its enactment in 1948

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<sup>117</sup> See Bittker, *supra* note 99, at 1413 (quoting Surrey’s appraisal of the Revenue Act of 1948: “The adoption of a presently acceptable solution to the family income problem represents the one bright spot in the Revenue Act of 1948”).

<sup>118</sup> This is Surrey’s premise in the 1946 proposal, made when he was Tax Legislative Counsel at Treasury. Surrey, *supra* note 99, at 980.

<sup>119</sup> *Id.* The 1948 joint return made the husband and wife liable for tax on the unit’s income for the year through its imposition of joint and several liability.

<sup>120</sup> The Internal Revenue Service challenged the wife’s partnership in family businesses in cases in which the wife’s role ranged from having babies to running the poultry department of the grocery store. See Jones, *supra* note 99, at 30-63 (describing the family partnership cases litigated in the 1940’s). Surrey in his proposal for the joint return mentions family partnerships as one of the income splitting tax avoidance devices that demonstrated the importance of aggregation in the taxation of married couples. Surrey, *supra* note 99, at 981-82, 985-87. On the issue of income splitting itself, in his 1946 proposal Surrey took the view that “ability to pay” considerations would place the correct tax burden for married couples between “per capita” (split income) taxation and the mandatory joint return (unitary taxation). *Id.*

may have served, the income splitting joint return brought with it into the federal income tax a number of assumptions about marriage and tax theory that continue to affect tax policy and tax outcomes today. The income-splitting joint return had a substantial marriage bonus effect for sole earner couples.<sup>121</sup> Even though it did not introduce systemic marriage penalties measured by changes in the tax burden of couples, the 1948 joint return did introduce the secondary earner or stacking problem. Aggregation of incomes for the spouses in the progressive income tax tended to increase effective tax rates for the low earner in the couple, who typically was the wife.<sup>122</sup>

Despite the commitment to “equalize the treatment of married couples regardless of the character of their income,” Surrey’s initial proposal held out the possibility that dual earner marriages might be treated differently. Surrey apparently thought “the problem of the working wife” in a joint return should be solved with additional deductions although whether these would relate to additional costs of dual employment, child care or something else is not clear from his 1946 proposal.<sup>123</sup>

But the example of the dual earner marriage also presented another income theory issue that contained a deeper criticism of the goal of taxing couples with equal incomes equally. Surrey acknowledged that the “problem of the working wife” raised the issue

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<sup>121</sup> See Surrey, *supra* note 99; accord Dennis J. Ventry, Jr., *Liberals, Loopholes, and Long-term Growth: Equity, Growth and Gender in Postwar Tax Policy, 1948-1960*, at 6-25 (unpublished paper presented at the American Society for Legal History Annual Meeting Oct. 21-23, 1999) (on file with author) (cited with Mr. Ventry’s permission).

<sup>122</sup> Between 1948 and 1969 married taxpayers were still permitted to file as individuals on the basis of their separate incomes. While separate filing might reduce tax for the low earner, it usually increased the tax for the higher earner who had to forgo the benefits of income splitting on the joint return. Generally the joint return produced the lowest tax for the couple as a unit and also the lowest tax for the higher or primary earner. But for the lower or secondary earner, there was an increase in effective tax rates unless all joint return income was within the lowest bracket. For an early presentation of the stacking or secondary earner issue described here, see Harvey S. Rosen, *Is It Time to Abandon Joint Filing?*, 30 NAT. TAX J. 423, 425-26 (1977) [hereinafter Rosen 1977]. See also text accompanying notes 134-135 *infra*.

<sup>123</sup> Surrey, *supra* note 99, at 984.

of "imputed income of the housewife."<sup>124</sup> The problem is that the sole earner couple really has two economic incomes, the wages of the market earner and the imputed income of the housewife, and the tax law ignores the imputed income.

In economic terms, the housewife contributes imputed income in the form of the goods and services that she produces in the home for home consumption. Hence the economic income of a couple composed of a housewife and a sole earner with market wages of \$15,000 is actually more than the economic income of a dual earner couple with combined wages of \$15,000. However the imputed income of the housewife has not been subject to tax in the federal income tax.<sup>125</sup> Thus the housewife and her untaxed imputed income confers a double marriage bonus. Her economic income and its contribution to the couple's standard of living is tax free and marriage to her allows the sole market earner to reduce his taxes with her unused personal exemption, transferred standard deduction and married person's entitlement to the joint return tax rates.<sup>126</sup>

The choice of the joint return in 1948 was thus a choice to treat married couples with the same *money* incomes as equals and to ignore at least for the time being economic differences that existed between dual earner couples and sole earner couples.<sup>127</sup> In addition to these unresolved aggregation issues, the 1948 joint return left another tax equity problem for the future. The income-splitting feature of the new joint return created new disparities in the taxation of the married and the unmarried that were difficult to ignore.

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<sup>124</sup> *Id.*

<sup>125</sup> See Staudt, *supra* note 36.

<sup>126</sup> For a fuller discussion of the marital transfers, see *supra* notes 28, 35-40 and accompanying text. Tax incentives favoring housework can turn into disincentives to market work. If she were to venture into paid employment, the former housewife would have to earn more than the after tax value of her housekeeping or its purchased replacement to be show any economic improvement. See, e.g., Edward McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1001-5 (1993) (discussing imputed income from home production).

<sup>127</sup> Dr. June O'Neill in her Keynote Address also uses the term money income to identify the absence of imputed income from the equal income standard. See O'Neill, *supra* note 5, at 120. The correct term in the federal income tax is gross income but is not used here because it is not as informative to non-technicians.

### 3. Time Line of Marriage Penalties and Marriage Bonuses

The income-splitting joint return slashed marginal rates for married couples, delivering a tax cut of some \$800 million to them.<sup>128</sup> But the 1948 tax cuts left unmarried individuals with the old rate schedule. Comparing herself to a sole earner married couple with the same total income, an unmarried individual was required to pay from 20 percent to almost 40 percent more federal income tax.<sup>129</sup> Surrey as early as 1946 identified the need to find a better balance between married and unmarried taxpayers than the doubled joint return brackets provided. But Congress did not act to adjust the relationship between the two groups of taxpayers until 1969, during the first administration of President Richard M. Nixon.<sup>130</sup>

Effective in 1971, new rate tables fixed the ratio between the unmarried individual's tax and the tax on the joint returns at the same income level at 1.2.<sup>131</sup> This is the origin of the present pattern in the income tax treating the married couple as a tax unit that is greater-than-one unmarried individual tax unit but less-than-two. It was the rebalancing of the relative tax burdens on married couples and unmarried individuals in 1969 that introduced systemic marriage penalties for dual income couples.<sup>132</sup> With the widening of the rate

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<sup>128</sup> See Bartlett, *supra* note 116, at 1341, 1343, tbl. 3 (describing impact of Revenue Act of 1948).

<sup>129</sup> See Bittker, *supra* note 99, at tbl. 3.

<sup>130</sup> See Surrey, *supra* note 99, at 985-987. Surrey discusses the issue at some length, concluding that on a consumption standard the correct tax for a married couple "lies between the liabilities produced by the per capita system and by the mandatory joint returns." *Id.* at 985.

<sup>131</sup> See Pamela B. Gann, *The Earned Income Deduction: Congress's 1981 Response to the "Marriage Penalty" Tax*, 68 CORNELL L. REV. 468, 471-72 (1983) (discussing 1969 amendments).

<sup>132</sup> For a discussion of the singles penalty issue and the 1971 marriage penalties, see GRAETZ, *supra* note 98, at 31-34. The joint return did not go unchallenged in Congress in the 1950s and 1960s although the tax literature in this era tended to support it. See Ventry, *supra* note 121, at 6-25 (demonstrating that some reforms were regarded as loopholes benefiting the wealthy during the 1950s and 1960s). Blumberg notes marriage penalties in the child care deduction as well as stacking effects and the loss of one standard deduction. Blumberg, *supra* note 90, at n.35. The same change also made marriage bonuses somewhat smaller for sole earner couples because the joint return brackets were no longer twice as generous as the unmarried brackets.

brackets for unmarried individuals, the joint return no longer entitled married couples to doubled marginal brackets. Dual earner couples began to see that marriage had a tax cost.<sup>133</sup>

The 1969 amendments also restricted the filing status choices of married couples, cementing the hold of the joint return on married couples and with it the aggregation principle. While reducing the tax rates for singles, Congress created a new and disadvantageous rate schedule for married persons who wished to file separately from their spouses. The new rate tables for married persons filing separately consisted of tax brackets that were half as wide as those for joint return filers (as they are under present law for this filing status). Spouses with separate incomes were no longer permitted to file as individuals using the rates applicable to unmarried persons, as they had been able to do between 1948 and 1969.<sup>134</sup>

By forbidding married couples to use the new singles' rates, Congress cut off the possibility that the community property controversy would be re-opened by couples seeking to split marital income between separate tax returns at the newly reduced rates for unmarried individuals. The new, punitive rates for married separate filing increased the relative benefit of the joint return for married couples, further melding the economic identities of husband and wife for tax purposes. But for dual earner couples with relatively equal incomes, the new distinctions and new rate tables meant that marriage would increase their composite tax burden. The policy choice of 1948 that required married couples with equal amounts of money income to pay the same amount of tax was preserved and perpetuated although at the cost of imposing a marriage penalty on dual earners and other dual income couples.<sup>135</sup>

Yet even apart from the new marriage penalty on dual income

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<sup>133</sup> See, e.g., GRAETZ, *supra* note 98, at 34-38 (discussing the Boynters whose year-end divorce plan to reduce the marriage penalty attracted attention from the I.R.S., the courts and Congress in the 1970s).

<sup>134</sup> By filing separately, spouses were able to avoid the joint and several liability imposed on joint return filers. In the years between 1948 and 1969, separate filing by spouses rarely resulted in a lower combined tax bill than the joint return produced. See notes 20-25 *supra* and accompanying text.

<sup>135</sup> See GRAETZ, *supra* note 98, at 31-35; Bittker, *supra* note 99, at 1414-1415 & 1428-1429.

couples that began in 1971, the joint return came under attack because of its role in creating tax disincentives for married women to enter or remain in paid employment. Legal scholars and economists during this period of women's rights advocacy began arguing for individual taxation and abandonment of the joint return.<sup>136</sup> Economists and legal scholars in the 1970s pointed out that the joint return system imposed high effective marginal tax rates on the earnings of wives who entered or re-entered the labor force, reducing the economic return on their work effort.<sup>137</sup> Because the joint return required the incomes of the two spouses to be aggregated, the earnings of the secondary worker were seen to be stacked on top of the income of the primary earner and taxed at rates starting with the highest marginal rate applicable to him.<sup>138</sup> One feminist legal scholar argued that the tax disincentives to paid employment for married women seen in the limitations on child care deductions and the high effective rates created by aggregation of spousal incomes constituted gender discrimination.<sup>139</sup>

The secondary earner in the marriage, then as now, was assumed to be the wife in most instances both because of social expectations and because of lower earnings.<sup>140</sup> Empirical data had

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<sup>136</sup> See Blumberg, *supra* note 90, at 95; Rosen 1977, *supra* note 122. The Rosen article was entitled: *Is It Time to Abandon Joint Filing?*

<sup>137</sup> See e.g., Blumberg, *supra* note 90, at 50-59; Rosen 1977, *supra* note 122, at 427-428 (arguing that the joint return is economically inefficient and unduly burdensome to secondary workers).

<sup>138</sup> Stacking is a widely used term for this effect. See, e.g., *Hearing on the Marriage Penalty Before the House Comm. on Ways and Means*, 105th Cong. (1998) (statement of David Lifson, Vice Chair, Tax Executive Comm., American Institute of Certified Public Accountants). Stacking can impose a much higher average rate of tax on the secondary worker's earnings than applies to the primary earner. If, for example, the husband's first \$10,000 of income was taxed at 10% and his second \$10,000 of income was taxed at the 30% rate, his average rate of tax would not be 30% but 20%, reflecting the lower rate that applied to him in the bottom bracket. But if his wife earned \$10,000 more, the aggregation of incomes in the joint return would make 30% her bottom tax bracket. Her average tax rate would be no less than 30% and might be higher if her income exceeded the ceiling of that bracket.

<sup>139</sup> See Blumberg, *supra* note 90, at 95.

<sup>140</sup> Accord McCaffery, *supra* note 125, at 992-994 (arguing that continuing wage gap between husbands and wives continues to place wives in the role of secondary earner); Rosen 1977, *supra* note 122, at 426 (pointing out the "social reality" that "it is assumed that the husband will work full time and the wife make her labor force decision

already established that the labor force participation of married women was quite responsive to increases in real net wages. This suggested to some economists that high effective tax rates, which would reduce net wages, would lower the amount of time that married women would spend in paid employment. The concern raised was that the high effective tax rate that the joint return imposed on married women was creating inefficiencies and changing the work choices that women would otherwise make.<sup>141</sup>

But some legal scholars and economists defended the joint return and even marriage penalties. Partly in response to a bill that proposed a "marriage-neutral federal income tax," Professor Boris Bittker developed what has become the classical statement of the competing considerations in the taxation of married couples.<sup>142</sup> Pointing out that tax neutrality concerning marriage could not be reconciled with the goal of equal taxation of married couples with equal incomes in a tax system with progressive rates, he described a "collision of objectives."<sup>143</sup> Bittker argued that the correct policy choice was to retain aggregation and equal taxation of married couples, despite the appearance of marriage penalties. Marriage neutrality he found was inconsistent with what he described as "a dominant theme of tax theory for at least 50 years — the irrelevance of ownership within intimate family groups . . . together with its implication that taxpaying capacity is best measured by consolidated marital or family income."<sup>144</sup> In his view, couples neutrality was the

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conditional on the husband's income").

<sup>141</sup> See Rosen 1977, *supra* note 122, at 426.

<sup>142</sup> See Bittker, *supra* note 99, at 1395-6. Assistant Secretary of Treasury for Tax Policy, Edwin S. Cohen, in testimony before the House Ways and Means Committee in 1972 presented the analysis as a mathematical proof. GRAETZ & SCHENK, *supra* note 97, at 471 (presenting quotes of Edwin S. Cohen's 1972 testimony before the House Ways and Means Committee); see also *Hearings on the Tax Treatment of Single Persons and Married Persons Where Both Spouses are Working Before the House Comm. on Ways and Means*, 93rd Cong. (1972) (statement of Edwin S. Cohen, Assistant for the Treasury on Tax Policy). See also McCaffery, *supra* note 126, at nn.25-26; Zelenak, *supra* note 78, at 342-342.

<sup>143</sup> Bittker *supra* note 99, at 1395-6, 1430-31. This statement is regarded as the classical treatment of the issue.

<sup>144</sup> *Id.* at 1396; accord Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1590



better choice.

In 1981, tax theory notwithstanding, Congress allowed dual earner married couples a deduction intended to recognize the individual incomes of the spouses and reduce marriage penalties. Dual earner couples filing joint returns were allowed to deduct up to \$3,000 a year as an adjustment to gross income. The revenue estimate put the revenue loss from the dual earner deduction at \$37.5 million over five years.<sup>145</sup> The dual earner deduction was included in the Economic Tax Recovery Act of 1981, the multi-year \$251 billion tax cut for individuals that initiated President Ronald Reagan's supply side economics program to shrink the government and stimulate the economy with tax savings. The 1981 Reagan tax law enacted the largest cut in American history.<sup>146</sup>

The legislative history of the Economic Tax Recovery Act of 1981 prepared by the Joint Committee on Taxation reported that Congress had been "obliged to make a distinction between one-earner and two-earner married couples" in order to alleviate marriage penalties that "undermined respect for the family by affected individuals and for the tax system itself."<sup>147</sup> But the Joint Committee noted that the second-earner deduction reduced marriage penalties and improved work incentives "without abandoning the basic principle of encouraging joint returns."<sup>148</sup> Although the dual earner credit did not eliminate marriage penalties, it did reduce them substantially.<sup>149</sup> However, the dual earner deduction also increased marriage bonuses for some dual earner couples, as advocates of individual taxation of

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(1977) (defending the joint return on grounds that husband and wife pool income and "benefit more or less equally from the total available").

<sup>145</sup> STAFF OF THE JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF THE ECONOMIC RECOVERY ACT OF 1981 JCS-71-81, at 33-37 (1981) [hereinafter GENERAL EXPLANATION OF ERTA].

<sup>146</sup> See *id.* at 17-19; see also BRINKLEY, *supra* note 115, at 909-912.

<sup>147</sup> See GENERAL EXPLANATION OF ERTA, *supra* note 145, at 34.

<sup>148</sup> *Id.* at 35.

<sup>149</sup> See Harvey S. Rosen, *The Marriage Penalty is Down But Not Out*, 40 NAT. TAX J. 567, 568 (1987) (commenting on findings of Feenberg) [hereinafter Rosen 1987].

married couples were quick to point out.<sup>150</sup>

The bipartisan broad based tax reform of 1986 that flattened rates in President Reagan's second Administration also repealed the dual earner deduction that had been enacted five years before during his first Administration. The legislative history indicates that Congress expected that marriage penalties would be reduced by the effects of rate changes and changes in the standard deduction.<sup>151</sup> Subsequent analysis confirmed that both the incidence of marriage penalties and the average size of penalties were lower after 1986. But the same study also found that many married couples were still paying sizable penalties. For 1988, about 40 percent of married couples were found to be paying marriage penalties averaging \$1,100. Further, about 53 percent of married couples were experiencing marriage bonuses which averaged \$609. In 1988 penalties were projected to be \$24 billion and bonuses to be \$17.4 billion.<sup>152</sup>

Renewed interest in marriage penalties and bonuses prompted further scholarly inquiry into the impact of the joint return system in the late 1980s and early 1990s. The impact of marriage penalties and marriage bonuses on marriage decisions and on the choice of work for married women again became the subject of wide discussion and concern. A new wave of economics and legal scholarship critical of the joint return on behavioral and theoretical grounds began in the early 1990s,<sup>153</sup> just before the enactment of the 1993 Tax Reform Act which raised marriage penalties and bonuses to new heights. Much of

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<sup>150</sup> See Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980).

<sup>151</sup> See 1986 JOINT COMM. GENERAL EXPLANATION, *supra* note 39, at 19. The Republican Party won control of the Senate in 1980, and kept it until 1986, but the Democrats remained in the majority in the House throughout both of Reagan's terms in office. See BRINKLEY, *supra* note 115, at 909, 915, 921.

<sup>152</sup> See Rosen 1987, *supra* note 149, at 574.

<sup>153</sup> See e.g., Edward McCaffery, *supra* note 126; Marjorie Kornhauser, *Love, Money and the IRS: Family Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); Julie A. Nelson, *Tax Reform and Feminist Theory in the United States Context: Incorporating Human Connection*, (unpublished paper prepared for conference on Emancipatory Economics and Tax Reform, University of Limburg, Feb. 22, 1991) (copy on file in with author). Tax scholars also began to present the marriage penalty issue to wider audiences. See, e.g., Ann F. Thomas, *Women and Taxes: The Costly Connection*, RADCLIFFE Q., June 1993, at 9.

this criticism can be described as feminist because of its focus on the impact of the marriage penalty and bonus on the economic power and labor force participation of married women. Disincentives to paid employment and inequitable taxation of the second earner have continued to be the primary criticisms since the 1970s. However, a new generation of feminist scholars has also expressed concern about biases against recognizing the housewife's economic contribution.<sup>154</sup>

These critics have also questioned the theoretical premises of the joint return and the assumptions about the economics of marriage upon which supporters of the joint return have relied.<sup>155</sup> In addition to the feminist criticism, the joint return is being questioned on tax efficiency grounds as well. Here the argument is that the federal income tax should be neutral with respect to the choice between market work and housework for married women because it is a socially contested issue.<sup>156</sup> Continuing empirical research examining the impact of tax incentives and disincentives on the decision to marry and the divorce is beginning to indicate that women are influenced by tax outcomes in making these choices.<sup>157</sup> Empirical research has also reopened the question of whether husband and wife pool their incomes and consume as a unit or whether consumption depends on the source of income.<sup>158</sup>

#### 4. Recent History – The 103<sup>rd</sup> and 104<sup>th</sup> Congresses

The Revenue Reconciliation Act of 1993, signed into law by

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<sup>154</sup> See, e.g., Staudt, *supra* note 36, at 1571-1578 (advocating recognition of economic contribution of housewives through taxation and credit system); Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUMBIA L. REV. 2001, 2001-2008 (1996) (arguing that benefits of individual filing are overstated and that feminist goals are not well served by tax reform proposals alone but require coordination and implementation with family allowances to support caregivers).

<sup>155</sup> See McCaffery, *supra* note 126; Kornhauser, *supra* note 153.

<sup>156</sup> Zelenak, *supra* note 78. See also David A. Weisbach, *Line Drawing, Doctrine and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627 (1999) (analyzing efficiency in doctrinal decision making and identifying the distinction between market income and imputed income as one of the important line drawing issues in the tax law).

<sup>157</sup> Alm & Whittington, *supra* note 6.

<sup>158</sup> See, e.g., Amy Ellen Schwartz, *Whose Money Is It?*, 16 N.Y.L. SCH. J. HUM. RTS. 135 (1999).

President Clinton on August 10, 1993, substantially increased marriage penalties in the income tax and drew criticism from Congress and the media. The 1993 amendments added two tax brackets to the top of the income scale and expanded the earned income tax credits at the bottom. Because of the way they were structured, these changes affected many dual income couples adversely.<sup>159</sup> The marriage penalty effects of the 1993 tax increases provoked comment from a surprising array of sources. Liberal Democrats such as Representative Barbara Kennelly (D-CT) and the Congressional Caucus for Women's Issues aired their critique of the new marriage penalties publicly. At the same time, the subject of the income tax marriage penalty made news in the conservative and financial press.<sup>160</sup>

Under the headline "Living in Sin to Cut Tax Bill Would Look Even Better to Some Under Clinton Plan," *The Wall Street Journal* published an article describing and analyzing the marriage penalty and marriage bonus effects of the President's proposed tax bill while it was still pending.<sup>161</sup> The country's leading financial periodical gave prominence to marriage penalties — featuring the long and detailed article on page one of its Money and Investing section. With the aid of a table prepared by KPMG Peat Marwick, one of the country's largest accounting firms and the auditor of many

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<sup>159</sup> Revenue Reconciliation Act of 1993, Pub. Law No. 103-66, sec. 13131(a) & 13201(a), § 32(a)(b), § 1(a)-(e), 107 Stat. 415, 435, 458. In the earned income credit, joint return filers remained subject to the same income phaseouts as did unmarried individuals, causing dual income couples who married to lose some of the new tax benefits that would have come to them had they remained single. At the upper end, the breakpoints for the top two brackets for joint returns began to converge with the unmarried individual brackets, reducing bonuses and increasing marriage tax penalties. The top marginal rate of 39.6% began at \$250,000 for both joint returns and unmarried individuals. See also Daniel R. Feenberg & Harvey S. Rosen, *Recent Developments in the Marriage Tax*, 48 NAT. TAX J. 91 (1995) (assessing impact of the 1993 tax law amendments); *supra* notes 45-47 and accompanying text concerning breakpoints.

<sup>160</sup> Rep. Kennelly Tells Clinton His Top Rate Hike Would Widen Marriage Penalty, DAILY TAX REPORT, March 12, 1993, at D-15 (reporting remarks of Rep. Kennelly at meeting of members of Congressional Caucus for Women's Issues with President Clinton on March 11, 1993).

<sup>161</sup> Ellen E. Schultz, *Living in Sin to Cut Tax Bill Would Look Even Better to Some Under Clinton Plan*, WALL ST. J., March 9, 1993, at C1.

of the largest corporations, the *Journal* provided an estimate of marriage penalties for dual earner working couples at different income levels. For the low-income dual earners with \$24,000 of combined income, it showed a marriage penalty of \$4,040 and an effective tax rate of 45 percent, including Social Security tax. At the opposite end, the *Journal* reported that a dual earner couple earning \$250,000 each would pay \$27,150 to be married. The marriage bonus couple described was also affluent; with the husband earning \$170,000 and the wife earning \$12,000, marriage reduced their combined income tax burden by \$4,464.<sup>162</sup>

Social conservatives in Congress seized the issue of marriage penalties and linked it to their concerns about family values and sexual morality. One of the earliest legislative responses was that of then-freshman Representative Ernest J. Istook, Jr. (R-OK), an outspoken advocate of school prayer and other issues on the agenda of the Republican social conservatives.<sup>163</sup> Mr. Istook's bill, introduced on February 2, 1994, decreed that "no husband and wife shall be required to pay more in income taxes under this subtitle because of the fact that they were legally married during a taxable year, then they would be required to pay if they had not been married." The Istook bill specified that its new policy for the taxation of married couples would be implemented by offering husbands and wives the annual option to use the filing status that the spouses "would otherwise have used" if they had not been married.<sup>164</sup> Joining him in the original introduction of the bill were sixteen Republican stalwarts, including Representative J. Dennis Hastert (R-IL), the Speaker of the House in the 106<sup>th</sup> Congress.<sup>165</sup> Istook's proposal eventually gathered 62 co-

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<sup>162</sup> *Id.*

<sup>163</sup> See, e.g., Patrick B. McGuigan, *Ernest Istook: The Final Installment*, SUNDAY OKLAHOMAN (City Edition), Nov. 1, 1992, at 30, (quoting Representative Istook expressing approval for "voluntary nonsectarian prayer being offered in a classroom setting," school vouchers, and family values and opposition to condom distribution to high school students). Rep. Istook was also the sponsor of the Religious Freedom Amendment bill, H.R.J. Res. 78, 105th Cong. (1997), which called for a constitutional amendment to permit school prayer.

<sup>164</sup> H.R. 3851, 103rd Cong. (1994) (introduced by Mr. Istook (R-OK), Feb. 10, 1994).

<sup>165</sup> See, e.g., Hastert Corralles Fractious GOP to Pass \$792 Billion Tax Cut,

sponsors.<sup>166</sup> Representative Istook's bill was the only one that addressed itself to the income tax marriage penalty in the 103<sup>rd</sup> Congress. Indeed, it was the first general marriage tax penalty relief bill introduced in Congress since 1981.<sup>167</sup>

By September 27, 1994, the income tax marriage penalty was close to the top of the agenda of Representative Newt Gingrich (R-GA) and the insurgent conservative Republicans in the House. Repeal of the income tax marriage penalty appeared as one of the planks in their Contract with America. Three hundred fifty Republican candidates in the 1994 congressional bi-election were reported to have signed the Contract. Having gained control of the House, in the 104<sup>th</sup> Congress they began introducing the ten reforms that they had promised. In observance of their pledge, signers of the Contract introduced the Contract With American Tax Relief Act of 1995, which called for a marriage tax penalty reduction through a dual earner credit. The Contract with America bills generally offered the same solution — a dual earner tax credit of up to \$145.<sup>168</sup> Marriage tax penalty relief of the far reaching kind that Representative Istook had proposed was not seen in the bills introduced in the 104<sup>th</sup>

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84 TAX NOTES 495 (1999) (describing Rep. Hastert's roll as Speaker of the House).

<sup>166</sup> H.R. 3851; Bill Summary & Status for the 103<sup>rd</sup> Congress (visited Dec. 11, 1999) <<http://thomas.loc.gov>>.

<sup>167</sup> There were two marriage tax penalty relief proposals for the benefit of senior citizens in the intervening Congresses. In 1983, during the 98th Congress, Senator Boren proposed an amendment to the Social Security Act Amendments of 1983 that would have eliminated the phaseout marriage penalty in the taxation of Social Security benefits. It did was not agreed to in the Senate. See S. Amdt. 124, 98th Cong. (1983) and proposed as Amdt. to H.R. 1900, 98th Cong. (1983); *Bill Summary & Status for the 98th Congress* (visited Dec. 11, 1999) <<http://thomas.loc.gov>>. In the 101st Congress, Representative Ritter introduced a bill to "eliminate the marriage penalty for senior citizens in the standard deduction" and also to remove the phaseout marriage penalty in the taxation of Social Security benefits. Senior Citizens' Tax Fairness Act of 1990, H.R. 4904, 101st Cong. (1990).

<sup>168</sup> Compare Contract with America Tax Relief Act of 1995, H.R. 1215, 104th Cong. (1995), § 102 (introduced by Mr. Archer (R-TX)) and Tax Fairness and Deficit Reduction Act of 1995, H.R. 1327, § 6102, 104th Cong. (1995) (introduced by Mr. Kasich (R-OH)). American Dream Restoration Act, H.R. 6, 104th Cong. (1995), introduced by Representatives Crane (R-IL), Nussle (R-IA), and Salmon (R-AZ), offered a different formulation, allotting a total budget of \$2 billion to marriage penalty relief. Their bill called for the Secretary to determine the dollar amount each year.

Congress.

## II. MARRIAGE PENALTY RELIEF PROPOSALS IN THE 105<sup>TH</sup> AND 106<sup>TH</sup> CONGRESSES

In the 105<sup>th</sup> and 106<sup>th</sup> Congresses, policy makers have shown more interest in the income tax marriage penalty than at any time since 1981 when the short-lived dual earner deduction was enacted. More than forty-five measures aimed at providing marriage tax penalty relief were introduced in the three most recent sessions of Congress. Both Congresses put marriage penalty relief proposals into major legislation but neither Congress succeeded in enacting its proposals into law. The various bills advanced different solutions to the marriage penalty, often more than one at a time. Over the course of the last three years, two parallel trends have developed. Defying the dictates of tax theory concerning the inconsistencies of couples neutrality and marriage neutrality, Congress has shown strong interest in retaining and enhancing the joint return but at the same time making it optional by allowing dual income couples to elect to be taxed on the basis of individual incomes.

The solutions to the marriage penalty that Congress has been pursuing indicate both a continuing commitment to the joint return and skepticism about its fairness in all instances. The idea of an optional combined return of individual incomes, which received substantial support in both Congresses, represents a significant departure from the theory and practice of the joint return. It would allow married couples with equal total incomes to be taxed quite differently, depending on how the income was earned or owned within each marriage. Yet framed as an alternative to the joint return, it confirms that the aggregation system is a valid method of taxing some couples. From the point of view of theory, the divergent and sometimes internally inconsistent proposals for marriage penalty relief present a confused picture. Some simply re-enforce the aggregation principle in the taxation of married couples while others promote disaggregation by offering filing options. From the perspective of tax politics, these diverse proposals suggest a concern to try to accommodate the pressing claims of dual earner married couples for

equitable treatment without disturbing the now-traditional tax benefits of the joint return for sole earner couples.

The high level of interest in income tax marriage penalties in the 105<sup>th</sup> and 106<sup>th</sup> Congresses can be attributed to a number of factors. Since 1993, marriage penalties have been a more tangible and more visible concern of taxpayers. The substantial increases in the marriage penalty effects of the income tax after the 1993 amendments and the ever-larger numbers of dual earner married couples who pay penalties have both contributed to moving the discussion of the issue from the academic tax and economics literatures to the center of the political arena again.<sup>169</sup> An important event in this transition was the decision of the insurgent Republican fiscal and social conservatives to include the repeal of the marriage penalty in their Contract with America campaign in 1994.<sup>170</sup> Another significant factor has been the availability of quantitative data from the Congressional Budget Office and the General Accounting Office concerning the incidence, distribution, and magnitude of marriage penalties.<sup>171</sup>

The analysis that follows of trends in the marriage relief proposals in the 105<sup>th</sup> and 106<sup>th</sup> Congresses looks at the bills themselves and the impact that the proposals would have if enacted rather than at the less specific discussions of goals and concerns that surrounds the legislative process. Although the party politics of the marriage tax penalty debate is not the focus of this article, a few observations about the political context are necessary. Legislative proposals for marriage penalty relief have come from both Republicans and Democrats, but Republicans have dominated the field as they have generally done in tax legislation in the three most recent Congresses.

Since the 1994 congressional elections, the Republican Party

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<sup>169</sup> See, e.g., CBO STUDY, *supra* note 4, at 8; Feenberg & Rosen, *supra* note 159. See also *supra* text accompanying notes 92-96 (discussing increases in the number of dual earner couples and the impact of this trend on marriage penalties).

<sup>170</sup> See *supra* text accompanying notes 163- 68.

<sup>171</sup> See CBO STUDY, *supra* note 4 (analysis of statutory sources of marriage penalties upon which it relies); GEN. ACCT. OFF., *Income Tax Treatment of Married and Single Individuals*, GAO/GGD-96-175 (September 1996). See also Bruce Bartlett, *The Politics of the Marriage Penalty*, 16 N.Y.L. SCH. J. HUM. RTS. 185 (discussing the influence of the CBO Study).



has maintained a majority in both the House of Representatives and the Senate, pursuing an agenda of tax cuts and other fiscal policies at odds with those of the President and his Democratic Party. Although the first session reduced the capital gains tax and enacted the child credit promised in the Contract with America, the second session of the 105<sup>th</sup> Congress, riven by the bitter partisan politics of the presidential impeachment, did not enact any of the major pieces of tax legislation that the majority Republican leadership sought.<sup>172</sup> By the beginning of 1999, a budget surplus of as much as \$ 3 trillion was projected for the ensuing ten years. Early in the fiscal year 2000 budget process, President Clinton made clear his intention to veto any bill that attempted to cut taxes before his goals for Social Security, national debt reduction, and other fiscal reforms are accomplished.<sup>173</sup> He made good his threat in his September veto of the 1999 tax cut bill.

The President's Fiscal Year 2000 Budget proposal, released in early February 1999, did not include any recommendation for general marriage penalty relief. However, it did call for an expansion of the dependent and child care credit, which primarily applies to dual earner couples, but the Administration identified this proposal simply as "[m]aking Child Care More Affordable."<sup>174</sup> Although he did not directly address the issue of marriage penalties, Secretary of the Treasury, Robert E. Rubin, in his testimony before the House Ways and Means Committee and the Senate Finance Committee, made it clear that the Administration was not particularly interested in the

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<sup>172</sup> See note 229 *infra* for a fuller discussion of the failed 1998 tax cut bill.

<sup>173</sup> See, e.g., *House Republicans in Quandary Over Approach to Tax Policy*, DAILY TAX REPORT, Feb. 11, 1999, at GG-1 (quoting Rep. Callahan (R-AL) "We don't have the votes to override a veto, which the president is going to do to any tax cut"); *Appearance of GOP Unity on Budget, Taxes May Hide Key Disagreements*, DAILY TAX REPORT, Feb. 2, 1999, at GG-13; *Lott's Radio Address*, 1999 TAX NOTES TODAY 31-25, Feb. 13, 1999 available in LEXIS Fedtax Library, TNT file.

<sup>174</sup> The Administration proposed to extend this non-refundable tax credit to all parents of infants, without regard to whether the parents were in paid employment or whether they had child care expenses. Hence stay-at-home parents of infants under the age of one year and working parents whose infants were cared for by other family members would have been eligible for a partial credit. See DEPARTMENT OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION'S REVENUE PROPOSALS 23-25 (1999).

issue. Secretary Rubin told the Senate and House tax writing committees that "tax burdens for working families are at record lows for recent decades."<sup>175</sup> It has been against this background of anticipated presidential vetoes, and in the 106<sup>th</sup>, the anticipated budget surplus, that members of both the majority and minority parties in Congress have made their proposals for marriage penalty relief.<sup>176</sup>

The bills analyzed here were found by means of word searches on THOMAS and the LEXIS bill tracking service. They are bills that are self-identified as marriage penalty relief measures.<sup>177</sup> Floor amendments that were not agreed to generally are not included in the survey. Support and interest in bills that have not been enacted is difficult to measure. In the discussion below, assessments of interest and support for the different ideas about marriage penalty relief are based not only on the endorsement of the tax writing committees or the inclusion of a proposal in major legislation — which indicates interest on the part of Congressional leadership as well as member support — but also on the number of co-sponsors of the bills of individual members. The number of bills that proposed a particular idea is also considered a measure of support for the solution advanced. Co-sponsors are reported both by the LEXIS bill tracking service and in the THOMAS database. Neither measure can be regarded as politically conclusive; both can fairly be regarded as representative of current congressional sentiment.

The future of the joint return system of marriage penalties and marriage bonuses is unclear at this time. Where the next Congress

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<sup>175</sup> *Treasury Secretary Robert E. Rubin Testimony Before the Senate Finance Comm.*, Text as Prepared for Delivery, Feb. 2, 1999, (visited Dec. 11, 1999) <http://treas.gov/press/releases>.

<sup>176</sup> See e.g., SENATE FIN. COMM., REPORT ON THE TAXPAYER REFUND ACT OF 1999 (S.1429), S. REP. NO. 106-120, reprinted in BNA TEXT SUPP., July 27, 1999, at S-110. [hereinafter REPORT ON THE TAXPAYER REFUND ACT]. See *infra* text accompanying notes 252, 302-307 (discussing veto).

<sup>177</sup> The bills and proposals aimed at adapting retirement savings tax incentives to the work patterns of women in the labor force and the provisions addressing divorce-related issues are not within the scope of this article. These subjects are addressed in the Senate Finance Committee Report and Minority Views under the heading "Enhancing Fairness for Women." See also, Symposium: *Forum on Women and Social Security: What Would Equity Look Like?*, 16 N.Y.L. SCH. J. HUM. RTS. 217 (1999).

will find consensus and, indeed, whether it will forge a new agreement on the taxation of marriage remains to be seen. The current crop of Congressional marriage penalty relief proposals suggest an interest in enhancing the marriage bonus value of the joint return and reducing marriage penalties at the same time, an expensive program by any measure. Whatever direction the income tax takes on the question of marriage penalties and marriage bonuses, it will be important to understand the competing ideas from among which policy choices are made. Whether the choice is to change the joint return system broadly or narrowly or to leave it alone, the alternatives considered along the way will illuminate the tax and social policy content of the decisions reached. Observing Congress in the midst of the process is an opportunity to listen to policy makers both speaking to their constituencies and thinking out loud through their legislative proposals.<sup>178</sup>

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<sup>178</sup> The motivation of legislators is the subject of an extensive political science and law and economics literature. Explanations of the motivations for introducing legislation in this literature range from the altruistic and pluralist public interest view of competing ideas and beneficial compromises to the more cynical view of public choice theory which sees legislators as beholden, perhaps financially, to interest groups who in turn are competing for advantage. Professor Shaviro has pointed out that other, non-monetary benefits of a more directly political nature can accrue to legislators who introduce bills or co-sponsor them. These intangible benefits include enhancing reputation for presenting innovative ideas, for leadership skills in advocacy and developing consensus, and for intellectual leadership shown by mastery and knowledge of difficult subject matter as well as the opportunity to exercise power. Introducing legislation can also be a means of symbolic communication with constituents and thus a means of promoting their own re-election by advocating laws that large numbers of voters in the Member's district like. Both of these categories of benefits can be reaped without regard to the actual impact of the legislation and, indeed, whether or not it is enacted. See Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980's*, 139 U. PA. L. REV. 1, 3-11 (1990) (arguing that both public interest and public choice theory offer incomplete explanations for tax reform legislation, ignoring the inherent value and benefit for the legislator of legislating as a means of symbolic communication and an exercise of power, benefits that may not depend on the actual impact of the legislation sponsored). The naming of bills may be an important part of the symbolic communication. Many of the measures described below that would only modestly reduce marriage penalties bear the title "Marriage Penalty Elimination Act."

*A. The Proposals – Summary and Scorecard*

The multitude of income tax marriage penalty relief measures introduced during the three most recent sessions of Congress can usefully be divided into eight major categories. In terms of the impact on the marriage penalty and its sources in the federal income tax law, the specific proposals pursued by Congress during these three years have ranged from very narrow to over-broad. The chronological development of the legislation and the trends in congressional sponsorship and support for the different marriage penalty relief proposals over the past three years are described in detail in the next section. Figure A below provides a summary analysis in tabular form of the scope and impact of the major categories of proposals to reduce income tax marriage penalties and some of the important variations.

Proposals to revive the dual earner deduction of the 1980s formed one of the major categories of penalty relief solutions presented in legislation during the 1997 to 1999 period.<sup>179</sup> Amendments that sought to reduce EITC phaseout marriage penalties were found in a number bills and represent another approach.<sup>180</sup> Proposals for comprehensive elimination of the marriage penalty made up a third and quite different category of marriage penalty relief ideas. The specific proposal introduced in these bills was the optional combined return of individual incomes, a hybrid approach to income measurement and liability composed of features of both the individual and joint return filing statuses.<sup>181</sup>

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<sup>179</sup> For a fuller discussion of the dual earner deduction in the 1980s see text accompanying note 145, *supra*; for a discussion of the dual earner deduction proposals and bills see text accompanying note 205, *infra*. See also Appendix - Tables 3 & 4 *infra*, listing the bills introduced in the three sessions and noting the categories of proposals in each.

<sup>180</sup> See text beginning at note 277, *infra*, for a discussion of the EITC relief proposals; see also Appendix - Tables 1 & 2 *infra* for a listing of the EITC relief bills introduced in each chamber during the session.

<sup>181</sup> See text beginning at note 213, *infra*; Appendix – Tables 3 & 4 for a listing of bills introducing the optional combined return in each session and notation of sponsorships. The term optional combined return of individual incomes is introduced in this article as a convenient and distinguishing name for this proposal which in the bills introducing it is generally called “a combined return of income taxes” or “combined return under which each spouse is taxed using the rates applicable to unmarried

The five other major proposals can be broadly described as attempts to re-establish the fuller income-splitting results of the 1948 joint return, in whole or in part. One of the proposals in this group did indeed call for an income splitting combined return to be created as an optional filing status for married couples.<sup>182</sup> Another proposal would have produced much the same results as the income splitting 1948 joint return but took the approach of combining changes in the structures of the standard deduction and of the rate tables to achieve this outcome. These proposals for structural income splitting would have made the joint return standard deduction equal to double the amount allowed to unmarried individuals and at the same time would have revised the tax rate tables to make the brackets for joint return filers twice as wide as those for unmarried individuals.<sup>183</sup>

Proposals to restructure only the standard deduction and give joint return filers a doubled deduction formed another separate and significant category of bills.<sup>184</sup> Another group of bills proposed to revise the rate tables only and give joint return filers brackets double in width to those for unmarrieds.<sup>185</sup> Yet another group of proposals following this theme would have doubled only the lowest bracket for the joint return.<sup>186</sup>

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individuals." See, e.g., The Marriage Tax Elimination Act, S.1314, 105th Cong. (1997).

<sup>182</sup> See text beginning at notes 225, 269 *infra* for a fuller discussion of the proposal; see also Appendix-Tables 3 & 4 for listing of bills introducing income splitting combined return and co-sponsorships.

<sup>183</sup> See text beginning at notes 237, 268, 273, *infra* for a fuller discussion of structural income splitting proposals; see also Appendix-Tables 3 & 4 for list of bills proposing both standard deduction doubling and bracket doubling. This article introduces the term structural income splitting for this proposal to indicate both its impact and technical form. The bills themselves do not include any designation or name for the combination of amendments they propose.

<sup>184</sup> See text beginning at note 197 *infra* for a fuller discussion of the proposals to allow joint filers a doubled standard deduction; see also Appendix-Tables 3 & 4 for a listing of the bills that made this proposal as a separate relief measure and in tandem with bracket doubling in a structural income splitting proposal.

<sup>185</sup> See text beginning at note 240 *infra* for a fuller discussion of the bracket doubling proposals; see also Appendix-Tables 3 & 4 for a listing of bills proposing bracket doubling both as a separate solution to marriage penalties and as part of structural income splitting.

<sup>186</sup> See beginning at note 270 *infra* for a discussion of proposals for doubling the lowest bracket for joint return filers; see also Appendix-Tables 3 & 4 for a listing of

Figure A provides a comparison and summary of the scope and impact of these eight major categories of relief proposals and includes four additional proposals, for a total of twelve. Two of the additions represent important variations of the major proposals. The proposal made by Senator Gramm to create a new deduction from gross income (GI) for joint return filers is in concept in the same category as the proposal to allow joint return filers a standard deduction equal to twice the deduction for unmarried filers. Both would remove the marriage penalty feature of the standard deduction by increasing deductions for joint return filers. The Gramm proposal varies from the doubling proposal in four ways. It measures the marriage penalty in the standard deduction against the amount for heads of household deduction as well as against the unmarried individual's deduction. It positions its anti-penalty deduction as a subtraction from gross income so that it will reduce adjusted gross income and thus also encompass relief from phaseout penalties and the EITC marriage penalty in particular. The deduction also is available whether or not the standard deduction is claimed and hence may be used by more taxpayers. Finally, it places an income limit on the relief, a restriction that is not present in any of the other proposals to eliminate the marriage penalty element of the standard deduction.<sup>187</sup> Including the Gramm variation as a separate category in Figure A provides a basis for comparing the impact of measures with income limitations to those without and also demonstrates the greater impact of measures that reduce AGI as compared to those that have their effect below the line only.

For purposes of the scope and impact analysis, Figure A divides the category of EITC marriage penalty relief measures in two, presenting the proposals that would reduce phaseout penalties only for dual earner couples as a solution distinct from a general increase in phaseout ceilings for all joint return filers. In terms of scope this distinction is important and points out that a policy choice to reduce the EITC marriage penalty can be made in both a focused manner or

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bills making this proposal.

<sup>187</sup> Compare S. Amdt. 2686, 105th Cong. (1998) with Save Social Security and Taxpayer Relief Act of 1998, H.R. 4597, 105th Cong. (1998). For a discussion of the doubling proposal, see text beginning *infra* note 192; see also Appendix - Table 3, *infra*.

as part of a general increase in EITC credits for married couples.

Two additional categories are also presented in Figure A — the proposals to eliminate the phaseout marriage penalty in the deduction for higher education loan interest payments and the proposals to expand the child care tax credit. Both are considered too specific in their focus to warrant inclusion in the group of major marriage penalty relief proposals but are included here for comparison and to provide a fuller picture of the range of proposals under consideration in Congress.<sup>188</sup> Congressional support for the eight major categories of proposals, as evidenced in bills introduced and co-sponsorships, is analyzed and presented in summary form in tables one through four in the appendix.

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<sup>188</sup> For a discussion of the amendments to IRC section 221 (1999) proposed in 1999 to remove the phaseout marriage penalty in the education loan interest deduction, *see supra* note 64 and accompanying text; *see also infra* note 302. For a discussion of the child care phaseout penalty and proposals to expand the child and dependent care credit, IRC § 21 (1999), *see supra* note 65 and text; *see also* text accompanying notes 255, 283-6, and 303 *infra*.

**FIGURE A**  
**IMPACT OF INCOME TAX MARRIAGE PENALTY RELIEF PROPOSALS**  
**INTRODUCED IN 105<sup>TH</sup> CONGRESS AND 106<sup>TH</sup> CONGRESS, 1<sup>ST</sup> SESSION**

Proposal	Marriage Penalty Relief Impact Scoring					
	Marriage penalty focus	Phaseout penalty relief	EITC phaseout relief	General relief impact	Individual spouses recognized	Increases marriage bonuses
Structural income splitting	Inefficient	no	no	yes; less if itemize	no	yes
Standard deduction doubled for joint return	Inefficient	no	no	some; none if itemize	no	yes
Tax brackets doubled for joint returns	Inefficient	no	no	yes	no	yes
Income splitting combined return	Inefficient	no	no	yes; less if itemize	no	yes
Lowest tax bracket widened overall	Inefficient	no	no	no; income limits apply	no	yes
Deduction from GI for jt. returns up to \$50,000	Inefficient	yes	yes; in Gramm proposal	no; income limits apply	no	yes
Edu-loan interest jt. return phase-out relief	Inefficient	§ 221; deduction reduces AGI	maybe	no	no	yes
Child care tax credit expansion	Efficient but less so due to infant year credit	only for § 21	no	no; requires qualified dependents in household	somewhat; limited by joint return AGI	somewhat; due to infant year credit
EITC phase-out relief for joint returns	Inefficient	no	yes	no; EITC targeted to low earners	no	yes
EITC phase-out relief for dual earners only	More efficient than most *	no	yes	no; EITC targeted to low earners	yes	some*
Dual earner deduction or tax credit	More efficient than most *	yes	in some proposals	yes; but some phase-outs proposed	yes	some*
Optional combined return of individual incomes	Efficient	no; as proposed joint return retained for credits	no; as proposed joint return retained for credits	yes; no source or income limits	yes	no

\* A SOLE EARNER COUPLE CANNOT FALL INTO THE MARRIAGE PENALTY CATEGORY BUT DUAL EARNER COUPLES WHOSE EARNINGS ARE VERY UNEQUAL CAN HAVE MARRIAGE BONUSES AND ALSO QUALIFY FOR DUAL EARNER DEDUCTIONS.



In assessing the scope and efficacy of the proposals introduced as marriage penalty relief measures, six criteria are used: (1) the marriage penalty focus; (2) the extent of phaseout penalty relief; (3) the extent of EITC (earned income tax credit) penalty relief; (4) the generality of application; (5) the recognition of the individual incomes of the spouses; and (6) whether marriage bonuses are increased. Figure A uses these criteria to rate each of the twelve categories of proposals.

Proposals that are restricted in their impact to reducing the marriage penalties in current law are described as having an efficient marriage penalty focus. Those proposals that would result in a tax reduction for all joint return filers, spending fiscal resources to enhance marriage bonuses to sole earner couples while providing incidental relief to dual earner or dual income married couples, are rated as inefficient or having a poor marriage penalty focus.

The tax credit and deduction phaseouts tend to be based on adjusted gross income. Hence the extent of phaseout penalty relief is determined by whether the proposed amendment has its impact "above the line," reducing AGI, or would alter the phaseout formula in a particular tax credit or deduction provision. The phaseout of the EITC is based on AGI and also on a different measure, earned income. To reduce the EITC marriage penalties, which can be unusually severe, targeted amendments are required. For this reason, determining the impact of a proposal on the EITC marriage penalty requires a separate evaluation.<sup>189</sup> The criterion generality of application assesses whether the proposal offers income tax marriage penalty relief broadly or only to a particular group of married couples. Relief targeted to a given income class or source of income would not be rated general relief.

The fifth criterion, the extent of recognition of the individual incomes of the spouses goes to the heart of the aggregation issue. The present joint return system aggregates the earnings and income of husband and wife, treating dual earner and sole couples with the same money incomes as having comparable economic power and ability to

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<sup>189</sup> See text beginning at note 61 *supra* for a discussion of phaseout marriage penalties. Adjusted gross income [AGI] is defined in I.R.C. section 62 (a) (1999). See text beginning at note 49 *supra* for a discussion of EITC marriage penalties.

pay tax. The aggregation precept disregards the empirical data confirming that most couples do not pool their earnings but tend to regard the earner as the owner of his market income. Moreover, by equating sole earner and dual earner couples, the joint return system ignores the real economic costs of having two wage earners rather than one, tending to devalue the work effort of married women both in the home and in paid employment.<sup>190</sup> Proposals to measure income tax liability or to extend marriage penalty relief on the basis of individual incomes are rated as recognizing individual spouses, those that base relief on joint return income are rated as not recognizing individual spouses.

The final criterion is not a measure of marriage penalty relief but instead tracks the impact of the proposal on marriage bonuses. It is somewhat duplicative of the question of marriage penalty focus but provides a specific assessment of the outcome for marriage bonuses.

### *B. The Trends*

#### 1. The 105<sup>th</sup> Congress

During the 105<sup>th</sup> Congress twenty-four bills and numerous resolutions aimed at marriage penalty relief were introduced. The Congressional Budget Office released its study of marriage and the federal income tax during the first session and the House Committee on Ways and Means held hearings on the marriage penalty during the Second session.<sup>191</sup> Although Republican members introduced most of the penalty reduction bills, Democrats introduced seven. In both chambers, Republicans remained in the majority and the atmosphere in Congress was fiercely partisan much of the time. But during this Congress, several marriage penalty relief bills enjoyed substantial

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<sup>190</sup> See text at notes 117-127, 136-144, 153-57 *supra* for a fuller discussion of aggregation theory and the joint return.

<sup>191</sup> CBO STUDY, *supra* note 4; *Hearings on the Marriage Penalty Before the House Comm. On Ways and Means*, 105th Cong. (1998). Among those testifying were Dr. O'Neill, Professor Michael Graetz, Dr. Daniel Feenberg, Bruce R. Bartlett and the President of the AICPA, who advocated disaggregation as the fairest approach and the dual earner credit as the simplest. *Id.*

bipartisan support.<sup>192</sup>

Despite the high level of interest in reducing it, no marriage penalty relief provisions were included in either the Taxpayer Relief Act of 1997 or the IRS Restructuring and Reform Act of 1998, the two major tax reform measures enacted in the 105<sup>th</sup> Congress.<sup>193</sup> Moreover, while many members of the 105<sup>th</sup> Congress denounced marriage penalties, the tax legislation enacted added to the number of marriage penalty provisions in the Internal Revenue Code.<sup>194</sup>

Ideas about marriage penalty relief in the 105<sup>th</sup> Congress ranged from the narrowly targeted to the expansively over-inclusive. Revenue costs also varied widely from \$6 billion to \$25 billion or so. The trends in the two sessions were quite different and merit individual analysis. Table 3, printed in the Appendix, traces these trends in the two sessions and over the 105<sup>th</sup> Congress as a whole. It provides a summary and analysis of twenty-four bills described below, encompassing the eight major categories of general income tax marriage penalty relief proposed.<sup>195</sup> The trends in the House from

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<sup>192</sup> For much of the 105th Congress, all other business, including tax reform had to compete with the impeachment process for the attention of the members. *See, e.g.,* Cheryl Bolen, *Senate to Pursue 'Dual Track' Approach; Do Legislation, Impeachment Simultaneously*, DAILY TAX REPORT, Dec. 15, 1998, at N-1 (describing efforts of Senate Republican leadership to decide whether to schedule only impeachment proceedings or try to work on legislative business in the mornings and impeachment in the afternoons).

<sup>193</sup> The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685; The Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788.

Conservative Republican members made frequent statements to the press about their intentions to eliminate the marriage penalty during the 105th Congress. *See, e.g.,* Heidi Glenn, *Congress Returns to Its Go-Nowhere Agenda*, 78 TAX NOTES 407 (1998) (quoting Senator Ashcroft (R-Mo) "This onerous tax on marriage penalizes the traditional family. We must promote this institution, not punish it"). In the same article *Tax Notes* also reported the plan of the Conservative Action Team in the House to include "full elimination of the marriage penalty" in their budget plan. *Id.*

<sup>194</sup> For example, the 1997 Act added several credit phaseout provisions including that in the child credit. *See supra* notes 62-63 and accompanying text.

<sup>195</sup> Figure A, *supra*, analyzes twelve categories of marriage penalty relief proposals. In Appendix - Tables 1 through 4, two pairs of the Figure A categories have been consolidated (deduction from GI for joint return up to \$50,000 with the standard deduction doubling and the two versions of EITC phaseout relief) and two have been eliminated (the §221 education loan interest deduction phaseout relief proposal and the child care tax credit expansion). *See also supra* note 188 and accompanying text.

1997 through 1999 are presented separately in Table 1 and those in the Senate in Table 2, both also in the Appendix.

a. The first session, 1997

In the first session of the 105<sup>th</sup> Congress, nine marriage penalty relief bills were introduced, six in the House and three in the Senate.<sup>196</sup> All but one were introduced by Republicans. The bills advanced four different solutions to the income tax marriage penalty: a dual earner deduction or credit; an increase in the standard deduction for married couples; a new optional filing status for married couples; and a return to the 1948 version of the joint return with full income splitting. The bill that had the strongest support in the House was the proposal of Representative Weller (R-IL) for optional taxation of individual incomes in a combined return. Of the Senate bills, the split income proposal introduced by Senator Faircloth (R-NC) had the largest number of co-sponsors. None of the nine bills became part of major legislation during the session.

i. Doubled standard deduction

In the House, Representative Joseph K. Knollenberg (R-MI) introduced a general tax reduction bill that included a proposal to make the standard deduction for married couples filing joint returns equal to twice the deduction allowed to unmarried individuals. The bill also proposed to make the standard deduction for married persons filing separate returns equal to the deduction for an unmarried individual.<sup>197</sup> Knollenberg's bill had 14 co-sponsors by the end of the session; all were Republicans.<sup>198</sup> The proposed doubling of the

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<sup>196</sup> In addition, House Bill 242, introduced by Mr. Neal (D-MA) on January 7, 1997, proposed the elimination of the marriage penalty in old I.R.C. § 121, the provision allowing a one-time exclusion of gain from the sale of the principal residence by taxpayers over the age of 55. See H.R. 242, 105th Cong. (1997). Old I.R.C. § 121 was repealed by the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788 and replaced by new I.R.C. § 121. New I.R.C. § 121 allows the exclusion of up to \$500,000 in gain from the sale of a principal residence for married couples filing joint returns and \$250,000 for other taxpayers. I.R.C. § 121 (1999).

<sup>197</sup> Taxpayer Relief and Protection Act of 1997, H.R. 2718, 105th Cong. §§ 3(a), (1), (2) (1997).

<sup>198</sup> H.R. 2718.

standard deduction would remove one of the structural features of the marriage penalty. But such a change would also substantially increase marriage bonuses. Its impact extends well beyond reversing the marriage penalty itself, which is only experienced by dual income couples. The doubling proposal was not limited in any sense to the marriage penalty couples. The effect of the proposal for a doubled standard deduction simply would be to give a tax cut to all married joint filers who elect the standard deduction.

Under present law the standard deduction for joint filers creates both marriage bonuses for sole income couples and marriage penalties for dual income couples. It allows joint filers a deduction that is greater than the amount allowed for an unmarried individual but less than the total deduction that two unmarried individuals could claim.<sup>199</sup> By setting the level of the joint filers' deduction at twice the amount for unmarrieds, the portion of the marriage penalty arising from the standard deduction would be eliminated. But the marriage bonus effect of the standard deduction would be increased as well. For sole earner married couples who are already using a standard deduction that is 60 percent larger than what they would be entitled to use as singles, the doubling would result in a marriage bonus of 100 percent. If the bill were applicable for 1999, it would give all married couples filing joint returns that did not itemize their personal deductions an additional deduction of \$2,900.

It is difficult to estimate the ultimate cost of such a proposal. However, the estimated revenue cost for a similar proposal made in 1998 that also included an additional deduction for the blind and elderly was about \$6 billion a year. The House Ways and Means Committee estimated that the somewhat broader 1998 proposal would affect 48 million married individuals but did not indicate how many would just be receiving additional marriage bonuses. Ways and Means did note that six million additional individuals were expected to use the standard deduction if it were doubled.<sup>200</sup>

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<sup>199</sup> See examples in notes 28-32 *supra* and accompanying text.

<sup>200</sup> HOUSE WAYS AND MEANS COMM. REPORT, H.R. DOC. NO. 105-739, reprinted in BNA TEXT SUPP., Sept. 25, 1998, at S-25, S-26, S-58. Although 72 percent of all taxpayers use the standard deduction, it appears to be used by a lower percentage of joint return filers. See CBO STUDY, *supra* note 4, at 15. The CBO estimates that there

Increasing the standard deduction would have little impact on the other sources of the marriage penalty. The standard deduction only reduces taxable income and does not affect adjusted gross income. But adjusted gross income is the measure used to determine eligibility for the earned income credit, child care credit and in most other phaseouts.<sup>201</sup> Moreover, allowing a doubled standard deduction for all joint return filers across the board is a solution that is both over inclusive and narrow in scope. Some but not all of the revenue loss would reduce marriage penalties, most would go to marriage bonus couples. And even though inefficient, poorly focused and expensive, it is a solution that addresses only one source of the penalty and hence would leave much of the marriage penalty firmly in place. The CBO study estimated that 51 percent of the revenue cost of both doubling brackets and the standard deduction would go to marriage bonus couples. No estimate was provided of the effect or cost of doubling the standard deduction by itself, but the CBO notes that the standard deduction is an important contributor to the marriage penalty in lower income couples.<sup>202</sup>

The choice of the standard deduction as the focus of marriage penalty relief may have the appeal of simplicity but it can lead to erratic and inequitable results. While some 70 percent of returns claim the standard deduction, another 30 percent do not because taxpayers have chosen to itemize their deductions instead. Although disproportionately more higher income taxpayers choose to itemize than do low income taxpayers, there are important variations based upon state of residence. Taxpayers in such high tax states as New York and California elect to itemize more frequently, at the rates of 36% and 34.8% respectively, and at lower income levels than do taxpayers in low tax states like Texas, which has no state income tax. Only about 18.4% of federal income tax returns filed in Texas in 1997

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were 54.67 million married couples filing tax returns in 1995. *Id.* at tbl. C-4. The General Accounting Office [hereinafter GAO] report found that 25.15 million married taxpayers filing jointly used the standard deduction in 1992. See GEN. ACCT. OFF., *supra* note 171, at appendix V.

<sup>201</sup> See I.R.C. §§ 32(a)(2), 21(a)(2) (1999). See also 1998 EFFECTIVE MARGINAL RATE STUDY, *supra* note 40, at 4-10.

<sup>202</sup> CBO STUDY, *supra* note 4, at 51.

claimed itemized deductions.<sup>203</sup>

Further, reliance on the standard deduction to deliver marriage penalty relief may impose unintended costs on lower income couples. The itemized deduction for medical expenses is heavily used at lower income levels. More than 49 percent of the tax returns that in 1997 claimed the itemized deduction for medical and dental expenses reported AGI below \$30,000. Some 2,799,965 tax returns were in this category.<sup>204</sup> Why marriage penalty relief should not also be available to taxpayers who do not elect the standard deduction because, for example, they have a catastrophic accident in a given year and itemize their medical expenses is not clear.

ii. Dual earner deduction or credit

Two different versions of the dual earner deduction were proposed in the first session. Early in 1997, Representative Sam Johnson (R-TX) proposed a dual earner credit of up to \$145 for joint return filers.<sup>205</sup> Like the dual earner tax credit proposal in the Contract with America, the statutory dollar limit was further limited by the amount of marriage penalty on earned income. Eleven other Republicans joined Johnson as co-sponsors when the bill was introduced. Later in the session, Representative Wally Herger (CA-R) introduced H.R. 2593, proposing an above the line dual earner deduction very similar to the one that had been in effect from 1981 through 1986.<sup>206</sup> The proposed amendment would have permitted a deduction from gross income of up to \$3,000 for dual earner married couples filing joint returns. The deduction was further limited by the earned income of the low earner.<sup>207</sup> Herger's dual earner deduction

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<sup>203</sup> See INTERNAL REV. SERVICE, STATISTICS OF INCOME BULLETIN 153-205 (Spring 1999) [hereinafter SOI BULLETIN].

<sup>204</sup> See *id.*

<sup>205</sup> Tax Freedom for Families Act of 1997, H.R. 1584, 105th Cong. § 202 (1997) (introduced by Mr. Sam Johnson (R-TX)) (credit to reduce marriage penalty).

<sup>206</sup> See text accompanying notes 145-150 *supra*.

<sup>207</sup> Marriage Penalty Relief Act, H.R. 2593, 105th Cong. § 2 (1997) (introduced by Mr. Herger (R-CA)) (restoration of deduction for two-earner married couples); compare GENERAL EXPLANATION OF ERTA, *supra* note 145 and I.R.C. § 221 (prior to repeal in 1986), reprinted in 1 INTERNAL REVENUE CODE, INCOME TAXES 4861-69 (CCH, June 25, 1999).

bill attracted 188 co-sponsors — 51 Democrats and 137 Republicans. Representative Barbara Kennelly (D-CT) introduced the measure with Herger.<sup>208</sup> Judged by the number of co-sponsors, the Herger dual earner deduction was the runner-up in the House.

The CBO Report estimated that restoration of the dual earner deduction, which is what Herger proposed, would cost about \$9 billion in lost revenue.<sup>209</sup> About 80 percent of the revenue cost would be applied to reduce marriage penalties. But about 10 percent of the tax reduction arising from the dual earner deduction would go to joint return filers already receiving marriage bonuses. The Congressional Budget Office predicted that the greatest impact of the dual earner deduction would be felt in the \$50,000 to \$100,000 aggregate income range.<sup>210</sup> It would not have much affect on the marriage penalty at lower incomes because in addition to the \$3,000 ceiling, the dual earner deduction is limited to 10 percent of the earnings of the low earner.

Restoring the dual earner deduction would reduce aggregate marriage penalties by about 32 percent.<sup>211</sup> Although in amount the \$2,900 extra standard deduction that Representative Knollenberg proposed is very close to the \$3,000 maximum that the restored dual earner deduction would allow, the two deductions are quite different in their impact on marriage penalties. The dual earner deduction reduces adjusted gross income and hence could reduce the marriage penalty impact of the earned income tax credit, child care deduction and other phaseouts which are calculated with reference to adjusted gross income. The increase in the standard deduction would not reduce marriage penalties as much as the dual earner deduction would because the standard deduction has no impact on adjusted gross income. It simply reduces taxable income.<sup>212</sup>

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<sup>208</sup> H.R. 2593.

<sup>209</sup> CBO STUDY, *supra* note 4 at Summary tbl. 4.

<sup>210</sup> *Id.* at 51-52, Summary tbl. 4, fig. 8. CBO estimates that 3% would go to unaffected couples and 7% to penalty couples, but in amounts in excess of their penalties. *Id.*

<sup>211</sup> *Id.* at Summary tbl. 4.

<sup>212</sup> See I.R.C. §§ 32(a)(2), 21(a)(2) (1999); compare I.R.C. §§ 62 and 63 (1999). See also Figure A, *supra*.



iii. Optional combined return of individual incomes

Three bills in the House and one in the Senate proposed a new, optional separate return filing status for married couples that recognized the individual income of each spouse as the basic measure of ability to pay tax. This innovative alternative to the joint return would allow married couples to elect on an annual basis whether to file a joint return or the new optional combined return of individual incomes.<sup>213</sup> The optional combined return would allow husband and wife to determine their separate taxable incomes and then calculate the tax due on each income using the rate tables for unmarried individuals. The sum of the two tax computations would be the tax due from the couple.<sup>214</sup> It is an efficiently focused penalty relief proposal because only couples who otherwise would incur marriage tax penalties are likely choose this alternative. But the proposed separate filing status would not eliminate all marriage penalty effects because in the form proposed important features of the joint return system would be retained.

The disaggregation of incomes in the tax computation would eliminate the marriage penalty effects of the progressive tax rate tables, the standard deduction and all other features that affect the determination of taxable income. Income of one spouse would no longer be stacked on top of the income of the other in determining the initial amount of tax payable.<sup>215</sup> However, the optional combined return of individual incomes as proposed did retain some features of the joint return, including joint and several liability for tax. Further,

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<sup>213</sup> Compare Taxpayer Justice Act of 1997, H.R. 3059, 105th Cong. (1997) (introduced by Ms. Jackson-Lee (D-TX)); Marriage Tax Elimination Act, H.R. 2456, 105th Cong. (1997) (introduced by Mr. Weller (R-IL)); H.R. 2462, 105th Cong. (1997) (introduced by Mr. Kasich (R-OH)); and Marriage Tax Elimination Act, S. 1314, 105th Cong. (1997) (introduced by Mrs. Hutchinson (R-TX)) (section 2 — Combined returns to which unmarried rates apply). See also Marriage Tax Elimination Act, S. 1285, 105th Cong. (1997) (introduced by Mr. Faircloth (R-NC)) (section 2 — Combined return to which unmarried rates apply). The term "optional combined return of individual incomes" is developed and introduced in this article. See *supra* note 181.

<sup>214</sup> H.R. 2456 (proposing new § 6013A to the Internal Revenue Code). The citations here are to the proposed new I.R.C. section.

<sup>215</sup> For discussion and examples of marriage penalties in the progressive rate tables and standard deduction, see *supra* text accompanying notes 42-48, 26-33, 136-41.

the new married separate filing status did not attempt to reverse the marriage penalties in the various tax credit phaseouts or the EITC.

The optional combined return of individual incomes is a distinct departure from the joint return and its goal of equal tax for all married couples with the same total income. It would allow differentiation between couples and would result in two married couples with the same total incomes paying different amounts of tax, if, for example, one was a sole earner couple and the other was a dual earner couple. The dual earner couple would generally pay less tax than the sole earner couple unless all income was within the lowest marginal bracket.<sup>216</sup> All married couples with dual incomes, whether the sources of income are earnings or investments, would be eligible to make the election to report individual incomes on a combined return.

The four bills proposing the optional combined return were identical, although one was introduced by a Democrat, Representative Jackson-Lee (D-TX), and the others by Republicans. In the Senate, Mrs. Hutchinson's (R-TX) bill found twelve co-sponsors. But in the House, Representative Weller's (R-IL) bill had very wide support. It attracted 238 co-sponsors, the largest following among all of the anti-penalty bills in the first session of the 105<sup>th</sup> Congress.<sup>217</sup>

The optional filing proposal is a hybrid, allowing disaggregation of incomes some of the time but retaining the joint return's concepts of tax liability and aggregation for most phaseouts. The option to use the unmarried individual rate tables and disaggregate income was conditioned upon filing a combined return. Apart from the separate income and tax table computations, the combined return was to be treated as if it were a joint return.<sup>218</sup> The proposal specified that tax credits would continue to be "determined" and applied against the couple's joint tax liability "as if the spouses had filed a joint return."<sup>219</sup> Thus the combined return would not have

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<sup>216</sup> This conclusion assumes that the combined return allows each spouse an unmarried individual's standard deduction, which was the effect of the proposals.

<sup>217</sup> H.R. 2456; *Bill Summary & Status for 105th Congress* (visited Dec. 11, 1999) <<http://thomas.loc.gov>>.

<sup>218</sup> H.R. 2456 (proposed sections 6013A (a)(1) & (e)).

<sup>219</sup> H.R. 2456 (proposed section 6013A(d)). The provision speaks of

reduced the marriage penalty effects of the many tax credit phaseouts based on joint return AGI. Other features of the joint return, including joint and several liability would apply to the combined filing.

Reducing pre-credit tax by means of the optional combined return would have the effect of making any earned income credits more valuable because this credit is refundable. But the optional combined return would not have alleviated the marriage penalty effects of the EITC phaseout. The married couple with two incomes of \$11,000 each would continue to have to aggregate incomes in determining the earned income tax credit and they would find that marriage still reduced their earned income credits by \$2,817, or 12.8 percent of their AGI.<sup>220</sup>

One important issue that the proposal leaves somewhat unresolved is the allocation of income from property. The approach to identifying separate income that the optional combined return takes might have the effect of reopening the old controversy about community property that the adoption of the joint return in 1948 was intended to end. Earned income is to be taxed to "the spouse who rendered the services." Income from property is to be "divided between the spouses in accordance with their respective ownership rights in such property."<sup>221</sup> For married couples, ownership rights in property are still determined by the marital property law of the jurisdiction in which they reside. Community property law differs from state to state and ownership rights can sometimes be found in the absence of control.<sup>222</sup> Because control is the general standard in the

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applying the credits against "the joint liability of the couple for tax." *Id.*

<sup>220</sup> See *supra* note 55.

<sup>221</sup> H.R. 2456 (proposed section 6013A(b)(1) & (2)).

<sup>222</sup> Community property law continues to be regarded as different from common law on these questions even though most common law states have adopted equitable distribution concepts that arguably give spouses interests in property to which they do not have title during the marriage. The old law allowing or even requiring income splitting for tax purposes by couples in the community property law system remains in effect except where Congress has specifically provided that community property laws will not apply. Unless the intention is to reopen the possibility of differences in taxation based on different marital property law systems, it may be necessary to introduce the concept of control along with ownership. See Beck, *supra* note 20, at 465-467 (discussing the continuing impact of *Poe v. Seaborn* and community property law in the income tax). Professor Beck argues that its main impact has been to

tax law for assigning tax liability, there is a potential for conflict if state law rights arise when tax concepts of control are not satisfied.<sup>223</sup> The intention may be to deal with this issue in regulations but it is too sizable an issue for such a delegation.<sup>224</sup>

iv. Income splitting joint return

Senator Faircloth (R-NC) proposed an optional combined return that would have permitted married couples to choose to be taxed on the basis of the income-splitting joint return that was in effect from 1948 to 1970. Although the structure of his proposal was the same as the Weller bill's, the content was quite different. Like the Weller combined return, the Faircloth version allowed husband and wife to elect to determine their incomes separately and then apply the tax tables for unmarried individuals. But the Faircloth version defined the separate income of each spouse as "one-half of the taxable income computed as if the spouses were filing a joint return." A doubled standard deduction was also to be allowed. Thus it called for a return to income splitting, 1948 style. Apart from this very significant difference, the Faircloth optional combined return followed the Weller proposal, retaining the joint return features and the marriage penalty effects of the credit phaseout rules.

Like the prototype 1948 income splitting joint return, the 1997 Faircloth proposal would eliminate marriage penalties in the rate structure itself and also, like the 1948 proposal, it would create substantial marriage bonuses. The present rate tables with their more-than-one, less-than-two bracket differential already give sole income couples marriage bonuses. But the Faircloth income splitting

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make married women in community property law jurisdictions who file separate returns liable for tax on half the income of their husbands. He also notes seven provisions in the Internal Revenue Code which contain the override language directing implementation "without regard to community property laws." *Id.*

<sup>223</sup> See Kornhauser, *supra* note 153, at 74-77; accord Susan Kalinka, *Federal Taxation of Community Income: A Simpler and More Equitable Approach*, 1990 Wis. L. REV. 633, 633-35 (1990) (arguing for a change in the "settled principle" in federal income taxation that control of property is irrelevant in taxation of community property).

<sup>224</sup> The Joint Committee Staff report notes that "It is not clear whether ownership rights would be determined without regard to community property laws." STAFF OF THE JOINT COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO PROPOSALS TO REDUCE THE MARRIAGE TAX PENALTY, JCX-1-98, at n.14 (1998).

approach would increase marriage bonuses by doubling the marginal brackets for all married couples and their standard deduction. Measured by reference to the married couple, all joint return filers would seem to be able to reduce taxes on the basis of the Faircloth income splitting combined return. For unmarried taxpayers, it would also re-introduce the singles penalty differential supposedly redressed in the 1969 amendments. Senator Faircloth's income splitting combined return attracted 39 co-sponsors in the Senate.<sup>225</sup>

The Faircloth proposal for an income splitting combined return is another example of an approach that is both over-inclusive and limited in its impact on the marriage penalty. Retaining as did the Weller proposal the joint return for determining applicability of tax credits, the Faircloth income splitting return would have no impact on phaseout penalties or the EITC marriage penalties. Yet it would increase the marriage bonuses of virtually all bonus couples. The Congressional Budget Office analysis of a comparable proposal suggests that the revival of the income splitting joint return would cost about \$25 billion and that 51 percent of that revenue loss would be caused by tax reductions that further increased marriage bonuses.<sup>226</sup>

v. Other thoughts about marriage penalties

Members of Congress expressed interest in exploring alternatives to the current joint return system in several resolutions also introduced in this session. Senator Kerrey (D-NE) included in Senate Bill 1096, the Internal Revenue Service Restructuring and Reform Act of 1997, a provision that would have required the Treasury and the Comptroller General to each conduct a study of separate filing. He asked for recommendations for eliminating the marriage penalty, dealing with community property issues, and "reducing the burden for divorced and separated taxpayers." Representative Portman (R-OH) introduced an identical bill in the

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<sup>225</sup> See Marriage Tax Elimination Act, S.1285, 105th Cong. (1997) (introduced by Mr. Faircloth (R-NC), Oct. 9, 1997).

<sup>226</sup> See CBO STUDY, *supra* note 4, at Summary tbl. 4. The CBO estimate is an evaluation of the doubling of marginal brackets and standard deductions, which is the effect of the Faircloth proposal. Like the Faircloth proposal, it would appear to leave the impact of credit phaseouts on marriage penalties unchanged, i.e., still in effect.

House on July 30, 1997, the day before Senator Kerrey introduced his bill.<sup>227</sup>

Other resolutions expressed a general concern about the impact of the tax system on marriage and family. Senator Faircloth, who had introduced the bill calling for the re-creation of the 1948 split income version of the joint return, also included the marriage penalty issue in his outline of nine goals for "any new Federal tax system." Number seven on his list was the direction that any new tax "not penalize marriage or families." The provision was part of his Tax Code Elimination Act of 1997.<sup>228</sup>

b. The second session, 1998

In the second session of the 105<sup>th</sup> Congress interest turned in an entirely different direction. Both the House and the Senate strongly endorsed the idea of restructuring the standard deduction to in effect remove its marriage penalty feature. But while each chamber approved such a measure in 1998, the two specific proposals that passed were quite different in scope and impact. Proposals for more comprehensive relief also attracted substantial support. The House and Senate favored very different approaches to this solution as well.

The doubled standard deduction proposal appeared in six bills in the House, including the 1998 Taxpayer Relief Act, which passed the House and then floundered in the Senate. This proposal attracted the most co-sponsors among the various ideas for marriage penalty relief introduced in the House during the session. In the Senate, a different proposal for removing the marriage penalty element in the standard deduction gained approval as an amendment to the Universal Tobacco Settlement Act. The version that the Senate approved was targeted to low and middle income levels and structured as an above the line deduction reducing adjusted gross income and phaseout

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<sup>227</sup> The Kerrey bill called for studies of the "feasibility of treating each individual separately for purposes of the Internal Revenue Code of 1986." S. 1096, 105th Cong. (1997). It is not clear whether his interest was in mandatory or optional separate taxation. Rep. Portman's bill was H.R. 2292, 105th Cong. (1997).

<sup>228</sup> Internal Revenue Service Oversight, Restructuring and Tax Code Elimination Act of 1997, S. 1555, 105th Cong. (1997) (introduced November 13, 1997).

penalties.<sup>229</sup>

Measured by the co-sponsor interest in individual bills, the House leader was again a bill introduced by Congressman Weller. His 1998 proposal took a quite different approach than had the focused and efficient solution advanced in his 1997 bill. In the second session Mr. Weller's bill proposed structural income splitting – the doubling of the standard deduction and tax rate brackets for joint return filers. In the Senate, few co-sponsors emerged for any of the bills. Senator Kay Bailey Hutchinson's bill reintroducing the optional combined return of individual incomes proposal tied with the Gramm joint filers' deduction amendment for most co-sponsors in the session. Each bill only attracted four co-sponsors.

The array of proposals introduced in this session included both new ideas about marriage penalty relief and solutions that had been seen before. The new proposals were, first, an increase in the income ceiling of the earned income tax credit specifically for married couples and second, structural income splitting through doubling of the standard deduction and marginal rate brackets for joint filers. Doubling of the lowest bracket entered the field of competing solutions to the income tax marriage penalty. The dual earner deduction and the optional combined return proposals were also reintroduced. Overall, sixteen different bills and measures addressed themselves specifically to the marriage penalty issue.<sup>230</sup>

i. Doubled standard deduction

The proposal to increase the standard deduction for joint returns as a form of marriage penalty relief, which had been

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<sup>229</sup> See Appendix-Table 3 *infra*. For an account of the legislative history of the 1998 Taxpayer Relief Act (H.R. 4579, 105th Cong. (1998)) in the House and Senate, see *Clinton Signs Omnibus Spending Bill Containing Tax Extenders, Some Tax Breaks*, DAILY TAX REPORT, Oct. 22, 1998, at GG-2 (noting that "Senate GOP leaders had sought to bring up for Senate floor consideration an \$80 billion tax cut package (H.R. 4579), but lacked the votes needed to prevent a threatened filibuster and to override an expected presidential veto of the measure."). See Appendix – Table 2 *infra* for a listing of the major marriage penalty relief proposals introduced as amendments to the Universal Tobacco Settlement Act, S.1415, 105th Cong. (1997).

<sup>230</sup> See Appendix – Table 3 *infra* for a listing of the bills introduced in the Second session with notation of sponsorship interest in leading bills and proposals; see also Figure A *supra* for a summary of the impact of each category of proposal.

introduced in one bill in the first session of the 105<sup>th</sup> Congress, was re-introduced in ten bills and measures in the second session. These ten new bills and measures had broad bipartisan support. Seven of the bills proposed the doubling of the standard deduction alone<sup>231</sup> and three proposed it in combination with a doubling of marginal brackets for joint return filers.<sup>232</sup> Democrats Rangel (D-NY) and Gephardt (D-MO) introduced bills to provide marriage penalty relief by giving joint return filers a doubled standard deduction as did Republicans Nancy Johnson (R-CT) and Weller (R-IL) and House Ways and Means Chairman Archer (R-TX).

The ten bills and amendments advocating an increased standard deduction took a number of different approaches to achieving that end. The Archer bill, H.R. 4579, which passed in the House on September 26, 1998, provided simply that the standard deduction for joint return filers would be twice the amount for unmarried individuals.<sup>233</sup> Archer's bill was very similar to the Knollenberg proposal of the prior year. The 1998 bills of Representatives Rangel and Nancy Johnson also provided for a doubling based on the existing statutory amounts of the standard deductions.<sup>234</sup> But five of the bills proposed to increase the base amount of the standard deduction for all four filing statuses as well as to allow joint return filers a doubled deduction.<sup>235</sup> Yet another of these proposals, an amendment twice

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<sup>231</sup> See H.R. 3524, 105th Cong. § 1 (1998) (introduced by Representative McDermott (D-WA)); Marriage Penalty Reduction Act, S. 1989, 105th Cong. § 2 (1998) (introduced by Senator Ford (D-KY)); Tax Relief for Working Americans Act of 1998, H.R. 4542, 105th Cong. § 101 (1998) (introduced by Mrs. N. Johnson (R-CT)); 1998 Taxpayer Relief Act, H.R. 4579, 105th Cong. § 101 (1998) (introduced by Mr. Archer (R-Texas)); Save Social Security and Taxpayer Relief Act of 1998, H.R. 4597, 105th Cong. § 101 (1998) (introduced by Mr. Rangel (D-NY)); S. Amdt. 2686, 105th Cong. (1998) and S. Amdt. 2437, 105th Cong. (1998), both amending the Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997), both offered by Mr. Gramm (R-TX).

<sup>232</sup> Gephardt 10 percent Tax Act of 1998, H.R. 3620, 105th Cong. § 102 (1998) (introduced by Mr. Gephardt (D-MO)); Marriage Penalty Elimination Act of 1998, H.R. 3734, 105th Cong. § 3 (1998) (introduced by Mr. Weller (R-IL)); Marriage Penalty Elimination Act of 1998, S. 1999, 105th Cong. § 3 (1998) (introduced by Mrs. Hutchinson (R-TX)). See also discussion of structural income splitting at note 237 *infra*.

<sup>233</sup> H.R. 4579 § 101.

<sup>234</sup> Compare H.R. 4579 § 101 with H.R. 4542 § 101 and H.R. 4597 § 101.

<sup>235</sup> Compare H.R. 3524 § 1 with S. 1989 § 2, H.R. 3620 § 102, H.R. 3734 §



offered by Senator Gramm to the Universal Tobacco Settlement Act, proposed an increase in the joint filers' deduction but restricted it to those with adjusted gross incomes of \$50,000 or less. The Gramm proposal made the anti-penalty increment of the standard deduction an adjustment to gross income. As an above the line deduction, the Gramm proposal would have reduced adjusted gross income of eligible joint return filers and hence reduced phaseout penalties. It also included a provision that specifically provided relief from the EITC phaseout for joint return filers eligible for the new deduction.<sup>236</sup>

ii. Structural income splitting

One of the more significant developments in the second session was the emergence of a marriage penalty relief proposal that can be described as structural income splitting. In the 1997 session, one Senate bill that received considerable support had tried to recreate the tax computation method of the 1948 joint return, restoring to married couples full income splitting. This bill was not reintroduced in the second session but members in both chambers proposed bills that achieved substantially the same effects. Rather than changing the joint return provisions of the tax law, these structural income splitting bills proposed to reach the same tax outcome by a coordinated restructuring of both the standard deduction and the tax rate tables. The standard deduction was to be modified to provide joint return filers with an allowance equal to double the amount given to unmarried individuals. At the same time, the tax tables were to be redesigned to create a new joint return rate schedule in which the tax brackets would be twice as wide as those for unmarried individuals. Another related development was seen in the bills which proposed widening some or all of the tax brackets for joint return filers. Five bills introduced in the second session proposed to give married couples some or all of the benefits of the 1948 version of the income splitting joint return.<sup>237</sup>

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3, and S. 1999 § 3.

<sup>236</sup> S. Amdt. 2686. See also Lawrence Zelenak, *Gramm Marriage Penalty Fix Needs Some Fixing of Its Own*, 79 TAX NOTES 1515 (1998) (pointing out the Gramm Amendment's cliff effect).

<sup>237</sup> Middle Class Tax Relief Act of 1998, H.R. 3151, 105th Cong. § 3 (1998)

Three of the proposals in this category, which were introduced by Senator Kay Bailey Hutchinson and Representatives Gephardt and Weller, would have given joint return filers the entire structural income splitting package of doubled marginal brackets and doubled standard deductions.<sup>238</sup> In essence this combination replicates the 1948 joint return as far as income computation and pre-credit taxes were concerned. But neither of these changes would affect the phaseouts or other marriage penalties that were determined on the basis of adjusted gross income. Standard deductions and rate tables do not have any impact of adjusted gross income. In terms of reducing marriage penalties, the CBO found the split income approach would remove about 44 percent of penalties. Weller's bill had 58 co-sponsors in the House, fifty-seven Republicans and one Democrat.

Overall, this approach is an expensive and inefficient way to reduce marriage penalties. The cost of structural income splitting is high. The 1997 Congressional Budget Office report estimated that doubling brackets and standard deductions would cost about \$25 billion. These adjustments are in substance across the boards tax cuts and the CBO's prediction that some 51 percent of the tax savings would be received by marriage bonus couples confirms this observation.<sup>239</sup> In comparison the dual earner deduction, which is also criticized for being somewhat inefficient, would have a revenue cost of only \$9 billion and would remove about 32 percent of the penalty. Only about 10 percent of the revenue cost for the dual earner form of marriage penalty relief would leak out to marriage bonus couples.

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(introduced by Mr. Thune (R - SD) on Feb. 3, 1998) (increases the 15% bracket and doubles this bracket for joint returns); H.R. 3620 § 101 (offers a general reduction in rates; all joint return brackets double individual); H.R. 3734 § 2 (section 2 — all joint return brackets double individual); S. 1999 § 2 (all joint return brackets double individual); Middle Class Tax Relief Act of 1998, S. 1569, 105th Cong. § 2 (1998) (introduced by Mr. Coverdell (R-Ga), Jan. 27, 1998) (increases the 15% bracket and doubles this bracket for joint return; same as H.R. 3151). See also Appendix-Table 3 *infra*.

<sup>238</sup> H.R. 3620 §§ 101, 102 (general reduction in rates; all joint return brackets double individual; raises standard deduction); H.R. 3734 §§ 2, 3 (all joint return brackets double individual; raises standard deduction); S. 1999 §§ 2, 3 (all joint return brackets double individual; raises standard deduction). See also Figure A *supra*; Appendix - Table 3 *infra*.

<sup>239</sup> CBO STUDY, *supra* note 4, at Summary tbl. 4.

The other two bills, those of Representative Thune and Senator Coverdell, attempted something less than full structural income splitting, focusing instead on marginal tax brackets alone. These identical bills would have created a 15 percent bracket with a ceiling of \$70,000 for joint return filers and \$35,000 for unmarried individuals.<sup>240</sup> In the upper brackets, the post-1969 relationship of more-than-one, less-than-two was maintained. So marriage penalties remained above the \$70,000 level but were eliminated from the rate table structure for married couples with incomes up to that level. Neither bill proposed to alter the standard deduction. Some 44 percent of joint return filers in the \$20,000 to \$50,000 income group pay marriage penalties and 54 percent receive bonuses.<sup>241</sup> Like the larger vertical adjustment proposed by Gephardt and the others, the newly widened bottom bracket would redress some marriage penalties but would also increase marriage bonuses for many couples.

iii. Optional combined return of individual incomes

Senator Hutchinson reintroduced her proposal for an optional combined return of individual incomes in the second session of the 105<sup>th</sup> Congress. She later also proposed structural income splitting through doubled brackets and doubled standard deductions as described above. Although the combined return of individual incomes bill attracted only four co-sponsors in the Senate in 1998, it tied with the Gramm joint filers deduction for most heavily co-sponsored bill in the session. In the House this proposal, which had gathered 271 co-sponsors in 1997, was not reintroduced in 1998.<sup>242</sup>

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<sup>240</sup> H.R. 3151 § 3 (increases 15% bracket and doubles this bracket for joint returns); S. 1569 §2 (increases 15% bracket and doubles this bracket for joint return; same as H.R. 3151).

<sup>241</sup> CBO STUDY, *supra* note 4, at Summary tbl. 1.

<sup>242</sup> See Half and Half: Tax Relief and Debt Reduction Action of 1998, S. 1711, 105th Cong. (1998) (introduced by Mrs. Hutchinson (R-Texas), March 5, 1998) (proposing optional combined return of individual incomes). Senator K.B. Hutchinson's structural income splitting bill was Senate Bill 1999, 105th Cong. (1998). See also Appendix - Table 3 *infra* for a comparison of the bills introduced in the first and second sessions of the 105th Congress.

iv. Dual earner deduction or credit

The solution to the marriage penalty that had drawn 188 co-sponsors in the first session of the 105<sup>th</sup> Congress attracted little interest in the second session. In the debate over the Universal Tobacco Settlement bill, Senator Daschle (D-SD) proposed the dual earner deduction as an amendment. Structurally similar to the dual earner deduction repealed in 1986, the Daschle proposal allowed much larger deductions but phased out entirely at \$60,000 of joint adjusted gross income. The amendment was rejected in the Senate. Senator Daschle also introduced his dual earner proposal in a separate bill.<sup>243</sup>

v. Earned income tax credit relief

In the first session of the 105<sup>th</sup> Congress, none of the marriage penalty relief proposals addressed the substantial marriage penalties that can arise in the earned income tax credit. During the second session, EITC phaseout penalty relief provisions were included in three bills, two in the Senate and one in the House.

In the House, Representative Neal (D-MA) introduced a bill that targeted marriage penalty relief at the earned income tax credit phaseout. The marriage tax penalties at this level are notoriously large, averaging 7.6 percent of income but ranging as high as 25 percent. The Neal proposal would have lifted the starting point of the phaseout from \$11,610 to \$16,020 for married couples filing a joint return. Seventeen Democrats co-sponsored the measure.<sup>244</sup> In the Senate, EITC marriage penalty relief also received attention for the

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<sup>243</sup> See S. Amdt. 2688, 105th Cong. (1998), amending Universal Tobacco Settlement Act, S. 1415, 105th Cong. (1997) (offered by Mr. Daschle (D-SD) on June 10, 1998) (professing “to provide a deduction for two-earner married couples . . .”); S. 2147, 105th Cong. (1998). The Daschle dual earner deduction bases the phaseout on “the taxpayer’s” modified adjusted gross income but elsewhere refers to the earned income of “the spouse.” *Id.* The import seems to be that the ceiling is based on the joint return and not on the income of the low earner spouse. See also Appendix - Table 3 *infra* for a comparison of the proposals introduced and co-sponsorship interest in the two sessions.

<sup>244</sup> For a fuller discussion of EITC marriage penalties, see *supra* notes 49-60 and accompanying text. See also H.R. 3995, 105th Cong. (1998) (introduced by Mr. Neal (D-MA), June 4, 1998); *Bill Summary & Status report for 105th Cong. (1998)*, (visited Dec. 11, 1999) <<http://thomas.loc.gov>>.

first time in the 105<sup>th</sup> Congress. Both the Gramm amendments and the Daschle amendment and bill made special provision to address the earned income credit and sought to have the deductions they were proposing reduce the EITC phaseout marriage penalties. However, the focus of the marriage penalty relief being proposed differed from bill to bill. The Daschle proposal was limited to dual earner couples, at least potentially marriage penalty couples. But the Gramm and Neal proposals would have increased EITC eligibility for joint filers who were sole earner couples as well as dual earners, hence removing penalties and adding to bonuses at the same time.<sup>245</sup>

vi. The sense of the Congress

In addition to the many bills and proposals, members of Congress again expressed their thoughts about the marriage penalty in resolutions as they had done in the first session. These resolutions were more specific in their content. While expressing very grave concern about the possibility that the income tax was influencing marriage behavior, the resolutions also voiced concern about the creation of tax disincentives for traditional family structures.

The Senate resolved that “a simple and fair federal tax system is one that . . . does not penalize marriage or families.” The same resolution went on to express its concern about the impact of marriage penalties on society. Noting the findings of the Congressional Budget Office on the percentage of married couples paying penalties and the average size of those penalties, the resolution added a piece of data from another source. It reported that there had been a very substantial increase in the percentage of unmarried couples between 1970 to 1996. The Senate in its resolution drew its own conclusions about the behavioral effects of marriage penalties. It found that “This penalty is one of the factors behind the decline of marriage” and resolved to start reducing it. This resolution passed in the Senate on April 2, 1998.<sup>246</sup>

A few weeks before, on February 11, 1998, the House of

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<sup>245</sup> See S. Amdt. 2688; S.1415; S. Amdt. 2686, 105th Cong. (1998) and S. Amdt. 2437, 105th Cong. (1998); *see also* Appendix - Table 3 *infra* and Figure A *supra*.

<sup>246</sup> Concurrent Senate Budget Resolution for FY 1999 – 2003, S. Res. 86, 105th Cong. §§ 302, 326 (1998) (enacted). The finding that 0.5% of couples were unmarried couples in 1970 and that 7.2% were unmarried in 1996 is unattributed.

Representatives had passed a resolution expressing the sense of Congress that “the federal government should acknowledge the importance of at-home parents and should not discriminate against families who forgo a second income in order for a mother or father to be at home with their children.”<sup>247</sup> More clearly perhaps than the technical solutions to the marriage penalty that it debated, these resolutions express the conflict for Congressional policy makers between the claims of sole earner married couples for their now traditional marriage bonuses and the increasingly pressing tax equity claims of dual earner couples.

In the 1997 session, the House appeared to be interested in proposals that were more narrowly focused on reducing taxes for marriage penalty couples. The two ideas about marriage penalty relief that attracted substantial interest, the dual earner deduction and the optional combined return of individual incomes, both had this effect. Moreover, the interest shown in these proposals indicated a willingness to consider differentiating between married couples on the basis of the individual incomes of husband and wife. On the other hand, the more expansive and less targeted combined return proposal that simply reduced taxes on all married couples by re-introducing complete income splitting gathered more support in the Senate than did the idea of combined returns of individual incomes.<sup>248</sup>

The next year, in the second session, both the House and Senate were attracted to the more over-inclusive solutions. Both chambers approved proposals to double the standard deduction. At the same time, the most over-inclusive solution, structural income splitting, gained supporters in the House and the Senate. By the end of the second session, the 105<sup>th</sup> Congress seemed focused on benefiting the sole earner married couple as much as it was working on marriage penalty relief for the dual earner couple.<sup>249</sup>

## 2. The 106<sup>th</sup> Congress

The first seven months of the 106<sup>th</sup> Congress saw almost as

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<sup>247</sup> H. Con. Res. 202, 105th Cong. (1998) (enacted).

<sup>248</sup> Compare Figure A *supra* and Appendix - Table 3 *infra*.

<sup>249</sup> Compare Figure A *supra* and Appendix - Table 3 *infra*.

many marriage penalty relief proposals as had been made in the two prior years put together. From January 6, 1999 through July 29, 1999, twenty separate bills and three important floor amendments addressing the income tax marriage penalty were introduced.<sup>250</sup> During the entire 105<sup>th</sup> Congress, twenty-four bills had been introduced. As in the 105<sup>th</sup> Congress, proposals described as marriage penalty relief by their sponsors ranged from full income splitting to the dual earner deduction. The 106<sup>th</sup> Congress had an interest in changing specific joint return phaseouts and in general tax cuts, also sometimes identified as marriage penalty relief. More than half the bills proposed two or more anti-penalty provisions. In this riot of marriage penalty relief proposals, one Senator introduced two bills on the same day, offering two alternative formulations of the same solution.<sup>251</sup>

This intense legislative interest in the income tax marriage penalty culminated in August in the passage of the Taxpayer Refund and Relief Act of 1999, the \$792 billion Republican tax cut bill that

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<sup>250</sup> For consistency, only the version of the tax cut bill House Bill 2488 reported by the Ways and Means Committee and the Senate Finance Committee's Senate Bill 1429 are included in the count of bills that were introduced in the 106th Congress. Unless otherwise noted, neither of the engrossed tax cut bills in the House and Senate (the versions that passed in the respective chambers) are included in the count or in the analysis of introduced measures that follows. The conference bill is not counted as an introduction either. On January 6, 1999, Rep. Joseph Knollenberg (R-MI) for the third time introduced (in H.R. 108, 106th (1999) ), his proposal for a doubled standard deduction for joint returns. See Marriage Penalty Relief Act, H.R. 108, § 2, 106th Cong. (1999). Carolyn McCarthy (D-NY) introduced House Bill 2646 on July 29, 1999, a bill which also proposed a double standard deduction for joint returns and expansion of the dependent care deduction. See Common Sense Family Tax Relief Act of 1999, H.R. 2646, §§ 101, 102, 106th Cong. (1999). See *infra* Appendix - Table 4.

<sup>251</sup> Compare the structural income splitting proposal in the Marriage Tax Penalty Elimination Act of 1999, S. 12, 106th Cong. (1999) (introduced by Mrs. Hutchinson (R-TX), Jan. 19, 1999) and the income splitting combined return proposal in the Marriage Tax Elimination Act of 1999, S. 15, 106th Cong. (1999) (introduced by Mrs. Hutchinson (R-TX), Jan. 19, 1999). Senator Hutchinson was not alone in her enthusiasm for marriage penalty relief of this nature. She was joined by 18 co-sponsors in Senate Bill 12 and 12 co-sponsors in Senate Bill 15. On July 30, 1999, Senator Hutchinson also introduced the floor amendment to Senate Bill 1429 that added the doubled standard deduction to the Senate's tax cut bill. See S.Amdt. 1472, 106th Cong. (1999); see also *Bill Summary & Status Reports, 106th Cong. (1999)*, (visited Dec. 11, 1999) <<http://thomas.loc.gov>>.

President Clinton vetoed on September 23, 1999. The vetoed bill itself adopted four different marriage penalty solutions.<sup>252</sup> The Senate, in its version of the bill, had approved five anti-penalty proposals, including the optional combined return of individual incomes.<sup>253</sup> Even more clearly than in the 105<sup>th</sup>, there was strong Congressional interest in simultaneously augmenting the benefits of the joint return and in permitting individual taxation of spouses. Despite the inconsistency of these two ideas of tax equity, the Senate demonstrated that it was capable of holding both at the same time, at least for awhile. In substance, the vetoed tax cut bill proposed structural income splitting for middle income taxpayers, with additional marriage penalty relief for upper income taxpayers through the doubled standard deduction and earned income tax credit relief for married couples at the lower end of the income range.

In the aftermath of the veto of the 1999 tax cut bill, the question of what Congress will do about marriage penalties and marriage bonuses remains open, perhaps not to be addressed again until after the elections in the year 2000. In this fluid setting, the ideas and interests of individual members expressed in the bills that they introduced are even more important to understanding the direction of policy development in this area. During the first session of the 106<sup>th</sup> Congress, Representative Weller for the third time introduced the individual House Bill that attracted the greatest number of co-sponsors in the session. The structural income splitting program that he introduced for the second time was also the most popular proposal in the House, measured by number of co-sponsors. In the Senate, Mrs. Hutchinson's structural income splitting bill also had the greatest number of co-sponsors of any single bill. But the group of proposals for relief from EITC marriage penalties, contained in four bills in the Senate, found more co-sponsors.<sup>254</sup>

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<sup>252</sup> See *infra* note 282.

<sup>253</sup> See Remarks on Returning Without Approval to the House of Representatives the "Taxpayer Refund and Relief Act of 1999," 35 WEEKLY COMP. PRES. DOC. 1793 (Sept. 23, 1999); also *Congress Clears and Keeps its \$792 Billion Tax Cut*, 84 TAX NOTES 807 (1999). For a fuller discussion of the vetoed bill, see *infra* text accompanying note 300; Appendix - Table 4 *infra*.

<sup>254</sup> See Appendix - Table 4 *infra* for a listing of the bills introduced in the



Before examining the marriage penalty solutions selected by the majority leadership in the vetoed Taxpayer Refund and Relief Act of 1999, the trends in the individual member's bills are surveyed below. Eight specific types of marriage penalty relief proposals were proffered in the 106<sup>th</sup> Congress. They were: the doubled standard deduction for joint returns; structural income splitting; income splitting combined return; dual earner deduction; EITC phaseout penalty relief for joint returns; expansion of child and dependent care deduction for dual earners, phaseout penalty relief for the education loan deduction; and optional combined reporting of individual incomes. Rate flattening developed more of a following as a solution to income tax marriage penalties and is also discussed below in the text although it is not here classified as a major category of marriage penalty relief and hence is not included in the tabular summaries.

Table 4, printed in the Appendix, maps the trends in twenty-three different measures introduced in 1999 and all versions of the vetoed tax cut bill. The shifts in sponsorship interest in the eight major categories of proposals from session to session are presented in summary form in Tables 1 and 2, also in the Appendix.<sup>255</sup>

#### a. Doubled standard deduction

In the 106<sup>th</sup> Congress interest in doubling the standard deduction for joint return filers remained strong. Eighteen of the twenty-three marriage penalty relief bills and significant amendments introduced in 1999 would have given joint return filers a standard deduction equal to at least twice that allowed to unmarried individuals. Eight of these bills sought to incorporate the doubled standard deduction into a broader relief proposal; the remainder confined themselves to proposing amendments to the standard deduction allowance as the primary form of marriage penalty relief. In all instances the doubled allowance was available to all joint return filers whether or not they were dual earner or dual income couples. Hence all the proposals had the effect of increasing the marriage

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second session and a count of the co-sponsorships of the leading bills and proposals. To compare the 1999 session with the 105th Congress, see Appendix - Tables 1 & 2, *infra*.

<sup>255</sup> See note 195 *supra* for a comparison of the categories of proposals in Figure A *supra* and Appendix - Tables 1 through 4 *infra*.

bonus as well as reducing marriage penalties. Doubling the standard deduction was a feature of the House Ways and Means Committee's tax cut bill from its inception. The proposal was added to the Senate Finance Committee's bill only as a floor amendment.

Ten bills offered the doubled standard deduction as the only form of general marriage penalty relief.<sup>256</sup> In four bills in this group, an expansion of the child and dependent care credit was also proposed, arguably a form of marriage penalty relief for dual earner married couples but only applicable to those with children under the age of 13 or other qualified dependents. Democrats introduced three of the four bills with the child care feature.<sup>257</sup> The House Ways and Means Committee's tax cut bill, the Financial Freedom Act of 1999, was among those that offered general marriage penalty relief only through the doubled standard deduction.<sup>258</sup> Like another Republican sponsored bill introduced in the Senate, the Ways and Means Committee bill included a general tax rate cut as well.<sup>259</sup> Representative Kleczka's bill, one of seven in the House that proposed general marriage penalty relief through the doubled standard

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<sup>256</sup> Financial Freedom Act of 1999, H.R. 2488, 106th Cong. §§ 111, 112 (1999) (introduced by Mr. Archer (R-TX), July 16, 1999); Family Tax Reduction Act of 1999, H.R. 2085, 106th Cong. §§ 2, 5 (1999) (introduced by Ms. Hooley (D-OR), June 9, 1999); Marriage Penalty Elimination Act of 1999, S. 284, 106th Cong. § 2 (1999) (introduced by Mr. McCain (R-AZ), Jan. 21, 1999); Marriage Penalty Relief Act, H.R. 108, 106th Cong. § 2 (1999) (introduced by Mr. Knollenberg (R-MI), Jan. 6, 1999); H.R. 725, 106th Cong. (1999) (introduced by Mr. Kleczka (D-WI), Feb. 11, 1999); Tax Relief for Working Americans Act of 1999, S. 1160, 106th Cong. § 101 (1999) (introduced by Mr. Grassley (R-IA) and Ms. Feinstein (D-CA)); Tax Relief for Working Americans Act of 1999, H.R. 2020, 106th Cong. §§ 101, 102 (1999) (introduced by Mrs. Johnson (R-CT)); Common Sense Family Tax Relief Act of 1999, H.R. 2646, 106th Cong. §§ 101, 102 (1999) (introduced by Mrs. McCarthy (D-NY), July 29, 1999); Pro-Family, Pro-Growth, Pro-Reform Tax Reduction Act of 1999, H.R. 2574, 106th Cong. §§ 702, 703 (1999) (introduced by Mr. Maloney (D-CT), July 20, 1999).

<sup>257</sup> H.R. 2085, §§ 2, 5; H.R. 2646, §§ 101, 102; H.R. 2574, §§ 702, 703; 2020, §§ 101, 102. *See also* I.R.C. § 21 (1999).

<sup>258</sup> The Ways and Means Committee bill also included, and identified as marriage penalty relief, a proposal to raise the phaseout starting point for the student loan interest deduction of I.R.C. section 221 for joint return filers. H.R. 2488, §§ 111, 112.

<sup>259</sup> The Senate bill, S. 799, also proposed a widened lowest bracket in all filing categories. S. 799, 106th Cong. §§ 1, 2, 3 (introduced by Mr. Nighthorse (R-CO) April 14, 1999).

deduction only, had 154 co-sponsors, the largest number in this category of bills.<sup>260</sup>

In 1999 the support in Congress for focusing marriage penalty relief on a restructured standard deduction was strong and bipartisan. The Ways and Means Committee bill passed in the House as introduced, without adding any additional ideas about general marriage penalty relief.<sup>261</sup> In the Senate, the Democratic minority on the Senate Finance Committee proposed an overall increase in the standard deduction and restructuring it to double the joint return allowance in order “to address the marriage penalty for couples who do not itemize.” The minority views also proposed a comparable reduction in the income subject to phaseout in the earned income tax credit for joint return filers “to provide a similar benefit.”<sup>262</sup> This proposal was not offered as a bill but as a floor amendment to the Senate Finance Committee’s bill.<sup>263</sup>

The eight remaining introductions of the proposal combined a doubled standard deduction with other substantial income tax law amendments that were identified as marriage penalty relief. The doubled standard deduction was a feature of the five bills that proposed 1948 style income splitting in one form or another.<sup>264</sup> With

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<sup>260</sup> See *Bill Status Report Data Base for 106th Congress*, (visited Dec. 11, 1999) <<http://thomas.loc.gov>>.

<sup>261</sup> *Compare Financial Freedom Act of 1999*, H.R. 2488, 106th Cong. § 101 (1999) (introduced by Mr. Archer (R-TX), July 16, 1999) with *Financial Freedom Act of 1999*, H.R. 2488 (Engrossed House bill), 106th Cong. § 101 (1999) (passed by the House, July 22, 1999). Both versions of the bill included broad-based tax reduction through tax rate cuts.

<sup>262</sup> TAXPAYER REFUND ACT OF 1990 (S. 1429), S. REP. NO. 106-120, reprinted in BNA TEXT SUPP., July 27, 1999, at S-110 and S-112.

<sup>263</sup> S.Amdt. 1442, §§ 101, 201, 106th Cong. (1999), amending S. 1429, 106th Cong. (1999) (introduced by Mr. Breaux (D-LA), July 29, 1999). Senator Breaux’s amendment was withdrawn after debate. See *Bill Status Report Data Base for 106th Congress* (visited Dec. 11, 1999) <<http://thomas.loc.gov>>.

<sup>264</sup> Four bills proposed structural income splitting. See S. 12; Marriage Tax Elimination Act of 1999, H.R. 6, 106th Cong. (1999) (introduced by Mr. Weller (R-IL), Feb. 10, 1999); American Values Tax Savings Plan for the 21<sup>st</sup> Century, H.R. 2350, 106th Cong. §§ 101, 102 (1999) (introduced by Mr. Sam Johnson (R-TX), June 6, 1999); Top Ten Terrible, H.R. 2414, 106th Cong. (1999) (introduced by Mr. Tancredo (R-CO), July 1, 1999). The income splitting combined return proposal of the Marriage Tax Elimination Act of 1999, S. 15, 106th Cong. (1999) (introduced by Mrs. Hutchinson (R-TX), Jan. 19,

the amendment that added it to the Senate Finance Committee's bill, the doubling proposal became one of four changes identified as marriage penalty relief measures in the Taxpayer Refund Act of 1999.<sup>265</sup> One of the floor amendments offered by the Democratic leadership to the Senate Finance Committee's bill would have both increased the standard deduction by 60 percent and made the joint return allowance double the amount for unmarried individuals.<sup>266</sup> Senator Moynihan's (D-NY) proposal included a similar increase in the joint return filers' standard deduction along with a dual earner deduction.<sup>267</sup>

b. Structural income splitting and the income splitting combined return

In the first session of the 106<sup>th</sup> Congress, eight bills in addition to the vetoed tax cut bill introduced amendments to the Internal Revenue Code that would have had the effect of re-creating income splitting along the lines of the 1948 joint return. Five of the bills proposed structural income splitting for all joint filers. Three of the bills would have confined the effects of income splitting to the lowest marginal bracket. Moreover, both the version of the tax cut bill that the Senate passed and the conference bill presented to the President in substance proposed income splitting for the lowest bracket taxpayers.

Representative Weller re-introduced his proposal for full structural income splitting, a concept which was echoed in several other bills. It gathered an even greater following in 1999 than it had in 1998 — 232 members of the House joined him as co-sponsors in the 106<sup>th</sup> while only 58 had in the 105<sup>th</sup> Congress. Twenty-six of the

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1999) had a similar effect.

<sup>265</sup> Senate floor amendment to Senate Bill 1429 proposed by Senator K.B. Hutchinson, Senate Amendment 1472, was agreed to on July 30, 1999. See *Bill Status Report Data Base for 106th Congress* (visited Dec. 11, 1999) <<http://thomas.loc.gov>>. See also S. 1429 (as introduced); H.R. 2488 (Senate Engrossed Amendment); Appendix - Table 4 *infra*.

<sup>266</sup> S. Amdt. 1442 (the Breaux Amendment).

<sup>267</sup> S. Amdt. 1384, 106th Cong., §§ 101, 102 (1999) (introduced by Mr. Moynihan (D-NY), July 28, 1999) (amending S. 1429).

co-sponsors in the 106<sup>th</sup> Congress were Democrats.<sup>268</sup> Four other bills either made the same proposal as Weller's did — to both double standard deduction allowance and double the width of the marginal rate brackets for joint return filers — or called for its equivalent, an income splitting combined return.<sup>269</sup>

A scaled-down version of structural income splitting found more support from congressional leadership in both parties than did the Weller proposal. The Democratic minority report in the Senate Finance Committee (and one of the Democratic leadership's amendments to the Senate tax cut bill) proposed a substantial amount of income splitting for the lowest bracket joint return filers through a combination of bracket widening at that level and doubling of the standard deduction.<sup>270</sup> Two bills, both introduced by Republicans, made similar proposals.<sup>271</sup>

The version of the Senate Finance Committee's tax cut bill which passed in that chamber would also have created significant income splitting effects at the lowest taxable income levels through the same mechanisms.<sup>272</sup> The tax cut bill that emerged from the Conference Committee would have fully implemented structural income splitting in its expanded bottom tax bracket.<sup>273</sup>

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<sup>268</sup> H.R. 6. The bill summary report listed 232 co-sponsors. See *Bill Summary Report of the 106th Congress*, (visited Dec. 11, 1999) <<http://thomas.loc.gov>>.

<sup>269</sup> Structural income splitting proposals: S. 12; H.R. 2350, § 101, 102; H.R. 2414. The income splitting combined return proposal of the Marriage Tax Elimination Act of 1999, S. 15, 106th Cong. (1999) (introduced by Mrs. Hutchinson (R-TX), Jan. 19, 1999) had a similar effect.

<sup>270</sup> See REPORT ON THE TAXPAYER REFUND ACT, *supra* note 176, at S-110; see also S. Amdt. 1442, S. Amdt. 1384.

<sup>271</sup> S. 799, §§ 1, 2, 3 106th Cong. (1999) (introduced by Mr. Nighthorse (R-CO), April 14, 1999) (section 1 (reduces all tax rates); section 2 (lowest bracket widened); and section 3 (standard deduction doubled)); Middle Class Tax Relief Act of 1999, H.R. 767, 106th Cong. § 3 (1999) (introduced by Mr. Thune, Feb. 12, 1999) (widens lowest bracket and doubles it for joint return; ceiling \$70,000). The Thune bill did not propose doubling the standard deduction.

<sup>272</sup> In the form introduced, S. 1429 called for a flattening of tax rates and broad-based tax cut through the widening of the bottom bracket. The doubling of the standard deduction was added by Mrs. Hutchinson's amendment. See S. Amdt. 1472.

<sup>273</sup> See Taxpayer Refund and Relief Act of 1999, H.R. 2488 (Enrolled Bill), 106th Cong. §§ 101, 111 (1999) (vetoed by President Clinton, Sept. 23, 1999).

## c. Dual earner deduction

Interest in reviving the dual earner deduction in the 106<sup>th</sup> Congress continued to be limited largely to Democrats. Senator Daschle (D-SD) and Representative Lampson (D-TX) again introduced bills to provide a dual earner deduction that phased out at \$60,000 of adjusted gross income.<sup>274</sup> Senator Moynihan (D-NY), in his failed floor amendment to the Senate Finance Committee's tax cut bill, proposed a somewhat different version of the dual earner deduction.<sup>275</sup> All three of these dual earner proposals also would have reduced the marriage penalties in the EITC phaseout, but only for dual earner couples.<sup>276</sup>

## d. Earned income tax credit

The 106<sup>th</sup> Congress gave much more attention to the marriage penalty effects of the earned income tax credit than had the 105<sup>th</sup> Congress. Three bills and two floor amendments introduced marriage penalty relief amendments to the earned income tax credit provision. Interest in the Senate was more substantial than in the House. In the Senate, the Republican leadership as well as the Democratic leadership proposed EITC relief measures. However, these introductions did not all represent the same idea about marriage penalty relief in the earned income tax credit. Some provided for a general increase in the EITC for married couples by creating new and higher phaseout limits for joint return filers while others targeted

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<sup>274</sup> Income Security Enhancement Act of 1999, S. 8, 106th Cong. § 202 (1999) (introduced by Mr. Daschle (D-SD), Jan. 19, 1999) (section 202 — dual earner credit with phaseout at AGI of \$60,000); Income Security Enhancement Act of 1999, H.R. 1453, 106th Cong. § 202 (1999) (introduced by Mr. Lampson (D-TX), April 15, 1999) (section 202 — dual earner deduction with phaseout at AGI of \$60,000). The Daschle bill had 10 co-sponsors.

<sup>275</sup> The Moynihan proposal had a \$95,000 income phaseout ceiling and provided for minimum deductions of up to \$4,350. S. Amdt. 1384, §§ 101, 102, 106th Cong. (1999), (introduced by Mr. Moynihan (D-NY), July 28, 1999). It followed the minority alternative described in the Senate Finance Committee's report. See REPORT ON THE TAXPAYER REFUND ACT, *supra* note 176, at S-112.

<sup>276</sup> All three of these dual earner deduction proposals included specific EITC phaseout relief provisions.

phaseout penalty relief to dual earners in the lowest income range.

In the Senate Finance Committee, both parties proposed to make specific provision for joint return filers in the earned income tax credit to alleviate marriage penalties. The majority and the minority proposed different technical approaches but they had similar impact. The Senate Finance Committee bill increased the phaseout starting and ending points for the earned income tax credit.<sup>277</sup> The Democratic minority report proposed to carry its increases in the standard deduction into the earned income tax credit to reduce the income used in applying the phaseouts.<sup>278</sup> Senator Breaux's (D-LA) floor amendment to the Senate Finance Committee's bill included the same proposal.<sup>279</sup> The Senate approved the Finance Committee's earned income tax credit proposal in the tax cut bill that it passed and the same provision was included in the enrolled bill vetoed by the President.<sup>280</sup>

Like the other provisions designated as marriage penalty relief in the vetoed Taxpayer Refund and Relief Act of 1999, the amendment to the earned income tax credit would have increased marriage bonuses as well as reducing marriage penalties. The increased phaseout starting and ending points were to apply to all joint return filers whether they were marriage penalty couples or sole earner couples. In contrast, the three proposals for dual earner deductions also would have reduced the marriage penalty in the earned income tax credit, but only for couples who were dual earners.<sup>281</sup> The dual earner deduction and its EITC marriage penalty relief proposals were more focused and more efficient, but the estimated revenue cost of the more expansive marriage penalty relief

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<sup>277</sup> See S. 1429, § 202 (EITC joint return relief).

<sup>278</sup> See REPORT ON THE TAXPAYER REFUND ACT, *supra* note 176, at S-110 and S-112.

<sup>279</sup> Compare S. 1429 and S. Amdt. 1442.

<sup>280</sup> Taxpayer Refund Act of 1999, H.R. 2488, (Engrossed Senate Amendment), 106th Cong. § 202 (1999) (passed in Senate July 30, 1999); Taxpayer Refund and Relief Act of 1999, H.R. 2488 (Enrolled Bill), 106th Cong. § 115 (1999) (vetoed by Pres. Clinton, Sept. 23, 1999).

<sup>281</sup> See *supra* notes 274-276 and accompanying text (discussing Daschle, Lampson and Moynihan dual earner bills).

proposal for the earned income tax credit was a modest \$1.3 billion per year.<sup>282</sup>

e. Expansion of the child and dependent care credit

In the 106<sup>th</sup> Congress, the proposal to enlarge the child and dependent care credit emerged as an additional form of marriage penalty relief. The President's Fiscal Year 2000 Budget Proposal made in February 1999, suggested expanding the non-refundable child and dependent care credit for dual earner married couples and sole earner parents and the parents of infants. The Joint Committee Staff Comments on the President's Budget Proposal noted that an increase in the dependent care credit "can be thought of as a proposal to decrease the marriage penalty for families with children." The Clinton Administration had also proposed increasing the dependent care credit in the 1999 budget.<sup>283</sup>

The Senate Finance Committee's tax cut bill sought to expand child care tax credit much along the lines of the President's budget proposal.<sup>284</sup> Four other bills in addition to the Senate Finance Committee's bill proposed to expand the child and dependent care credit. Democrats introduced three.<sup>285</sup> With a floor amendment that improved upon the President's proposal of a new credit for parents of infants under the age of one year, the expansion of the child care tax credit was approved by the Senate in its tax cut bill and also in the conference bill vetoed by the President.<sup>286</sup> Considered as marriage

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<sup>282</sup> See 1999 JOINT COMM. CONF. BILL SUMMARY AND REVENUE ESTIMATES, *supra* note 2, at S-11.

<sup>283</sup> JOINT COMM. ON TAXATION, DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2000 BUDGET PROPOSAL 43, JCS-1-99 (1998).

<sup>284</sup> Compare S.1429, § 204 with JOINT COMM. ON TAXATION, at 37-43.

<sup>285</sup> Common Sense Family Tax Relief Act of 1999, H.R. 2646, 106th Cong. (1999) (introduced by Rep. Carolyn McCarthy (D-NY), July 29, 1999); Pro-Family, Pro-Growth, Pro-Reform Tax Reduction Act of 1999, H.R. 2574, 106th Cong. § 703 (1999) (introduced by Mr. Maloney (D-CT), July 20, 1999); Family Tax Reduction Act of 1999, H.R. 2085, 106th Cong. § 5 (1999) (introduced by Ms. Darlene Hooley (D-OR), June 9, 1999); Tax Relief for Working Americans Act of 1999, H.R. 2020, 106th Cong. § 102 (1999) (introduced by Mrs. Johnson (R-CT)) (28 co-sponsors).

<sup>286</sup> See H.R. 2848 (Engrossed Senate Amendment) § 204 (1999); JOINT



penalty relief, expansions in the child care credit are under inclusive and are not generally applicable to marriage penalty couples. This credit is only applicable to dual earner couples with qualifying dependents and would not result in a general reduction in marriage penalties.

But nonetheless it is also an approach that has a relatively efficient marriage penalty focus. While not all dual earner couples are marriage penalty couples, according to the CBO Report, about 76 percent are. Moreover, if sole earner couples are excluded from the scope of the provision, the efficiency rating improves again. All sole earner couples may not receive bonuses, but none of them pay penalties. To the extent that the proposal to expand the child and dependent care credit is used to provide an infant year supplement to all parents, including sole earner couples, the efficiency and penalty focus rating would diminish.

#### f. Flatteners

Income tax flattening proposals have been a significant part of the congressional tax reform landscape in recent years. In 1999, flattening the income tax became more closely associated with marriage penalty relief in the bills introduced. One bill in the Senate described its proposal to widen the bottom marginal bracket — for unmarried individuals as well as for joint returns — as an effort “to mitigate the marriage penalty.”<sup>287</sup> Four bills and amendments

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COMM. ON TAXATION, COMPARISON OF HOUSE AND SENATE VERSIONS OF TAX CUT BILL (H.R. 2488), WITH JCT REVENUE ESTIMATES, *reprinted in* BNA TEXT SUPP., Aug. 4, 1999, at S-10 [hereinafter JOINT COMM. COMPARISON]; Taxpayer Refund and Relief Act of 1999, H.R. 2488, § 114 (1999) (Enrolled Bill). The extension to parents of infants includes a caption containing the words “stay at home parents” but the operative language of the provision would make it applicable to all parents of qualifying children whether family members are the caregivers or undocumented paid care arrangements are used. The wide approval which met the proposal to expand the child care tax credit for working parents is particularly significant in the context of the efforts of the previous Congress to establish tax policy that was neutral on the question of the labor force participation of parents. The child credit enacted in 1997 provides up to \$500 per child in tax credits, generally non-refundable, that are available to stay at home parents as well as dual earner parents.

<sup>287</sup> Share the Surplus Tax Reduction and Simplification Act, S. 1379, 106<sup>th</sup> Cong. § 12 (1999) (introduced by Mr. Domenici (R-NM) July 15, 1999).

proposing other forms of marriage penalty relief, including the Senate Finance Committee's tax cut bill, also proposed bracket widening at the bottom of the rate tables.<sup>288</sup> Flat tax advocates with increasing frequency in the past two years have also advanced the claim that a flat income tax would eliminate marriage penalties.<sup>289</sup>

Widening the brackets and flattening out the marginal rate structure of the income tax somewhat reduces marriage penalties, however it does not eliminate them. The reduction occurs because the impact of aggregation of incomes is lessened. For example, if the upper limit of the bottom bracket were raised to \$70,000 for joint return filers, as one bill proposed, only dual earner couples whose combined incomes exceeded that amount would see marriage penalties arising from the marginal brackets themselves in calculating pre-credit income tax liability.<sup>290</sup> From an historical perspective, the suggestion that flattening will reduce marriage penalties in the joint return system is a familiar one. This was the argument for repeal of the dual earner deduction made in 1986 when the federal income tax was flattened by the consolidation of brackets and rate reduction. Then as now, flattening brackets reduces the marriage penalty somewhat but does not eliminate it. Flattening would not affect the

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<sup>288</sup> S. 799, § 2; S. 1429 (amendment to S 1442); H.R. 767, § 3; Taxpayer Refund Act of 1999, S. 1429 (Senate Finance Committee Bill); Taxpayer Refund Act of 1999, H.R. 2488, §§ 102, 201, 202, 204 & 209 (Engrossed Senate Amendment) (passed in Senate July 30, 1999) (section 102 — lower bracket increased — broad based tax relief designation; section 201 — combined return of individual incomes; section 202 — EITC joint return relief; section 204 — dependent care credit expanded; infants added; and section 209 — doubles joint return standard deduction).

<sup>289</sup> See *Hearings on the Marriage Penalty Before the House Comm. on Ways and Means*, 105th Cong. (1998) (statement of Bruce Bartlett).

<sup>290</sup> See H.R. 767 (proposing the \$70,000 bottom bracket). A dual earner couple with two \$35,000 taxable incomes would find the 15% rate applicable to the entire amount. The present ceiling of \$43,050 on the bottom bracket for joint returns would put \$26,050 of their income into the 28% bracket. Widening of the bottom bracket would reduce the amount of income tax and the cost of marriage tax penalties for those with incomes above the lowest bracket as well, because more of their income would be taxed at the lower rate. See REPORT ON THE TAXPAYER REFUND ACT, *supra* note 176, at S-110 (minority views, criticizing Senate Finance Committee majority bill's widening of the lowest bracket by \$4,000 for joint returns and \$2,000 for unmarrieds). The Senate Finance bill raised the upper limit of the bottom bracket by \$2,000 for unmarried individuals and \$4,000 for joint return filers.

penalties that arise from the rest of the joint return system, such as those caused upon marriage by the loss of part of the standard deduction or a portion of the earned income tax credit.<sup>291</sup>

Even the flattest taxes being proposed would continue to impose a higher effective tax rate on the secondary earner in the couple and with it, continue some of the tax incentives for housework and tax disincentives to market employment. The general flat tax proposals, such as those of Representatives Armey and Senator Shelby, combine flattening of rates with a per capita personal exemption that would reduce, if not eliminate, marriage penalty effects for the couple as a unit.<sup>292</sup> Yet the flat tax proposals retain aggregation of incomes for married couples and with it, marriage bonuses and some progressivity in average tax rates. For example, in the Shelby-Arme y flat tax, unmarried taxpayers are entitled to a personal exemption of \$11,000 and a married couple (without children) is allowed an exemption of \$22,000.<sup>293</sup> Although the stated tax rate in the Shelby-Arme y flat tax proposal is 17%, there are in effect two marginal brackets. The personal exemptions create a bottom bracket with a tax rate of zero and hence varying average rates of tax depending on how much income there is above the exemption level.<sup>294</sup>

If removing tax disincentives that affect the choice of work for married women is one of the reasons to seek marriage neutrality,<sup>295</sup> the solution will not be found in the flat taxes. Stacking the income of the wife, generally the spouse seen to be the secondary earner, on top of the income of the husband, results in a higher tax rate for her than for him. His income is seen to absorb the personal exemptions of both

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<sup>291</sup> For a discussion of the continuance of marriage penalties after the 1986 reforms, see Rosen 1987, *supra* note 149, at 568.

<sup>292</sup> See Freedom and Fairness Restoration Act of 1997, S. 1040, 105th Cong. § 101 (1997) (introduced by Mr. Shelby (R-AL)); Freedom and Fairness Restoration Act of 1997, H.R. 1040, 105th Cong. § 101 (1997).

<sup>293</sup> S.1040, § 101; H.R. 1040, § 101.

<sup>294</sup> An exemption of \$22,000 and a stated tax rate of 17% would result in an average rate of tax of 8.5% on \$44,000 of income and an average rate of tax of 12.75 % on \$88,000 of income.

<sup>295</sup> Professor Zelenak made this argument persuasively in his 1994 article. See Zelenak, *supra* note 78.

and her income is seen to bear the full stated rate of tax.<sup>296</sup> The couple does not pay a larger total tax because of their marital status, but the secondary worker still sees a higher effective tax rate when substituting market employment for home production. This problem arises when there is aggregation of incomes if there is any amount of progressivity. If progressivity cannot be eliminated completely, the solution would seem to be disaggregation, a return to the individual taxation of husbands and wives.

g. Optional combined return of individual incomes

In the 106<sup>th</sup> Congress, the optional combined return of individual incomes gained significant support. It was the chief form of marriage penalty relief in the tax cut bill that the Senate Finance Committee originally introduced. This proposal to create an alternative to the joint return for dual income couples also won the approval of a majority of the Senate. It was included in the version of the Senate's tax cut bill that passed in that chamber.<sup>297</sup>

But the optional combined return of individual incomes did not survive the Conference Committee. In its place the Conference Committee approved the doubling of the lowest marginal tax bracket for joint returns.<sup>298</sup> This substitution of the income splitting lowest bracket for the optional combined return of individual incomes took place in the negotiation of the differences between the House and Senate tax cut bills. In a process not unfamiliar to observers of tax legislation, the Conference Committee settled differences by taking an approach to the taxation of married couples that had not been approved in the tax cut bill of either the House or the Senate.

The proposal for the optional combined return of individual incomes was included in the Finance Committee's tax cut bill in much

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<sup>296</sup> See Rosen (1977), *supra* note 122 (discussing stacking and the impact of marriage penalties on the labor supply of married women).

<sup>297</sup> Compare Taxpayer Refund Act of 1999, S. 1429 (Senate Finance Committee bill) and H.R. 2488 (Engrossed Senate Amendment), §201.

<sup>298</sup> See 1999 JOINT COMM. CONF. BILL SUMMARY AND REVENUE ESTIMATES, *supra* note 2, at S-11 (comparing the engrossed bill from the House and the engrossed amendment from the Senate with the Conference bill results in the category entitled "Marriage Penalty Relief").

the same form as it had been proposed in the first session of the 105<sup>th</sup> Congress by Representative Weller and Senator Hutchinson.<sup>299</sup> Tax credits were still to be determined and applied on the basis of a joint return income aggregation, but taxable income and the regular federal income tax were determined as if the couple was unmarried. In describing its proposal for optional filing, the Senate Finance Committee indicated its intention to take “a comprehensive approach” to the reduction or elimination of marriage penalties. The optional combined return of individual incomes was both more comprehensive and more targeted toward marriage penalty couples than any of the other proposals introduced during the three sessions of Congress. Revenue estimates indicated that it would cost about \$24 billion in the form proposed.<sup>300</sup> Revenue estimates of the cost of the income splitting for the lowest bracket and a doubled standard deduction for all joint return filers in the Conference Bill were not provided on an annual basis and hence a comparable measure is not available.<sup>301</sup>

h. The Taxpayer Refund and Relief Act of 1999 – the vetoed tax cut bill

The bill that the President vetoed on September 23, 1999,

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<sup>299</sup> The Senate Finance Committee’s version added language providing that income from jointly owned property was to be allocated 50-50 between husband and wife. The impact of this change on the community property issue is not clear. It tends to suggest that community property principles are to be followed in determining whether a spouse has income. If that is its meaning, the impact of the combined return of individual incomes would be very different in New York than in California or Texas. *See* text accompanying notes 106-110 *supra*. *Compare* Taxpayer Refund Act of 1999, S. 1429, § 201 (Senate Finance Committee bill) *and* Marriage Tax Elimination Act, H.R. 2456, 105th Cong. (1997) *and* Marriage Tax Elimination Act, S. 1314 105th Cong. (1997). Taxpayer Refund Act of 1999, H.R. 2488, (Engrossed Senate Amendment), §§102, 201, 202, 204, & 209 (section 102 — lower bracket increased — broad based tax relief designation); section 201 — combined return of individual incomes; section 202 — EITC joint return relief; section 204 — dependent care credit expanded); and section 209 — doubles joint return standard deduction).

<sup>300</sup> ESTIMATED BUDGET EFFECTS OF THE TAXPAYER REFUND ACT OF 1999, AS APPROVED BY THE COMMITTEE ON FINANCE ON JULY 21, 1999, S. REP. NO. 106-120 (1999).

<sup>301</sup> ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 2488 (JCX-61-99 R), at 1. A total of \$112.881 billion is shown for 2000-09. *Id.*

called for some \$792 billion in tax cuts over the next ten years. More than \$121 billion of the tax cut proposed by the Taxpayer Refund and Relief Act of 1999, some 15 percent, was allocated to marriage penalty relief provisions.<sup>302</sup> Like the majority of the marriage penalty relief bills in the 106<sup>th</sup> Congress, the tax cut bill addressed itself to a number of different features of the problem but shied away from thorough-going solutions. Moreover, with the exception of the \$5 billion or so aimed at expanding the dependent and child care credit, the remainder of the more than \$115 billion revenue cost would have gone to a collection of the least efficient forms of marriage penalty relief.

Different proposals for marriage penalty relief came to the Conference Committee from the House and Senate. The choices of the Conference Committee on the marriage penalty question were the doubled standard deduction for joint filers, a double-size bottom tax bracket for the joint return, increased earned income tax credits for joint filers and an expanded child care credit with special provision for stay-at home parents of infants.<sup>303</sup> In effect, the Conference Committee constructed a bill that would have given middle income married taxpayers the benefits of structural income splitting on the 1948 model, at least for determining pre-credit tax liability. The vetoed tax cut bill gave upper income married taxpayers the valuable opportunity to claim the doubled standard deduction at their higher

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<sup>302</sup> See 1999 JOINT COMM. CONF. BILL SUMMARY AND REVENUE ESTIMATES, *supra* note 2, at S-31 (showing \$121.95 billion for four items: (1) doubling the standard deduction; (2) doubling the lowest bracket, together totaling \$ 112.881 billion; (3) increasing earned income tax credit phaseout starting and stopping points for joint returns, \$4.163 billion; and (4) expanded dependent care credit, \$4.9 billion). Unlike the others, the description of dependent care expansion in the table did not use the words marriage penalty. The alternative minimum tax [AMT] and its marriage penalty are not included in this sum nor is the marriage penalty discussed above. The energetic efforts to repeal the entire AMT for individuals suggest that it raises broad-based tax reduction issues rather than marriage penalty issues despite the inclusion of the penalty buzz word in the legislative materials. *Id.* at S-33, pt. III.

<sup>303</sup> Taxpayer Refund and Relief Act of 1999, H.R. 2488, 106th Cong. (1999) (Enrolled Bill), (vetoed by Pres. Clinton, Sept. 23, 1999) (section 101 — lowest bracket doubled for joint return; section 111 — doubles joint return standard deduction; section 115 — EITC joint return relief; section 114 — dependent care credit expanded; infants added).

marginal rates and also the benefit of having more income taxed in the expanded bottom bracket. But the marriage penalty effects of the upper four tax brackets would have remained. Similarly, itemizers at all income levels would have seen relatively little marriage penalty relief. Married couples in the earned income tax credit range were to be given the opportunity to reduce penalties or increase bonuses, depending on where they stood under current law.

The marriage penalty solutions proposed in the Conference Committee's bill were among those rated the least efficient by the CBO Study. Structural income splitting in the CBO projections was expected to deliver about half of its revenue cost to couples who were not paying marriage penalties at all.<sup>304</sup> Nor was the amendment proposed for the earned income tax credit any more focused on marriage penalty couples. While marriage penalties would have been reduced by each of these proposals, the reduction in penalties almost seems incidental to the enhancement of marriage bonuses that also would have resulted. The expansion of the child and dependent care credit would have helped dual earner couples but only if they had qualifying dependents. The picture of the taxation of married couples that emerges from the Conference bill is one of continuing penalties and increased bonuses and erratic and unintended consequences.

Indications of the dominance of the trend toward using marriage penalty relief provisions to justify a general tax cut for married couples can be seen in the development of the Senate's tax cut bill as well as in that of the House. The House leadership in the Ways and Means Committee adopted one of the broadest and least efficient forms of marriage penalty relief — the doubled standard deduction. The Senate Finance Committee's bill started in a different direction, with the most narrowly targeted form of marriage penalty relief, the optional combined return of individual incomes. But the addition of the Senate floor amendment to double the standard deduction suggested strongly that the Senate was pursuing two different agendas at the same time. It was making an effort to accommodate dual earners but it also took the opportunity to try to

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<sup>304</sup> See CBO STUDY, *supra* note 4, at Summary tbl. 4.

reduce taxes for sole earner married couples.<sup>305</sup>

The Senate bill as introduced already provided a doubled standard deduction for marriage penalty couples through the optional combined return of individual incomes. Couples electing the optional combined return determined their individual pre-credit tax liability by using the standard deduction for unmarried individuals as well as the rate table for unmarrieds.<sup>306</sup> The restructuring of the standard deduction itself pursuant to the floor amendment only served marriage bonus couples who would not be electing the optional combined return.

The impact of the proposals made in the vetoed tax cut bill on the marriage penalty is consistent with the trend of the other bills introduced in the 106<sup>th</sup> Congress. The year 1999 saw growing support for general tax cuts for married couples presented in the guise of marriage penalty relief. Sole earner couples stood to benefit from almost all of the penalty relief proposals introduced in the first session of this Congress even though they already receive substantial marriage bonuses and pay no marriage penalties.<sup>307</sup>

But nonetheless, interest in providing an alternative filing status for dual earner and dual income couples that would recognize individual income as the basis for taxation was visible and substantial in the Senate. A similar level of support for individual taxation of husbands and wives had also been seen in the House in 1997, at the beginning of this three year run of marriage penalty relief proposals, when Representative Weller's proposal for the optional combined return of individual incomes gathered more than 200 co-sponsors. Amidst the movement toward general tax cuts for married couples, the proposal for an alternative to aggregation stands out as an expression of skepticism about the entire enterprise of joint return taxation.

Finally, it seems worth noting that despite the trend toward describing tax reduction broadly applicable to joint return filers as marriage penalty relief, the tax cut bill did distinguish its proposal for a general flattening of the bottom bracket from marriage penalty

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<sup>305</sup> Compare Appendix - Table 4 *infra* with Figure A *supra*.

<sup>306</sup> S. 1429, 106th § 201 (1999).

<sup>307</sup> Compare Appendix - Table 4 *infra* with Figure A *supra*. See also CBO STUDY, *supra* note 4, at Summary tbl.2.



relief. The widening of the lowest bracket for the benefit of unmarried individuals and heads of household was identified as broad based tax reduction. The proposal to lower the bottom rate from 15 percent to 14 percent also appeared under the broad based tax relief title.<sup>308</sup>

### CONCLUSION

It would be unduly speculative to treat all of the tax reform proposals made in Congress over the past three years as indicative of considered policy choices, even on the part of their sponsors. The tax legislative process in these years, especially since 1998, has taken place in an atmosphere of bitter and partisan disagreement about the federal budget. The tax reform and tax cut bills that Congress proposed in 1998 and 1999 were advanced under the threat, or perhaps the promise, of a presidential veto. Further, the prospect of a budget surplus made it possible to think about tax reform outside of a revenue neutral plan. Under these circumstances, the normal budget constraints may not have been at work, winnowing out the most cost-effective solutions. Accountability for revenue loss in making policy choices is not a concern if many members are convinced that the bill will not become law in any event. But even under these conditions, legislative proposals represent at least a window through which the thinking of elected policy makers can be glimpsed. Indeed it may be argued that the certainty of a veto encourages a more complete expression of goals and preferences than ordinarily occurs. The ideas advanced in bills that have not become law are nonetheless ideas that have attracted the interest and support of policy makers. It is as ideas about marriage and the income tax that the anti-penalty proposals in the past three sessions of Congress are important.

Most of the bills introduced in the past three years which identify themselves as marriage penalty relief would effectuate a general tax cut for all married couples who file joint returns. It would be easy to dismiss these proposals as political manipulation. Indeed,

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<sup>308</sup> Compare 1999 JOINT COMM. CONF. BILL SUMMARY AND REVENUE ESTIMATES, *supra* note 2, at S-31, pt. IA & IB.

it is arguable whether an amendment that would direct less than half of its tax reduction effects to marriage penalty couples, as would the structural income splitting proposal, ought to be described as marriage penalty relief at all. But at the same time these bills offer important insights into the re-examination of tax policy toward marriage that appears to have engaged the attention of Congress since 1993.

The forty-seven bills and amendments discussed above all claim to reduce or eliminate the marriage penalty. The attachment of the term marriage penalty to all of these proposals indicates the political potency of the issue. If nothing more, congressional policy makers who make use of the marriage penalty buzz word in their tax cut proposals are acknowledging the pressing claims of dual earner couples to more equitable tax treatment. Yet it remains a striking feature of the discourse that there appears to have been little interest in the most obvious solution to the problem of the marriage penalties created by the joint return system. Not a single bill proposing the repeal of the joint return or mandatory individual filing for married couples was introduced in these three sessions. The omission of this solution from the bills for marriage penalty relief is particularly noteworthy because from a revenue point of view repeal of the joint return is an attractive idea. If nothing else changed in the income tax, individual filing would end marriage bonuses and stop the loss of the \$32 billion in tax revenue now going in that direction. This would be more than enough to offset the impact of forgoing the \$28.8 billion in extra tax revenue that marriage penalty couples have been paying.

But a fair distillation of the prevalent ideas in Congress about the taxation of marriage over the past three sessions confirms that the most revenue efficient solution has no visible supporters. None of the bills proposed threatened marriage bonuses at all. The impact of all but two of the solutions proposed would have been to increase bonuses substantially. The dual earner deduction and the optional combined return of individual incomes are the exceptions. The import of most of the marriage penalty relief bills introduced in the past three years is that the sole earner marriage, although diminishing in its representation in American family life, has found renewed support in Congress. The trends in marriage penalty relief proposals of the past three years suggest strongly that Congress is willing to spend money on marriage.

Appendix - Table 1

Income Tax Marriage Penalty Relief Bills Introduced in the U.S. House of Representatives  
1997 to 1999 (105<sup>th</sup> Congress and 106<sup>th</sup> Congress, 1<sup>st</sup> Session)

Bill number (sponsor, party and state). Bill with most co-sponsors in session in bold; proposal with most co-sponsors indicated by XX; if passed in either chamber, marked with asterisk (*). <sup>a</sup>	INCOME TAX MARRIAGE PENALTY RELIEF PROPOSALS						
	Structural income splitting		Income splitting combined return	Lowest tax bracket widened overall	EITC phaseout relief for joint returns (§ 32)	Dual earner deduction or credit	Optional combined return of individual incomes
	Standard deduction doubled for joint returns <sup>b</sup>	Tax brackets doubled for joint returns					
105 <sup>TH</sup> CONGRESS, 1 <sup>ST</sup> SESSION (1997)							
H.R. 2718 (Knollenberg R-MI)	X						
H.R. 1584 (S. Johnson R-TX)						X	
H.R. 2593 (Herger R-CA)						X <sup>c</sup>	
H.R. 3059 (Jackson-Lee D-TX)							XX <sup>d</sup>
H.R. 2456 (Weller R-IL)							XX <sup>d</sup>
H.R. 2462 (Kasich R-OH)							XX
105 <sup>TH</sup> CONGRESS, 2 <sup>ND</sup> SESSION (1998)							
H.R. 3524 (McDermott D-WA)	XX <sup>f</sup>						
H.R. 4542 (N. Johnson R-CT)	XX						
H.R. 4579 (Archer R-TX) <sup>g</sup>	XX <sup>*</sup>						
H.R. 4597 (Rangel D-NY)	XX						
H.R. 3995 (Neal D-MA)					X		
H.R. 3151 (Thune R-SD)		X <sup>h</sup>					
H.R. 3620 (Gephardt D-MO)	X	X					
H.R. 3734 (Weller R-IL)	X	X <sup>i</sup>					
106 <sup>TH</sup> CONGRESS, 1 <sup>ST</sup> SESSION (1999)							
H.R. 6 (Weller R-IL)	XX	XX <sup>j,k</sup>					
H.R. 2350 (S. Johnson R-TX)	XX	XX					
H.R. 2414 (Tancredo R-CO)	XX	XX					
H.R. 767 (Thune R-SD)		X <sup>h</sup>		X			
H.R. 2488 (Archer R-TX)	X <sup>*</sup>						
H.R. 2085 (Hooley D-OR)	X						
H.R. 108 (Knollenberg R-MI)	X						
H.R. 725 (Kluczka D-WI)	X						
H.R. 2020 (N. Johnson, R-CT)	X						
H.R. 2646 (C. McCarthy D-NY)	X						
H.R. 2574 (Maloney D-CT)	X						
H.R. 1453 (Lampson D-TX)					X <sup>l</sup>	X <sup>l,i</sup>	
H.R. 2488 (EHB) <sup>m</sup>	X <sup>*</sup>						
H.R. 2488 (vetoed bill) <sup>n</sup>	CC <sup>*</sup>	CC <sup>n,*</sup>		C <sup>*</sup>	C <sup>*</sup>		

<sup>a</sup> Bills identified by word searches on THOMAS and LEXIS Bill Tracking; number of sponsors from THOMAS Bill Summary data base. Multiple co-sponsorships by a member in a given session have not been eliminated. Bills introduced by Chairman of Ways and Means Committee in *italics*. C denotes Conference bill.

<sup>b</sup> Amending I.R.C. § 63(c), (1999); would reduce taxable income only; phaseout penalties unaffected.

<sup>c</sup> Amending I.R.C. § 62 (a) (1999), reducing AGI and phaseout penalties.

<sup>d</sup> Proposal with most co-sponsors (271) in the House in 1997: optional combined return of individual incomes.

<sup>e</sup> 1997 House marriage penalty relief bill with most co-sponsors (238). H.R. 2593 had second most (189).

<sup>f</sup> Proposal with most co-sponsors (145) in the House in 1998: doubled standard deduction as only general relief.

<sup>g</sup> House Ways and Means Committee bill, 1998 Tax Relief Act; passed in House, no action in Senate.

<sup>h</sup> Only lowest bracket doubled for joint returns.

<sup>i</sup> 1998 House marriage penalty relief bill with the most co-sponsors (59).

<sup>j</sup> 1999 House marriage penalty relief bill with the most co-sponsors (232).

<sup>k</sup> Proposal with most co-sponsors (294) in the House in 1999: structural income splitting.

<sup>l</sup> Dual earner deduction phased out at joint return AGI of \$60,000; EITC relief for dual earner only.

<sup>m</sup> Enrolled House Bill, Financial Freedom Act of 1999, as passed in the House.

<sup>n</sup> Taxpayer Refund and Relief Act of 1999, Enrolled Bill; vetoed by President, September 23, 1999.

Appendix - Table 2

Income Tax Marriage Penalty Relief Bills Introduced in the U.S. Senate, 1997-1999  
(105th Congress and 106th Congress, 1st Session)

Bill number (sponsor, party and state). Bill with most co-sponsors in session in <b>bold</b> ; proposal with most co- sponsors indicated by ✓ <sup>f</sup> ; if passed in either chamber marked with asterisk (*). <sup>a</sup>	INCOME TAX MARRIAGE PENALTY RELIEF PROPOSALS						
	Structural income splitting		Income splitting combined return	Lowest tax bracket widened overall	EITC phaseout relief for joint returns (\$ 32)	Dual earner deduct'n or credit <sup>b</sup>	Optional combined return of individual incomes
	Standard deduct'n doubled for joint returns <sup>c</sup>	Tax brackets doubled for joint returns					
	105 <sup>TH</sup> CONGRESS, 1 <sup>ST</sup> SESSION (1997)						
<b>S. 1285 (Faircloth R-NC)</b>			✓✓ <sup>d</sup>				
S. 1314 (Hutchinson R-TX)							✓
	105 <sup>TH</sup> CONGRESS, 2 <sup>ND</sup> SESSION (1998)						
S.Amdt. 2436 (Gramm R-AZ) <sup>e</sup>	✓✓ <sup>f, g, h</sup>				✓		
<b>S.Amdt. 2686 (Gramm R-AZ)<sup>e</sup></b>	✓✓ <sup>f, h, *</sup>				✓ <sup>*</sup>		
S.Amdt. 2688 (Daschle D-SD) <sup>a</sup>					✓ <sup>i</sup>	✓	
S. 1989 (Ford D-KY)	✓✓						
S. 1569 (Coverdell R-GA)		✓ <sup>i</sup>		✓			
S. 2147 (Daschle D-SD)					✓ <sup>i</sup>	✓	
S. 1999 (Hutchinson R-TX)	✓	✓					
<b>S. 1711 (Hutchinson R-TX)</b>							✓✓ <sup>j</sup>
	106 <sup>TH</sup> CONGRESS, 1 <sup>ST</sup> SESSION (1999)						
<b>S. 12 (Hutchinson R-TX)</b>	✓	✓ <sup>k</sup>					
S. 15 (Hutchinson R-TX)			✓				
S. 284 (McCain R-AZ)	✓						
S. 1160 (Grassley/Feinstein)	✓						
S. 1379 (Donmici R-NM)				✓			
S. 8 (Daschle D-SD)					✓✓ <sup>l, m</sup>	✓	
S. 799 (Nighthorse R-CO)	✓			✓			
<b>S. 1429 (Roth R-DE)</b>					✓✓ <sup>*</sup>		✓ <sup>*</sup>
S.Amdt. 1384 (Moynihan D-NY) <sup>n</sup>	✓ <sup>h</sup>				✓✓ <sup>i</sup>	✓	
S.Amdt. 1442 (Breaux D-LA) <sup>n</sup>	✓ <sup>h</sup>			✓	✓✓		
S.Amdt. 1472 (Hutchinson R-TX) <sup>n</sup>	✓ <sup>*</sup>						
<b>H.R. 2488 (ESA)<sup>o</sup></b>	✓ <sup>*</sup>			✓ <sup>*</sup>	✓✓ <sup>*</sup>		✓ <sup>*</sup>
<b>H.R. 2488 (vetoed bill)<sup>p</sup></b>	C <sup>*</sup>	C <sup>*</sup>		C <sup>*</sup>	CC <sup>*</sup>		

<sup>a</sup> Bills identified by word searches on THOMAS and LEXIS Bill Tracking; number of sponsors from THOMAS Bill Summary data base. Multiple co-sponsorships by a member in a given session have not been eliminated. Bills introduced by Chairman of Committee on Finance in *italics*. C denotes conference bill.

<sup>b</sup> Amending IRC § 62(a), reducing AGI and phaseout penalties. Dual earner deduction to phased out at joint return AGI of \$60,000 (Daschle proposals) or \$95,000 (Moynihan).

<sup>c</sup> Amending IRC § 63(c), would reduce taxable income only; phaseout penalties unaffected.

<sup>d</sup> 1997 Senate marriage penalty relief bill and proposal with most co-sponsors (40).

<sup>e</sup> Senate floor amendment to S. 1415, the Universal Tobacco Settlement Act.

<sup>f</sup> Increase in joint return deduction phased out at joint return AGI of \$50,000 in both Gramm proposals.

<sup>g</sup> Proposal with most co-sponsors (8) in Senate in 1998: increase joint return standard deduction to at least double.

<sup>h</sup> Joint return standard deduction more than doubled.

<sup>i</sup> Only lowest bracket doubled.

<sup>j</sup> Tied with S.Amdt. 2686 for 1998 Senate marriage penalty relief bill with most co-sponsors (4).

<sup>k</sup> 1999 Senate marriage penalty relief bill with most co-sponsors (18).

<sup>l</sup> EITC phaseout relief for dual earners only.

<sup>m</sup> Proposal with most co-sponsors (28) in the Senate in 1999: EITC phaseout relief (not all limited to dual earners).

<sup>n</sup> Senate floor amendment to S. 1429.

<sup>o</sup> Engrossed Senate Amendment, amended version of S. 1429, passed by Senate; renumbered and renamed.

<sup>p</sup> Taxpayer Refund and Relief Act of 1999, Enrolled Bill; vetoed by President; September 23, 1999.

Appendix - Table 3

Income Tax Marriage Penalty Relief Bills Introduced in the 105<sup>th</sup> Congress, 1997-1998

Bill number (sponsor, party and state). Bill with most co-sponsors in chamber in session in <b>bold</b> ; proposal with most co-sponsors indicated by XX or √; if passed in either chamber marked with asterisk (*). <sup>a</sup>	INCOME TAX MARRIAGE PENALTY RELIEF PROPOSALS						
	Structural income splitting		Income splitting combined return	Lowest tax bracket widened overall	EITC phaseout relief for joint returns (§ 32)	Dual earner deduction or credit <sup>b</sup>	Optional combined return of individual incomes
	Standard deduction doubled for joint returns <sup>c</sup>	Tax brackets doubled for joint returns					
	105 <sup>TH</sup> CONGRESS, 1 <sup>ST</sup> SESSION (1997)						
H.R. 2718 (Knollenberg R-MI)	X						
H.R. 1584 (S. Johnson, R-TX)						X	
H.R. 2593 (Herger R-CA)						X <sup>d</sup>	
H.R. 3059 (Jackson-Lee D-TX)							XX <sup>e</sup>
<b>H.R. 2456 (Weller R-IL)</b> <sup>f</sup>							XX
H.R. 2462 (Kasich R-OH)							XX
<b>S. 1285 (Faircloth R-NC)</b>			√√ <sup>g</sup>				
S. 1314 (Hutchinson R-TX)							√
	105 <sup>TH</sup> CONGRESS, 2 <sup>ND</sup> SESSION (1998)						
H.R. 3524 (McDermott D-WA)	XX <sup>h</sup>						
H.R. 4542 (N. Johnson R-CT)	XX						
<i>H.R. 4579 (Archer R-TX)</i>	XX <sup>*</sup>						
H.R. 4597 (Rangel D-NY)	XX						
H.R. 3995 (Neal D-MA)					X		
H.R. 3151 (Thune R-SD)		X <sup>i</sup>					
H.R. 3620 (Gephardt D-MO)	X	X					
<b>H.R. 3734 (Weller R-IL)</b>	X <sup>j</sup>	X					
S. Amdt. 2436 (Gramm R-AZ) <sup>k</sup>	√√ <sup>l m n</sup>				√		
<b>S. Amdt. 2686 (Gramm R-AZ)</b> <sup>k</sup>	√√ <sup>m *</sup>				√ <sup>*</sup>		
S. Amdt. 2688 (Daschle D-SD) <sup>k</sup>					√ <sup>o</sup>	√ <sup>p</sup>	
S. 1569 (Coverdell R-GA)		√ <sup>i</sup>		√			
S. 1989 (Ford D-KY)	√√						
S. 1999 (Hutchinson R-TX)	√	√					
<b>S. 1711 (Hutchinson R-TX)</b>							√√ <sup>q</sup>
S. 2147 (Daschle D-SD)					√ <sup>o</sup>	√ <sup>p</sup>	

<sup>a</sup> Bills identified by word searches on THOMAS and LEXIS Bill Tracking; number of sponsors from THOMAS Bill Summary data base. Multiple co-sponsorships by a member in a given session have not been eliminated.

Bills introduced by Chairman of the House Ways and Means Committee or Senate Finance Committee in *italics*.

Introduction of particular proposal indicated by X (House) or √ (Senate).

<sup>b</sup> Amending I.R.C. § 62(a), reducing AGI and phaseout penalties.

<sup>c</sup> Amending I.R.C. § 63(c), would reduce taxable income only; phaseouts unaffected.

<sup>d</sup> 1997 House marriage penalty relief bill with second most co-sponsors (189).

<sup>e</sup> Proposal with the most co-sponsors (271) in the House in 1997: optional combined return of individual incomes.

<sup>f</sup> 1997 House marriage penalty relief bill with the most co-sponsors (238).

<sup>g</sup> 1997 Senate marriage penalty relief bill and proposal with the most co-sponsors (40).

<sup>h</sup> Proposal with the most co-sponsors (145) in the House in 1998: doubled standard deduction as only general relief.

<sup>i</sup> Only lowest bracket doubled for joint returns.

<sup>j</sup> 1998 House marriage penalty relief bill with the most co-sponsors (59).

<sup>k</sup> Senate floor amendment to S. 1415, the Universal Tobacco Settlement Act.

<sup>l</sup> Increase in standard deduction phased out at joint return AGI of \$50,000 in both Gramm proposals.

<sup>m</sup> Joint return standard deduction to be more than double the unmarried individual amount.

<sup>n</sup> Proposal with most co-sponsors (8) in Senate in 1998: increase joint return standard deduction to at least double.

<sup>o</sup> EITC phaseout relief for dual earners only.

<sup>p</sup> Dual earner deduction phased out at joint return AGI of \$60,000.

<sup>q</sup> Tied with S. Amdt. 2686 for 1998 Senate relief bill with most co-sponsors (4).

Appendix - Table 4

Income Tax Marriage Penalty Relief Bills Introduced in the 106<sup>th</sup> Congress, 1<sup>st</sup> Session (1999)

Bill number (sponsor, party and state). Bill with most co-sponsors in chamber in session in bold; proposal with most co- sponsors indicated by XX or √; if passed in either chamber marked with asterisk (*). <sup>a</sup>	INCOME TAX MARRIAGE PENALTY RELIEF PROPOSALS						
	Structural income splitting		Income splitting combined return	Lowest tax bracket widened overall	EITC phaseout relief for joint returns (\$ 32)	Dual earner deduct'n or credit <sup>b</sup>	Optional combined return of individual incomes
	Standard deduct'n doubled for joint returns <sup>c</sup>	Tax brackets doubled for joint returns					
106 <sup>TH</sup> CONGRESS, 1 <sup>ST</sup> SESSION (1999)							
<b>H.R.6 (Weller, R-IL) <sup>d</sup></b>	XX	XX <sup>e</sup>					
H.R.2350 (S. Johnson, R-TX)	XX	XX					
H.R. 2414 (Tancredo, R-CO)	XX	XX					
H.R.767 (Thune, R-SD)		X <sup>f</sup>		X			
<i>H.R.2488 (Archer, R-TX)</i>	X <sup>*</sup>						
H.R.2085 (Hooley, D-OR)	X						
H.R.108 (Knollenberg, R-MI)	X						
H.R.725 (Klecza, D-WI)	X						
H.R.2020 (N.Johnson, R-CT)	X						
H.R.2646 (C.McCarthy, D-NY)	X						
H.R. 2574 (Maloney, D-CT)	X						
H.R. 1453 (Lampson, D-TX)					X <sup>j</sup>	X <sup>h</sup>	
<i>H.R. 2488 (EHB) <sup>k</sup></i>	X <sup>*</sup>						
<b>S.12 (Hutchinson, R-TX) <sup>l</sup></b>	√	√					
S.15 (Hutchinson, R-TX)			√				
S. 284 (McCain, R-AZ)	√						
S. 1160 (Grassley / Feinstein)	√						
S. 1379 (Donimici, R-NM)				√			
S. 8 (Daschle, D-SD)					√√ <sup>j,k</sup>	√ <sup>g</sup>	
S. 799 (Nighthorse, R-CO)	√			√			
<i>S. 1429 (Roith, R-DE)</i>					√√ <sup>*</sup>		√ <sup>*</sup>
S. Amdt. 1472 (Hutchinson R-TX) <sup>i</sup>	√ <sup>*</sup>						
S.Amdt.1384(Moynihan, D-NY) <sup>l</sup>	√ <sup>m</sup>				√√ <sup>j</sup>	√ <sup>h</sup>	
S.Amdt. 1442 (Breaux, D-LA) <sup>l</sup>	√ <sup>m</sup>			√	√√		
<b>H.R.2488 (ESA) <sup>n</sup></b>	√ <sup>*</sup>			√ <sup>*</sup>	√√ <sup>*</sup>		√ <sup>*</sup>
<i>H.R. 2488 (vetoed bill) <sup>o</sup></i>	C <sup>*</sup>	C <sup>*</sup>		C <sup>*</sup>	CC <sup>*</sup>		

<sup>a</sup> Bills identified by word searches on THOMAS and LEXIS Bill Tracking; number of sponsors from THOMAS Bill Summary data base. Multiple co-sponsorships by a member in a given session have not been eliminated. Bills introduced by Chairman of the House Ways and Means Committee or Senate Finance Committee in *italics*. Introduction of particular proposal indicated by X (House) or √ (Senate). C denotes conference bill.

<sup>b</sup> Amending I.R.C. § 62(a), reducing AGI and phaseout penalties.

<sup>c</sup> Amending I.R.C. § 63(c), would reduce taxable income only; phaseouts unaffected.

<sup>d</sup> 1999 House marriage penalty relief bill with most co-sponsors (232).

<sup>e</sup> Proposal with most co-sponsors (294) in House in 1999: structural income splitting.

<sup>f</sup> Only lowest bracket doubled for joint returns.

<sup>g</sup> Dual earner deduction phased out at joint return AGI of \$60,000 (H.R. 1435 and S.8) or \$95,000 (S.Amdt.1384).

<sup>h</sup> Enrolled House Bill, Financial Freedom Act of 1999, as passed in the House.

<sup>i</sup> 1999 Senate marriage penalty relief bill with most co-sponsors (18).

<sup>j</sup> EITC phaseout relief only for dual earners.

<sup>k</sup> Proposal with most co-sponsors (28) in Senate in 1999: EITC phaseout relief (not all limited to dual earners).

<sup>l</sup> Senate floor amendment to S. 1429.

<sup>m</sup> Standard deduction for joint return more than doubled.

<sup>n</sup> Engrossed Senate Amendment, amended version of S. 1429, passed by Senate; renumbered and renamed.

<sup>o</sup> Taxpayer Refund and Relief Act of 1999, Enrolled Bill; vetoed by President, September 23, 1999.

