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COMMENT

FILING STATUS AND TODAY'S FAMILIES

Erik Baines *

INTRODUCTION

A long-standing issue of tax policy is whether to tax people as separate individuals or as social beings.¹ That is, how should a taxable unit be defined? Today, married couples may file either a joint return² or separate returns as married individuals.³ However, filing separately often increases a couple's combined tax liability.⁴ Single people must file exclusively as individuals, but their rates are generally, though not always, higher than those of married couples with the same amount of income.⁵ This tax difference between a married person and an individual creates what are known as marriage penalties and bonuses.⁶ These penalties and

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1. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1391 (1975).

2. See I.R.C. § 1(a) (2006).

3. See *id.* § 1(d) (2006).

4. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, CAT. NO. 15000U, PUBLICATION 501: EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION 6 (2011), available at <http://www.irs.gov/pub/irs-pdf/p501.pdf>. A married couple filing separately often loses benefits or cannot take full advantage of benefits provided for in the tax code. See *id.* More fundamentally, if the couple's incomes are vastly different, the higher earner will have higher effective tax rates because that income will not be shifted to the lower-earning spouse when filing separately. See *id.* at 7.

5. See I.R.C. §§ 1(a)-(c) (2006).

6. Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 339

bonuses often create a disincentive for both partners of a married couple to be employed.⁷ Historically, a single-earner couple was the norm; however, society has changed since Congress adopted the joint return in 1948.⁸ Shifting attitudes towards marriage and cohabitation continue to move the family away from the single-earner married couple norm.⁹

This comment argues Congress should place greater emphasis on the goal of achieving marriage neutrality.¹⁰ A marriage-neutral tax is one that does not take marriage into consideration in determining a person's tax liability.¹¹ The current tax code taxes couples on the theory that married couples should be treated as a taxable unit and should be taxed according to their combined income.¹² The rationale for treating similarly situated married couples differently from unmarried individuals fails for many practical reasons given today's social behaviors and attitudes.

Considering changes in societal norms, why should marriage be a relevant factor in tax policy today? Why should a couple suffer a penalty or derive a benefit merely because they are married? With our progressive tax structure,¹³ there should be less focus on marriage and more focus on an individual's ability or a family's ability to pay those taxes.

Section I of this comment considers the early income tax code, its focus on individual filing, and how early decisions of the Su-

(1994). Marriage penalties and bonuses are the tax savings or increased liabilities that apply to a married couple by the fact of their marriage.

7. See Bittker, *supra* note 1, at 1432-33; Zelenak, *supra* note 6, at 366.

8. See Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 682 & n.178 (2010); *infra* notes 78-80 and accompanying text. In 1948, Congress adopted the optional joint return as we know it today, allowing married couples to split their income between them regardless of who earned it. Revenue Act of 1948, ch. 168, § 303, 62 Stat. 110, 114-16 (codified as amended at I.R.C. § 51(B) (1946 & Supp. III 1950)).

9. See Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 7-8 (2007); Kahng, *supra* note 8; *infra* notes 78-80 and accompanying text.

10. As discussed in more detail later, it is impossible to combine the three ideas of marriage neutrality, progressivity, and treating similarly situated married couples equally. See *infra* notes 60-67 and accompanying text.

11. See Bittker, *supra* note 1, at 1395.

12. See I.R.C. §§ 1(a), (d) (2006); see also Zelenak, *supra* note 6, at 339 & n.1.

13. Progressivity means that as a taxable unit's income increases, that income is taxed at increasingly higher rates. Zelenak, *supra* note 6, at 339. An overarching idea of the tax code is progressivity: the higher an individual's (or married couple's) income, the greater their tax liability. See, e.g., I.R.C. §§ 1(a)-(d) (2006).

preme Court of the United States led Congress to adopt optional joint filing for married couples. Section II analyzes the joint return, tax norms, and arguments of proponents and opponents of the joint return. Section III analyzes structural issues raised by a return to an individual filing system, as well as why an individual filing system is superior to a joint filing system given the changes in American society. It also discusses a proposal to resolve an inequity that may be caused by a return to individual filing. The comment concludes that the joint return should be replaced with individual filing because individual filing better reflects today's family compositions.

I. THE EARLY INCOME TAX

Early American income tax provisions favored individual filing.¹⁴ Married couples have been able to file joint returns since 1918.¹⁵ While the Revenue Act of 1948 ("1948 Act") allowed income splitting,¹⁶ the Revenue Act of 1918 applied the same rate schedule to both individual and joint filings;¹⁷ therefore, filing jointly usually exposed a couple to a marriage penalty.¹⁸ Joint filings were only beneficial when one partner had negative income because only then would a married couple obtain a marriage bonus; the negative income would offset some of the income of the other partner, thereby lowering their taxable income.¹⁹

The Supreme Court of the United States weighed in on issues raised by this individualistic approach. In *Lucas v. Earl*, the Court held that a married couple who had contracted in 1901 to split income equally between themselves could not do so in regards to wages for federal tax purposes.²⁰ Income was taxed to the earner of the income and it could not be assigned to another.²¹ Le-

14. See Bittker, *supra* note 1, at 1400. The Sixteenth Amendment was ratified on February 3, 1913, explicitly making income taxes constitutional. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 33 & n.8 (1996).

15. Revenue Act of 1918, ch. 18, § 223, 40 Stat. 1057, 1074.

16. Revenue Act of 1948, ch. 168, § 301, 62 Stat. 110, 114, *repealed* by Internal Revenue Code of 1954, ch. 736, § 12, 684 Stat. 4, 11.

17. See Revenue Act of 1918, ch. 18, § 211, 40 Stat. 1057, 1062-64.

18. See Bittker, *supra* note 1, at 1400.

19. See Richard C.E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317, 335 (1990).

20. 281 U.S. 111, 113-14 (1930).

21. *Id.* at 114-15.

gal ownership of the income was the end-all be-all. After *Lucas*, taxpayers could shift investment income by transferring the income producing property to one spouse or the other, but those same taxpayers could not do the same with their wages.²²

In *Poe v. Seaborn*, the Supreme Court addressed the effect of community property laws on federal income taxation.²³ The Court stated, "[I]t is clear that income of community property is owned by the community and that husband and wife have each a present vested one-half interest therein."²⁴ The Court viewed community property as vesting in the couple rather than the individual, with one-half of all wage income from both spouses assigned to each spouse as it was earned; therefore, the Court allowed couples in community property states to split their income evenly.²⁵ At that time, "the husband was given the management, control and power of sale of such property" in both community property and common law property states; thus, there was not much difference between how money was acquired and spent in either type of state.²⁶

These leading cases led to a great geographical tax liability disparity between couples in common law states versus those in community property states, which led to a movement among common law property states to convert to community property states.²⁷ For example, in 1946, a single-earner couple with an income of \$5000 paid 4.8% less in taxes if they lived in a community property state as opposed to a common law property state.²⁸ However, the most extreme difference was seen at \$25,000, where the difference was 28.9%.²⁹ Some states attempted a lesser change,

22. See Bittker, *supra* note 1, at 1401.

23. 282 U.S. 101, 103 (1930). This case also included three companion cases: *Bender v. Pfaff*, 282 U.S. 127 (1930); *Hopkins v. Bacon*, 282 U.S. 122 (1930); and *Goodell v. Koch*, 282 U.S. 118 (1930).

24. *Poe*, 282 U.S. at 111.

25. See *id.* at 111, 118.

26. See *id.* at 111-12 (quoting *Warburton v. White*, 176 U.S. 484, 494 (1900)).

27. Bittker, *supra* note 1, at 1411.

28. Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Tax Burdens*, 59 TEX. L. REV. 1, 15 n.56 (1980). Gann cites a Treasury Department staff study which shows that at \$5000 of income, a married couple in a common law state would pay \$798 in taxes and a couple in a community property state would pay \$760. *Revenue Revisions, 1947-48 Hearings on Community Property and Family Partnerships Before the H. Comm. on Ways and Means*, 80th Cong. 849 (1947) [hereinafter *Hearings*]. At \$25,000 of income, the tax liabilities would be \$9082 and \$6460, respectively. *Id.*

29. Gann, *supra* note 28, at 16 n.56.

allowing couples to elect to be governed by the rules of tax-favored community property despite the default rule of common law property.³⁰

In *Commissioner v. Harmon*, the Supreme Court held that those state statutes allowing couples to choose to be governed by community property law over common law property rules had the same effect as the inter-spousal wage-splitting contract rejected for federal tax purposes in *Lucas*.³¹ Community property states historically allowed couples to choose to be governed by common law property rules; however, this was acceptable to the Supreme Court because the default rule was community property rather than common law property.³² Thus, a couple could “opt out”—but not “opt in”—to community property.³³ This again caused states to shift their property laws from optional community property systems to mandatory systems.³⁴

In response to the great geographic disparity in income tax liability between couples in community versus common law property states, in 1948, Congress authorized married couples to file an optional joint return.³⁵ Congress’s adoption of the optional joint return had several effects. Primarily, it allowed all married couples to split their income regardless of state law property rules.³⁶ Thus, a married couple would have the same tax liability as two single people making an equal amount.³⁷ This also produced geographic equality in tax liabilities among married couples throughout the states.³⁸ The 1948 Act provided a massive tax reduction for couples in common law property states, which was fiscally possible with the end of World War II.³⁹ Finally, the tax re-

30. Bittker, *supra* note 1, at 1411. Oklahoma, Oregon, Hawaii, Nebraska, Michigan, and Pennsylvania all adopted the community property system until Congress passed the Revenue Act of 1948, at which time these states quickly returned to their original common law property regimes. *Id.* at 1411–14.

31. 323 U.S. 44, 45–46 (1944).

32. *See id.* at 55–56 (Douglas, J., dissenting).

33. Bittker, *supra* note 1, at 1411.

34. *See id.* at 1411–12.

35. *Id.* at 1412.

36. *Id.* at 1413 (quoting S. Rep. No. 80-1013, at 25 (1948), *reprinted in* 1948 U.S.C.C.S. 1163, 1187).

37. Zelenak, *supra* note 6, at 346.

38. *Id.* (quoting S. Rep. No. 80-1013, at 25).

39. *See* Bittker, *supra* note 1, at 1410; *see also Hearings, supra* note 23, at 847 (estimating that a change to an optional joint filing system would generate about \$744 million in tax savings for 4.9 million married couples).

duction and the tax liability equalization of married couples across the United States was politically favorable.⁴⁰

The original tax code favored individual filing.⁴¹ The Supreme Court, however, overcomplicated the system and created large geographic disparity between common law and community property states.⁴² Congress attempted to resolve confusion and disparity through the 1948 Act; however, it did not legislatively reverse *Lucas* nor *Poe*.⁴³ Instead, it provided that any married couple, regardless of their state of residence, could split their income.⁴⁴ This created the basis for the optional joint return schedule that exists today.

II. THE TAX CODE AND FAMILIES

Today, a couple's marital status plays a predominant role in calculating a family's tax liability.⁴⁵ For example, a married couple with a combined taxable income of \$100,000 in 2011 paid taxes of \$17,250, i.e., an effective tax rate of 17.2%.⁴⁶ A single individual, or a single-earner non-married couple, with the same income paid \$21,617, an effective tax rate of 21.6%.⁴⁷ Two single individuals, each making \$50,000, only had a combined tax liability of \$17,250, an effective tax rate of 17.2%, an identical rate as that of a married couple with a combined income of \$100,000.⁴⁸

The justification for the current model is that married couples pool their resources and therefore should be treated as a taxable unit.⁴⁹ The idea is that a married couple's combined income is used for the benefit of the family.⁵⁰ The tax norm of horizontal equity for married couples is served when married couples with the same combined income pay the same amount of tax, i.e., that a

40. See Bittker, *supra* note 1, at 1413.

41. See *supra* note 14 and accompanying text.

42. Bittker, *supra* note 1, at 1408.

43. See S. Rep. No. 80-1013, at 23 (1948); Zelenak, *supra* note 6, at 347.

44. Zelenak, *supra* note 6, at 346; see H.R. Rep. No. 80-1274, at 4, 24 (1948).

45. See Bittker, *supra* note 1, at 1399.

46. See Rev. Proc. 2011-12, 2011-2 I.R.B. 297-98 tbl. 1. I.R.C. section 1(a) also includes surviving spouses. *Id.* This calculation excludes any deductions, exemptions, or credits available to particular taxpayers. See *id.*

47. *Id.* tbl. 3.

48. See *id.* tpls. 1, 3.

49. See Gann, *supra* note 28, at 7.

50. See *id.*

married couple with two earners each making \$50,000 pays the same tax as a married couple with a single earner making \$100,000.⁵¹ Finally, the argument goes, the tax code should support the nuclear family because this family arrangement best serves child-rearing.⁵²

Some tax scholars believe that an income tax should not consider a taxpayer's marital status when calculating his tax burden. These scholars believe that marital status does not affect a person's ability to pay taxes and is therefore irrelevant.⁵³ Furthermore, some of these scholars equate a couple's choice to marry with a personal consumption choice.⁵⁴ They argue that a person's choice to marry is a voluntary choice that should not receive special tax treatment.⁵⁵ Finally, two single taxpayers also may live together and pool their resources; thus, marital status is irrelevant to taxing similarly situated couples equally. A cohabitating couple's income may be used toward expenses, savings, and pleasure to the same extent as that of a married couple. Two single individuals also may live together to reduce expenses, although it is less clear that they also will combine their income for the purpose of savings.

Four factors have a substantial bearing on a person or couple's ability to pay taxes: (1) necessity of supporting two persons, (2) economies of scale, (3) imputed income for housework, and (4) employment expenses.⁵⁶ Couples with both spouses working outside of the home have additional costs and do not benefit from the additional time devoted to housework available to a single-earner couple.⁵⁷ On the other hand, a single person's cost of living is nat-

51. *See id.*

52. Robert L. Elbert, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 SETON HALL CONST. L.J. 1171, 1229 (1995).

53. Gann, *supra* note 28, at 6.

54. *Id.*

55. *See id.*

56. *See* Bittker, *supra* note 1, at 1443. A couple will benefit from economies of scale because they often will pay rent on one home rather than two and save money on food purchases, utilities, and the like as compared to two single people living in two different households. *See* Gann, *supra* note 28, at 30. Imputed income for housework is the idea that a single-earner couple will benefit from the non-earning partner's household labor instead of labor outside of the home for income. *See id.* A two-earner couple, in order to get the same benefit, would need to hire someone to do the housework and would have to pay taxes on that money used to hire the houseworker. *Id.* Finally, examples of employment expenses are the cost of uniforms or work clothing, commuting expenses, etc. *See id.*

57. *See* Gann, *supra* note 28, at 30.

urally lower than a couple's; therefore, a single person has a better ability to pay taxes. A couple living together often benefits from some degree of economies of scale, but if both partners are employed, they have higher employment costs.⁵⁸ For many of these reasons, some tax scholars have suggested the following equity criteria in determining tax burdens based on relative economies of scale and ability to pay:

(1) An unmarried person should pay a greater tax than a single-earner married couple with equal income.

(2) A single-earner married couple should pay a greater tax than a two-earner married couple with equal income.

(3) A two-earner married couple should pay more than two single persons with the same total income.⁵⁹

Furthermore, as pointed out by Boris Bittker,⁶⁰ some scholars suggest the equity objectives of our tax code and family status should be:

(1) Progressivity of the income tax: taxpayers with higher incomes should have a larger tax burden than those with lesser incomes;

(2) Equal taxes paid by equal-income married couples; and

(3) No effect on the income tax by individuals' choice to marry, i.e., it should be marriage-neutral.⁶¹

As Bittker explained, however, the first criterion is incompatible with both the second and third.⁶² A progressive tax cannot allow for both marriage neutrality and for a married couple to calculate their income together. So long as progressivity in an income tax is an important criterion, the income tax either must

58. *See id.*

59. *Id.* (citing E.J. MOCKLER ET AL., STUDIES OF THE ROYAL COMMISSION ON TAXATION, NO. 10: TAXATION OF THE FAMILY 129-31 (1964); Oliver Oldman & Ralph Temple, *Comparative Analysis of the Taxation of Married Persons*, 12 STAN. L. REV. 585, 586, 603-04 (1960)).

60. Boris Bittker (1916-2005) was the Sterling Professor of Law at Yale Law School and was a leading tax expert. *See The Heyday of Legal Realism, 1928-1954*, YALE L. SCH., <http://www.law.yale.edu/cbl/3085.htm> (last visited Dec. 10, 2012).

61. Gann, *supra* note 28, at 9 (citing Bittker, *supra* note 1, at 1395-96).

62. Bittker, *supra* note 1, at 1395 ("[G]iven a progressive rate schedule, a marriage-neutral tax system cannot be reconciled with a regime of equal taxes for equal-income married couples.").

be marriage-neutral or allow for joint returns for married couples. Bittker used the following tables to illustrate this point.

Table 1
HYPOTHETICAL INCOME AND TAXES BEFORE MARRIAGE⁶³

	Taxable Income	Tax
Alpha	\$10,000	\$1000
Beta	\$10,000	\$1000
Theta	\$4000	\$400
Zeta	\$16,000	\$2500

Table 2
EFFECT OF MARRIAGE ON TAXES⁶⁴

Marriage Will Have the Following Effect
On the Tax Burden Shown in Table 1:

If the Tax on Married Couples with \$20,000 of Taxable Income is:	Alpha-Beta	Theta- Zeta
Less than \$2000	Decrease	Decrease
\$2000	No Change	Decrease
More than \$2000 but less than \$2900	Increase	No Change
More than \$2900	Increase	Increase

Bittker demonstrates that it is impossible for an income tax to be progressive, treat similarly situated married couples equally, and be marriage-neutral.⁶⁵ For example, if the tax was marriage-neutral, each couple makes \$20,000, but Theta-Zeta would pay \$2900 in taxes while Alpha-Beta would pay only \$2000.⁶⁶ If the second criterion, horizontal equity between married couples, was honored, both married couples would pay the same amount in taxes.⁶⁷

63. *Id.* at 1396 tbl. 1. Note that Zeta's income is highest and is taxed at a higher rate than 10%, reflecting progressivity. *See id.*

64. *Id.* at 1397 tbl. 2.

65. *Id.* at 1396.

66. *Id.* at 1395-96.

67. *Id.* at 1396.

The ability-to-pay factor, that “[a]n unmarried person should pay a greater tax than a one-worker married couple with equal income,”⁶⁸ is a weak argument in support of the current system. Its primary rationale is economies of scale;⁶⁹ however, all couples benefit from economies of scale. The married single earner filing jointly greatly benefits from the imputed income of their non-earning partner and, therefore, should pay at least the same tax as an unmarried person. A one-person household must bear the full cost of living alone and also does not gain any imputed income from a partner providing household services; on the other hand, the one person only needs to take care of himself or herself. Two single persons, cohabitating or simply living together as roommates, can benefit from economies of scale (and possibly imputed income of household services), and the mere fact of marriage should not provide either a benefit or a penalty. A single-earner couple certainly should not obtain a tax benefit based on their marital status. Equally important, a two-earner married couple with near equal wages should not be penalized, as they often have the same burdens as a two-earner cohabitating couple. The next section delves into why marriage neutrality and progressivity should be prioritized over treating similarly situated married couples similarly.

III. THE CASE FOR THE RETURN TO INDIVIDUAL FILING

The primary rationale for joint tax returns is the assumption that a married couple is an economic unit.⁷⁰ The idea is that the income of one spouse or both will benefit the family unit as a whole.⁷¹ However, this “benefit principle” is not exclusive to the marital unit and extends to any relationship where costs are shared, thereby freeing income for other activities.⁷² An individual filing system does not consider economic units, nor should it normally.⁷³ If people choose to live together in order to save money, this choice should not be affected by the tax code. American families are much more diverse than they were in 1948 and American

68. Gann, *supra* note 28, at 8 (citing Oldman & Temple, *supra* note 59, at 603-04).

69. *See id.*

70. *Id.* at 25.

71. *Id.*

72. *Id.*

73. *See id.* at 6.

family composition continues to move away from the married couple.⁷⁴

A. *Family Composition Today*

The establishment of the joint return reflected American household compositions in 1948 and made much more sense when the married couple was the dominant family living arrangement.⁷⁵ Today's family living arrangements are much more diverse.⁷⁶ A return to individual filing better reflects the composition of today's diverse family living arrangements by ignoring marriage in determining tax liabilities. Similarly situated couples face similar economic issues, regardless of their marital status. A couple should neither derive a tax benefit nor suffer a tax penalty because the couple is married.

A significant portion of households have more than one earner or are one-person households; thus, the married couple is not as predominant as it once was among American families. For example, the number of one-person households more than doubled between 1960 (13%) and 2010 (27%).⁷⁷ Between 2009 and 2010, for instance, the number of unmarried cohabitating opposite-sex couples increased by 13%, from 6.7 million to 7.5 million.⁷⁸ In 1948 (when the joint return was initially adopted), married couples composed more than 75% of all households.⁷⁹ Although fifty-eight million couples were married and living together at the time of the U.S. Census survey in November 2011, they composed only about 49% of all households.⁸⁰ Statistics show a trend away from

74. See Kahng, *supra* note 8, at 682 n.178.

75. See Marjorie E. Kornhauser, *Love, Money and the IRS: Family, Income Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 101-02 (1993).

76. See Kahng, *supra* note 8, at 682 n.178.

77. Press Release, U.S. Census Bureau, U.S. Census Bureau Reports Men and Women Wait Longer to Marry (Nov. 10, 2010), available at http://www.census.gov/newsroom/releases/archives/families_households/cb10-174.html.

78. Rose M. Kreider, Increase in Opposite-Sex Cohabiting Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS) 1-2 (Hous. & Household Econ. Statistics Div. Working Paper, 2010), available at <http://www.census.gov/population/www/socdemo/Inc-Opp-sex-2009-to-2010.pdf>.

79. See U.S. CENSUS BUREAU, TABLE HH-1: HOUSEHOLDS BY TYPE: 1940 TO PRESENT (2011) [hereinafter TABLE HH-1], available at <http://www.census.gov/population/socdemo/hh-fam/hh1.xls>.

80. See *id.*

the nuclear family and marriage as the norm, although it still remains the predominant household arrangement.

Attitudes about unmarried cohabitation and working mothers show that a majority of Americans believe that neither marriage nor a stay-at-home spouse is necessary to raise a family. According to the Centers for Disease Control and Prevention, about 75% of men and women today agree or strongly agree that “[i]t is okay for an unmarried female to have a child,” and about 70% of men and women disagreed or strongly disagreed that “[a] young couple should not live together unless they are married.”⁸¹ Significantly, when men and women were asked whether “[a] working mother can establish just as warm and secure a relationship with her children as a mother who does not work,” about 80% agreed or strongly agreed.⁸² When presented with the statement, “It is more important for a man to spend a lot of time with his family than to be a success at his career,” about 70% of the men and women agreed or strongly agreed.⁸³ These attitudes show that there likely will continue to be increases in cohabitating partners, single parent families, and couples of all kinds where both partners are employed.

B. *Employment and Income*

Ability to pay is a key factor in an equitable tax system.⁸⁴ A 2009 study by the Bureau of Labor Statistics shows that people in the lowest and second-lowest quintile of income earn less than they spend.⁸⁵

81. See *Key Statistics from the National Survey of Family Growth*, CENTERS FOR DISEASE CONTROL & PREVENTION (July 27, 2012), http://www.cdc.gov/nchs/nsfg/abc_list_a.htm.

82. See *id.*

83. *Id.*

84. See Prerna Rao, Note, *What Would Humphrey Bogart Do?: An Overview of Federal Taxes as They Apply to the International Community of U.S. Nationals*, 25 QUINNPIAC PROB. L.J. 298, 304–05 (2012).

85. U.S. BUREAU OF LAB. STAT., U.S. DEPT' OF LAB. REPORT 1029, CONSUMER EXPENDITURES IN 2009, at 10 tbl. 1 [hereinafter CONSUMER EXPENDITURES], available at <http://www.bls.gov/cex/csxann09.pdf>.

Table 3

Quintiles of Income Before Taxes: Average Annual Expenditures and Characteristics, Consumer Expenditure Survey, 2009⁸⁶

Item	Lowest 20%	Second 20%	Third 20%	Fourth 20%	Highest 20%
Income before taxes	\$98,466	\$27,227	\$46,012	\$73,417	\$157,631
Average number in consumer unit:					
Persons	1.7	2.3	2.5	2.9	3.1
Children under 18	0.4	0.6	0.6	0.7	0.8
Persons 65 and older	0.4	0.5	0.3	0.2	0.2
Earners	0.5	0.9	1.3	1.7	2.0
Average Annual Expenditures	\$21,611	\$31,382	\$41,150	\$56,879	\$94,244

Some expenditures may be discretionary; however, a vast majority of the expenditures are necessities at the lowest quintiles. For example, average annual expenditures in the lowest two quintiles totaled \$21,611 for the lowest quintile, and \$31,382 for the second-lowest quintile.⁸⁷ Of these expenses, \$18,320 was spent on food, housing, transportation, healthcare, personal care, education, and personal insurance/retirement (including Social Security) at the lowest quintile, and \$26,427 was spent on these necessities at the second-lowest quintile, a difference of \$3291 and \$4955, respectively, from the total expenditures.⁸⁸

People in the second-lowest quintile on average had more people in the household than people in the lowest quintile, which accounts for at least some of the increased expenditures between the two lowest quintiles.⁸⁹ People do not have a significant amount of excess income unless they are in the fourth or highest quintile (\$16,538 and \$63,387, respectively).⁹⁰ Taxing those people in the lowest quintiles would not be effective if such a tax made them a public ward, nor in any sense would it be equitable. Our

86. *Id.* This table was shortened to include only the relevant statistics needed for the purposes of this comment.

87. *Id.*

88. *Id.* Other expenses listed in the report include entertainment, reading, tobacco/smoking supplies, miscellaneous, and cash contributions. *Id.*

89. *See id.*

90. *See id.*

current system recognizes this through the personal exemption and the standard deduction.⁹¹

Significantly, the number of earners rises as income rises. For example, in the third quintile an average of 2.5 people are in the household, 0.6 of which are children under eighteen, 0.3 are older than sixty-four, and 1.3 work.⁹² Since children under eighteen are not as likely to be in the labor force as an adult and people older than sixty-four are more likely to be retired, the 1.3 workers in a 2.5-member household grows more significant in showing how many earners are present in households at this quintile. Thus, it is likely that, for many couples in the third quintile, both individuals work. Recent statistics from the Census Bureau also bolster this theory:

91. The standard deduction and personal exemption reduce tax liabilities by amounts set by Congress in the tax code. I.R.C. §§ 63, 151 (2006 & Supp. V 2012). These deductions significantly reduce or eliminate tax liability for low-income persons or couples. For instance, a person with income less than or equal to the standard deduction and personal exemption will not have taxable income.

92. CONSUMER EXPENDITURES, *supra* note 85.

Table 4

Married Couple Family Groups, by Family Income, and Labor Force Status of Both Spouses: 2010 (Numbers in thousands)⁹³

Married Couple Family Households	All Married Couples	Both Employed/ Both in Labor Force	Neither in Labor Force
Without Own Children under 18 Years			
Total	33,835	13,594	9301
Family Income Under \$10,000	726	49	447
\$10,000 to \$14,999	675	28	412
\$15,000 to \$19,999	1012	64	689
\$20,000 to \$24,999	1473	107	965
\$25,000 to \$29,999	1662	140	1050
\$30,000 to \$39,999	3301	510	1618
\$40,000 to \$49,999	2943	681	1123
\$50,000 to \$74,999	6977	2751	1590
\$75,000 to \$99,999	5096	2738	678
\$100,000 and over	9969	6525	729
With Own Children under 18 Years			
Total	24,575	14,300	388
Family Income Under \$10,000	515	56	101
\$10,000 to \$14,999	421	64	39
\$15,000 to \$19,999	543	103	50
\$20,000 to \$24,999	733	152	40
\$25,000 to \$29,999	837	220	29
\$30,000 to \$39,999	1748	579	54
\$40,000 to \$49,999	2016	932	16
\$50,000 to \$74,999	5037	2937	28
\$75,000 to \$99,999	4086	2920	10
\$100,000 and over	8640	6338	21

The Census Bureau data shows that nearly half of all married couples with children with income between \$40,000 and \$49,999 are two-earner married couples.⁹⁴ Similarly, if the number of mar-

93. U.S. CENSUS BUREAU, TABLE FG2: MARRIED COUPLE FAMILY GROUPS BY FAMILY INCOME, AND LABOR FORCE STATUS OF BOTH SPOUSES: 2010 (2010), available at <http://www.census.gov/population/socdemo/hh-fam/cps2010/census/tabFG2-all.xls> (edited to present only the numbers significant to this comment).

94. See *id.*

ried couples without children where neither spouse is in the labor force is taken from the total, nearly 40% of the couples in this same income range are also two-earner couples.⁹⁵ In the face of the current unemployment rate these numbers become even more significant.⁹⁶ In the lower brackets it is likely that both individuals in a couple cannot work when they have children because of the high cost of child care as compared to the lesser-earner's after-tax income.⁹⁷

Many couples today have two earners, but a looming issue soon will require even more two-earner couples: the aging population. In order to help sustain the economy, Social Security, and other retirement plans, it will be necessary for more people to be employed and to assume the jobs of those who retire.⁹⁸ The labor force has contracted more than 1% since 2008, and is forecasted to expand only slowly over the next forty years.⁹⁹ In the 1950s and 1960s, 52% and 57%, respectively, of American family households had their own children under age eighteen.¹⁰⁰ By 2008, this percentage was 46%.¹⁰¹ In 2010, there were 308 million people in the United States.¹⁰² Seventy-four million of those people were over the age of fifty-five¹⁰³ and another forty-five million were between the ages of forty-five and fifty-four.¹⁰⁴ According to the Census Bu-

95. *Id.*

96. See generally Press Release, U.S. Bureau of Lab. Stat., The Employment Situation—September 2011 (Oct. 7, 2011), available at http://www.bls.gov/news.release/archives/empisit_10072011.pdf. As of September 2011, the national average unemployment rate was 9.1%; however, for blacks it was 16%. *Id.*

97. See LINDA GIANNARELLI & JAMES BARSIMANTOV, CHILD CARE EXPENSES OF AMERICA'S FAMILIES (2000), available at http://www.urban.org/UploadedPDF/310028_occac40.pdf.

98. Steve Matthews & Joshua Zumbrun, *Shrinking Labor Force May Curb U.S. Expansion for Two Decades*, BLOOMBERG (Aug. 30, 2011), <http://www.bloomberg.com/news/2011-08-30/aging-baby-boomers-shrinking-labor-force-may-curb-u-s-growth-for-20-years.html> (detailing government forecasts of future insufficient funds for Medicare and Social Security).

99. See *id.*

100. Press Release, U.S. Census Bureau, As Baby Boomers Age, Fewer Families Have Children Under 18 at Home (Feb. 25, 2009), [hereinafter As Baby Boomers Age], available at http://www.census.gov/newsroom/releases/archives/families_households/cb09-29.html.

101. *Id.*

102. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010, at 21 tbl. 16 (2011) [hereinafter STATISTICAL ABSTRACT 2010], available at <http://www.census.gov/compendia/statab/2012/tables/12s0016.pdf>.

103. U.S. CENSUS BUREAU, TABLE 1: POPULATION BY AGE AND SEX: 2010 (2012), available at <http://www.census.gov/population/age/data/files/2010/table1.xls>.

104. STATISTICAL ABSTRACT 2010, *supra* note 102.

reau, the aging population has been caused not only by the aging baby boomers, but also because of increases in longevity and childlessness.¹⁰⁵ More people working will make more people subject to the Social Security wage tax, which, presumably, will generate more revenue for sustaining Social Security.

C. *Imputed Income for Household Services*

A single-earner married couple should not derive a tax benefit from their choice of one partner staying home. Again, such couples derive a substantial, non-taxable benefit from the housework the non-working partner is able to perform, and the imputed income value of this labor is significant. Taxing such imputed income is not an answer because such a tax is administratively difficult (if not impossible) to effectuate: What if one spouse worked part-time? If both did? If one was unemployed? The Census Bureau's definition of "stay-at-home parent" is one who is out of the labor force during a fifty-two-week period to care for home and family, has a spouse that is in the labor force for the same fifty-two weeks, and has a child under age fifteen.¹⁰⁶ Would the stay-at-home spouse merely need to work a single day in order to avoid imputed income tax liability? If not, how many days or hours of work would qualify?

Taxing imputed income across all income levels would create vast inequities for those with children in the lowest quintiles of income who cannot afford for both partners to work because of significant child care costs.¹⁰⁷ For example, if imputed income for household services were calculated by the federal minimum wage (\$7.25 per hour)¹⁰⁸ at full time (forty hours per week),¹⁰⁹ the annual value of household services would be \$15,080. A married couple with income of \$20,000, if filing jointly in 2011–12, would have to pay taxes of \$4412 on \$35,080 income (adding imputed income of

105. See *id.* In 1976, 10% of women aged forty to forty-four were childless. *Id.* This number was 20% in 2006. *Id.*

106. U.S. CENSUS BUREAU, P20-561, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2007, at 12 (2009), available at <http://www.census.gov/prod/2009pubs/p20-561.pdf>.

107. See GIANNARELLI & BARSIMANTOV, *supra* note 97, at 1, 3–5.

108. U.S. DEP'T OF LABOR, *Federal Minimum Wage Rates Under the Fair Labor Standards Act*, <http://www.dol.gov/whd/minwage/chart.pdf> (last visited Dec. 10, 2012).

109. Everyone knows that a "parent's work is never done," and that forty hours a week is a poor estimate; the number of hours a stay-at-home spouse works is likely much larger than forty hours a week and includes holidays.

\$15,080 to \$20,000 of actual income).¹¹⁰ The tax liability for \$20,000 of income would be \$2150;¹¹¹ therefore, this couple would pay an additional tax of \$2262 if imputed income were taxed. Most low-income couples could not afford to pay this additional tax in order for one partner solely to perform household services.¹¹² Taxation of imputed income would cause a great intrusion into the individual family. It would be inequitable at low-income levels. In sum, these and other administrative difficulties, as noted above, make taxing imputed income impractical, if not impossible.

Taxing imputed income is not the answer, but providing tax benefits to those married couples able to take advantage of a spouse's housework is not the answer either. A two-earner couple, in order to get the same benefit of household services, would need to hire a housekeeper, babysitter, an errand boy, etc. Their income used to pay these wages is taxed; thus, they do not benefit from the same untaxed imputed income as a single-earner couple. Furthermore, a two-earner couple must pay increased employment costs.¹¹³ A two-earner couple with a combined income equal to that of a single-earner married couple should not bear the same tax burden. In fact, they should have a lesser burden. For example, imagine Alpha-Beta is a two-earner couple. Alpha and Beta each earn \$50,000 per year for a combined income of \$100,000. Theta-Zeta are a single-earner couple, and Theta makes \$100,000. The cost of a houseworker is \$20,000 per year and employment commuting expenses are \$5000 a year for each. Alpha-Beta will have \$25,000 less disposable income before tax than Theta-Zeta, because Alpha-Beta must pay the household worker and pay double the employment expenses.¹¹⁴

Under an individual filing system, a married couple would not receive a tax benefit along with the benefit of a stay-at-home spouse. Income is attributed to the spouse who earned it with in-

110. See Rev. Proc. 2011-12, 2011-2 I.R.B. 297-98 tbl. 1 (($\$35,080 - \$17,000$) \times 0.15 + \$1700 = \$4412). This calculation is based on the rates of a married couple filing jointly and does not include personal exemptions or a standard deduction.

111. See *id.* (($\$20,000 - \$17,000$) \times 0.15 + \$1700 = \$2150).

112. Cf. *supra* notes 86-90 and accompanying text (detailing expenses of lower-income couples as already exceeding income).

113. See Gann, *supra* note 28, at 30.

114. The math works out as so: for Alpha-Beta: $\$50,000 + \$50,000 - \$20,000 - \$5000 - \$5000 = \$70,000$ before tax income, versus Theta-Zeta: $\$100,000 - \$5,000 = \$95,000$ of before tax income, a difference of \$25,000.

dividual filing. However, income-shifting between spouses currently is available under the joint filing system.¹¹⁵ Since imputed income is a non-taxable benefit in and of itself, couples who choose to arrange their lifestyles this way should not also receive a tax benefit.

Income from property, however, still may be shifted to the lesser-earning partner by shifting the ownership of the property.¹¹⁶ A new tax code provision would be necessary in order to address this issue. Income attribution has been a long-standing issue with our income tax code.¹¹⁷ Although allowing all married couples to file joint returns “solved” this issue as between married couples, such shifting is possible between anyone by shifting the ownership of the property.¹¹⁸

D. *Income Attribution*

Current Supreme Court precedent presents a large problem for resolving issues of income attribution. Under an individual filing system, this precedent creates large geographic disparities in tax burdens across the United States.¹¹⁹ A return to the individual filing system may necessitate congressional action to legislatively overrule *Lucas v. Earl* or *Poe v. Seaborn*. Congress also may make these cases irrelevant for the purposes of attributing income between couples. The 1948 Act overruled neither but made them irrelevant by allowing spouses to file together regardless of their state of residence.¹²⁰ The primary purposes of this act were to create geographic equality and a politically favorable tax reduction.¹²¹

The Federal Income Tax Code should neither be subject to varied state property law nor embroiled in state property law. For example, the early income tax and the resulting Supreme Court decisions in *Lucas* and *Poe* caused several states to change their

115. See *supra* notes 35–37.

116. See James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409, 1422 (2010).

117. See *supra* Section I.

118. Shifting is subject to gift taxes if the value of the property is over the limits currently allowed. See I.R.C. § 2501(a)(7) (2006).

119. See *supra* Section I.

120. See Zelenak, *supra* note 6, at 346.

121. See S. Rep. No. 80-1013, at 25 (1948).

state property laws.¹²² This method of taxation was inefficient in that it caused states and individuals to change their normal activities in order to receive a beneficial tax result.¹²³ Plus, individuals should neither benefit from nor be burdened by the tax system merely because of what state they live in; i.e., a federal tax should maintain geographic equality.

A rather simple¹²⁴ solution to the issue of income attribution between spouses under various state laws would be to (1) tax the earner on wages and (2) tax income from property at the rate of the highest-earning partner while imposing that tax on the owner of the property.¹²⁵ This solution would avoid the issue of state property laws, maintain geographic equality, and reduce the incidences of spouses transferring income-producing property between them in order to avoid or minimize tax liability. A constitutional issue, however, is raised by taxing one person based on the income of another.

In *Hooper v. Tax Commission*, the Supreme Court ruled a state income tax statute unconstitutional that taxed a husband on his own income at rates determined in consideration with the wife's income.¹²⁶ However, Lawrence Zelenak¹²⁷ and Pamela Gann¹²⁸ be-

122. Bittker, *supra* note 1, at 1411–12; Zelenak, *supra* note 6, at 345.

123. See Zelenak, *supra* note 6, at 345–46. Efficiency is another tax policy norm. See Stanley S. Surrey & Gerard M. Brannon, *Simplification and Equity as Goals of Tax Policy*, 9 WM. & MARY L. REV. 915, 915 (1968). An efficient tax should not typically cause people to rearrange their affairs in order to obtain tax favorable results. *Id.* The tax code, however, is sometimes used for other policy purposes. For example, when Congress uses the tax code in order to provide tax benefits for certain actions (like the deduction for a primary home mortgage interest), such use of the tax code is called a tax expenditure. Gordon T. Butler, *The Line Item Veto and the Tax Legislative Process: A Futile Effort at Deficit Reduction, But a Step Toward Tax Integrity*, 49 HASTINGS L.J. 1, 7 (1997). Tax expenditures may violate the efficiency norm because the expenditure may cause people to rearrange their affairs to take advantage of that expenditure.

124. A simple tax code encourages higher rates of compliance, in part by making compliance easier for the average individual. See Douglas Shulman, Comm'r, Internal Revenue Serv., Remarks at Harvard Kennedy School (Nov. 14, 2011), available at <http://www.irs.gov/uac/Prepared-Remarks-of-IRS-Commissioner-Douglas-H.-Shulman-before-Harvard-Kennedy-School,-Cambridge,-Massachusetts> ("Most taxpayers want simplicity. They want to pay what they owe . . . understand what tax benefits they are entitled to . . . and not get tripped up by the system."). Simplicity is only one benchmark of tax policy, and an overemphasis on it can result in a less equitable code. See, e.g., Surrey & Brannon, *supra* note 123, at 915 ("Since 'simplification' is only one of several competing goals of tax policy, an assessment of its place should start with an attempt to state those goals in comparative terms. The main rival to oversimplification is, of course, equity.").

125. Zelenak, *supra* note 6, at 389.

126. 284 U.S. 206, 212–13, 215 (1931).

127. Lawrence Zelenak is the Pamela B. Gann Professor of Law at Duke University

lieve that *Hooper* no longer has any precedential value.¹²⁹ Zelenak emphasized the cases of *Butler v. United States* and *Carlton v. United States*, which both distinguished *Hooper*.¹³⁰ Where *Hooper* involved taxing one person on another's income, the tax schemes in *Butler* and *Carlton* used another's income merely to determine another taxpayer's tax rate.¹³¹ Gann emphasized *Fernandez v. Wiener*,¹³² in which the Supreme Court dealt with a similar issue of income attribution and taxation as *Hooper*, but decided that the statute involved in *Fernandez* was constitutional.¹³³ Gann points out that *Hooper* is not even mentioned, which had the effect of leaving "very little life in *Hooper*."¹³⁴

E. Revenue Neutral?

Another issue raised by changing the current system is whether or not revenue to the Treasury would be reduced. The answer is: maybe. Tax savings would shift from the single-earner family to the two-earner family, especially where the partners make nearly equal amounts.¹³⁵ These savings, which may net a loss in revenue to the Treasury, could be offset in part by the revenue increases attendant with having more net workers in the economy—sales tax revenue for states, gasoline revenue from addition-

and primarily teaches tax and tax policy. *Lawrence A. Zelenak*, DUKE UNIV. SCH. OF L., <http://www.law.duke.edu/fac/zelenak> (last visited Dec. 10, 2012).

128. Pamela Gann is the former dean of Duke University School of Law and is the current president of Claremont McKenna College in California. *Pamela B. Gann: President of Claremont McKenna College*, CLAREMONT MCKENNA COLL., <http://www.cmc.edu/president/gann-bio.php> (last visited Dec. 10, 2012).

129. Gann, *supra* note 28, at 57–58; Zelenak, *supra* note 6, at 390.

130. Zelenak, *supra* note 6, at 389–90 (citing *Butler v. United States*, 798 F. Supp. 574, 576 (E.D. Mo. 1992); *Carlton v. United States*, 789 F. Supp. 746, 747–48 (N.D. Miss. 1991)).

131. *Id.* (citing *Butler*, 798 F. Supp. at 576; *Carlton*, 789 F. Supp. at 748). Both of these cases were in the context of the kiddie tax, the taxation of certain unearned income of children at their parents' tax rates. *Butler*, 798 F. Supp. at 575 (referring to I.R.C. § 1(g) Supp. III 1992); *Carlton*, 789 F. Supp. at 747 (referring to I.R.C. § 1(g) (Supp. III 1992)).

132. Gann, *supra* note 28, at 57–58.

133. 326 U.S. 340, 362 (1945) (finding constitutional an estate tax which taxed a surviving wife in a community property state on the entirety of her husband's estate, except to the extent of her own earned income).

134. Gann, *supra* note 28, at 58. Gann goes on to point out that Justice Douglas, in his concurrence in *Fernandez*, agrees with the dissenters in *Hooper*. *Id.* (citing *Fernandez*, 326 U.S. at 365 (Douglas, J., concurring)).

135. See *supra* Section II.

al commuting, Social Security wage tax revenue, and additional instances of federal income tax revenue.¹³⁶

F. *Modified Individual Filing: A New Schedule*

An issue not resolved by a reversion to individual filing would be the inequitable result of increasing the tax burdens of those couples with children who currently cannot afford to have both partners working. Marriage neutrality is great, but an individualized filing system would increase the burden on those married families where the after-tax income of one parent is equal to or less than the cost of child care. The joint return allows these single-earner, low-income families to split their income and reduce their tax liabilities, thereby freeing up funds for necessities.¹³⁷ Marriage, however, does not create or solve this problem. Cohabiting couples with children in the same circumstances also would face this issue, as would employed grandparents or other relatives providing for dependents who live in their household. Pure individual filing is not the answer.

1. Current Code Sections

Several code sections attempt to alleviate a low-income family's economic situation. Some of these sections likely affect a person's decision to work. The Child and Dependent Care Credit attempts to encourage employment,¹³⁸ but the Earned Income Tax Credit ("EITC") may in some circumstances negatively affect a person's desire to work.¹³⁹ Former Internal Revenue Code section 221 also encouraged married couples to both find employment.¹⁴⁰

The Child and Dependent Care Credit attempts to resolve this issue, but it is difficult to obtain and is not applicable to many families. First, it cannot be claimed if a taxpayer is married and

136. *Cf.* 2 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS ¶ 3.2.1 (3d ed. Cum. Supp. No. 2 2012) (discussing the general uncertainty of how changes to the tax code will change taxpayer behavior).

137. *See supra* notes 49–50 and accompanying text.

138. *See* I.R.C. § 21 (2006) (allowing credit against certain taxes for the taxable year in an amount equal to the applicable percentage of employment-related expenses).

139. *See id.* § 32 (2006 & Supp. IV 2010) (allowing a credit against certain taxes for the taxable year in an amount equal to the credit percentage of the amount of a taxpayer's income for the taxable year as does not exceed the earned income amounts).

140. *See infra* notes 149–50 and accompanying text.

filing separately.¹⁴¹ However, under an individual filing system, this would be a moot issue. The credit applies to a “qualifying child”¹⁴² when a person pays for child care expenses in order to either work or look for work.¹⁴³ The care provider must be identified and the maximum benefit is limited to 35% of qualifying child care expenses.¹⁴⁴ The qualifying expenses cannot exceed \$3000 for one child or \$6000 for two or more children.¹⁴⁵ The Child and Dependent Care Credit should be maintained; however, it seems that it does not do enough to allow both individuals in lower-income couples to work. There should be additional incentives for two-earner families with dependents. Finally, this credit is non-refundable so lower-income families cannot take full advantage of this provision if their tax liabilities are already zero.¹⁴⁶

Child care is especially burdensome on three family groups: single-parent families, families with younger children, and families with low income.¹⁴⁷ Three out of five working American families pay for child care.¹⁴⁸ On average, American families in 1997 paid 10% of their income towards child care; however, single parents and low-income families on average paid 16% of their income towards child care.¹⁴⁹ A 2012 study update from Child Care Aware of America on child care costs by state showed that families at the poverty level paid from a range of 28.9% (Alabama) to 108.9%

141. See I.R.C. § 21(e)(2) (2006). *But see id.* § 21(e)(4) (2006) (allowing a married person who files a separate return to not be considered married if the couple lived apart for six months before the close of the year and the person claiming the exception provides more than half of the income for the household that year).

142. *Id.* § 152(a) (2006); *id.* § 152(c) (2006 & Supp. IV 2010) (defining a qualified child as including a sister, brother, grandchild, and others of close relationship to the taxpayer).

143. See *id.* §§ 21(a), (b), (e)(1) (2006).

144. INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, CAT. NO. 15004M, PUB. 503, CHILD AND DEPENDENT CARE EXPENSES 11 (2011). The maximum benefit of 35% only applies to those individuals who make \$15,000 or less. *Id.* The benefit is reduced by 1% or 2% for every \$2000 of additional income above \$15,000 to a minimum benefit of 20% reached at \$43,000 of income. *Id.*

145. I.R.C. § 21(c) (2006).

146. See *id.* § 21 (2006 & Supp. IV 2010) (located in 26 U.S.C. subtitle A, ch. 1, subch. A, pt. IV, sub pt. A (listing nonrefundable personal tax credits)). “Refundable” means that a taxpayer may obtain a negative tax rate, i.e., that she can get more back from a refund than her total tax liability. BITTKER & LOKKEN, *supra* note 138, ¶ 37.1.4.

147. GIANNARELLI & BARSIMANTOV, *supra* note 97, at 17.

148. *Id.*

149. *Id.* at 17–18.

(D.C.) of their income toward infant care and from 21.1% (Mississippi) to 83.3% (D.C.) toward four-year-old-child care.¹⁵⁰

Former section 221 also somewhat alleviated this problem.¹⁵¹ The deduction was for 10% of earned income from the lower-earning spouse, but limited to a maximum deduction of \$3000.¹⁵² For example, a couple in the 15% tax bracket could save up to \$450 in taxes per year due to this deduction.¹⁵³ People in higher tax brackets could benefit even more from this deduction. For example, a person in a 20% tax bracket could have their tax liability reduced by up to \$600.¹⁵⁴ A combination of something like defunct section 221 and a refundable Child and Dependent Care Credit would better allow low-income couples to both be gainfully employed.

The EITC may provide tax-disincentives for low-income couples to both be employed.¹⁵⁵ For example, in 2011, a married couple with one child received 34% of the first \$9100 as a tax credit, for a maximum credit of \$3094.¹⁵⁶ The EITC then began to phase out at \$21,770 (with a phase-out percentage of 15.98%) and was eliminated completely at \$41,132.¹⁵⁷ Thus, if a low-income single-earner married couple made \$21,000, there was a tax disincentive for the lower paid partner to work because the credit began to phase out.

2. Proposal: Secondary Earner Schedule

A lower tax rate for low- to moderate-income levels would provide incentives for a lower-earning partner to be employed. Such incentives for two-earner couples would help mitigate the tax-

150. CHILD CARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILD CARE apps. 8–9, at 50–53 (2012), available at http://www.naccrra.org/sites/default_site_pages/2012/cost_report_2012_final_081012_0.pdf.

151. See Zelenak, *supra* note 6, at 374 (citing STAFF OF THE JOINT COMM. ON TAXATION, 97TH CONG., 1ST SESS., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 33–34 (1981)).

152. *Id.*

153. *See id.* (15% of maximum deduction of \$3000).

154. *See id.* (20% of maximum deduction of \$3000).

155. BITTKER & LOKKEN, *supra* note 138, ¶ 37.1.1. The EITC is a refundable credit, meaning that a person may have a negative tax rate, i.e., that some people will obtain a larger return than they pay in taxes. *See id.*

156. *See* WILLIAM D. POPKIN, INTRODUCTION TO TAXATION 5 (5th ed. Supp. 2012).

157. *See id.*

disincentives created by the EITC for low-income couples. At the same time, the EITC still is available to those couples where it is not possible, financially or otherwise, for both partners to work. The benefits of this provision must be balanced against subsidizing a taxpayer's employment costs. The main goal of this benefit would be to encourage those who would not work because their after-tax income is less than the cost of child care and other employment-related costs. As the following discussion shows, the overall tax benefit is slight, but it would encourage both partners to be employed in some low-income families.

There would be several rules, explicit and implicit, for a person to benefit from this second-earner schedule. First, it would apply only to the lower-earning partner (or, if both partners make the same amount, either one—but not both—could file as a second earner). Second, marital status would be irrelevant for qualification; however, there would need to be two earners and a dependent living within the same household. Overall costs increase for a family with dependents, even if the family has free care providers. Families today include a same-sex couple with dependents, a grandparent-parent family, or even two single adult siblings taking care of a disabled parent. Each are equally deserving of any family tax benefit. The dependents may be supported by the primary earner, the secondary earner, or both. These first two requirements would be tracked by requiring the couples to file together, with the secondary earner filing a schedule attached to the primary earner's forms, and the primary earner's Form 1040 listing the dependents with their Social Security numbers.¹⁵⁸

Implicitly, only those families with taxable income would be able to take advantage of this provision. If a couple does not have taxable income, their tax rate is zero, so a reduced tax rate does not benefit them at all. If a couple's income is this low, they likely could not afford for both individuals to be employed even with this benefit. As previously mentioned, couples in this situation likely can qualify for the EITC.

Since the primary benefit would be to induce lower-earning individuals with children to find employment, it does not seem harsh to limit the benefit of the secondary earner schedule to

158. INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, OMB No. 1545-0074, FORM 1040: U.S. INDIVIDUAL INCOME TAX RETURN (2011).

those secondary earners who earn less than \$34,500 of taxable income. Since the secondary earner must make less than or equal to the primary earner, a secondary earner who makes \$34,500 of taxable income has at least a combined taxable income with his or her partner of \$69,000. As previously mentioned, families at this income level are not only able to pay for their necessities but also can accumulate savings.¹⁵⁹

Next it is necessary to determine exactly what rates would apply to the secondary earner. If the secondary earner was taxed at a rate 5% below that of an individual with up to \$34,500 of income, the secondary earner would have a maximum tax benefit of \$1725.¹⁶⁰ The following is my proposed rate schedule for a secondary earner:

§ 1(c): Individuals Filing a Secondary Earner Schedule¹⁶¹

There is imposed on the taxable income of—

- (1) A qualifying secondary earner (as defined in section __), or
- (2) A person qualifying as head of household (as defined in section 2(b)), a tax determined according to the following table:

Table 5

If taxable income is:	The tax is:
Not over \$8500	5% of taxable income
Over \$8500 but not over \$34,500	\$425 plus 10% of the excess over \$8500

Allowing people who qualify as head of household¹⁶² to be taxed at the secondary earner rate, at least if they make less than \$34,500, also is equitable. A head of household is generally a per-

159. See *supra* Section III.B.

160. See Rev. Proc. 2011-12, 2011-2 I.R.B. 298.

161. This is a fictional rate schedule created purely to emphasize the utility of a second rate schedule. I chose section 1(c) because married filing jointly no longer would be a part of the code under an individual filing system, nor for that matter would married filing separately. Individual filing likely would be moved to section 1(a) since it would become the predominant method of calculating tax. Finally, the income brackets follow those under the current individual filing schedule in I.R.C. section 1(c). See Rev. Proc. 2011-12, 2011-2 I.R.C. 298.

162. I.R.C. § 2(b) (2006).

son who supports dependents and does not live with a spouse.¹⁶³ Today there are many single-parent households and they also do not benefit from imputed income.¹⁶⁴ If the taxpayer made more than \$34,500, they again would be subject to current head of household rates.¹⁶⁵ For example, a head of household making more than \$34,500 would be taxed at the 15% rate for the excess income over \$34,500 until the top of that bracket is reached at \$46,250.¹⁶⁶

Imagine a situation where the secondary earner had wages of \$30,000.¹⁶⁷ His tax liability would be \$2575.¹⁶⁸ A one-person household or a single-earner couple with \$30,000 of income would have a tax liability of \$4075, a difference of \$1500.¹⁶⁹ At first glance, the fact that a secondary earner making as much as a primary earner while paying \$1500 less in taxes may seem harsh. However, a primary earner is either in a one-person household or has a partner who stays at home. The \$1500 difference, therefore, can be seen as either reflecting a greater ability to pay (the one-person household) or, in the case of a single-earner couple, a tax on the imputed income of the stay-at-home partner.¹⁷⁰

CONCLUSION

At the beginning of this millennium, social attitudes and behaviors are much different than they were in 1948. In fact, the married couple unit is "vanishing"¹⁷¹ and the cohabitating couple

163. *See id.*

164. Nancy Shurtz, *Sweden, Singapore, and the States: A Comparative Analysis of the Impact of Taxation on the Welfare of Working Mothers*, 55 ST. LOUIS U. L.J. 1087, 1131 (2011).

165. *See* Rev. Proc. 2011-12, 2011-2 I.R.C. 298.

166. *Id.*

167. Necessarily, the secondary-earner rates only would apply to wages, since income from property would be taxed at the rates of the primary earner under the general rules of the proposed individual filing system. *See supra* notes 124-25 and accompanying text.

168. *See supra* note 161 and accompanying text ($(\$30,000 - \$8500) \times 0.10 + \$425 = \2575).

169. *See* Rev. Proc. 2011-12, 2011-2 I.R.C. 298.

170. Again, if we assume that the imputed value of household work is at least minimum wage (\$7.25 per hour) and a mere forty-hour work week (a stay-at-home parent likely works more than forty hours per week), the imputed value of the homemakers income would be at least \$15,080 subject to a 10% rate; thus, the income would generate a tax liability of \$1,508.

171. Puckett, *supra* note 116, at 1431.

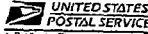
is growing rapidly.¹⁷² The joint return system no longer reflects the current composition of American families nor their economic circumstances. Prevailing social attitudes today show that people feel that a mother can work and be close to her children and that a father should prioritize extra time with family over extra time at work.¹⁷³ Aside from the erosion of the married couple, many other factors diminish any rationale for a married couple to derive a benefit from, or be penalized for, being married.

An individual filing system would eliminate marriage bonuses and penalties because such a system would be marriage-neutral. Furthermore, such a system would be more equitable because, as compared with a single-earner married couple, a two-earner married couple has more work-related costs and will suffer a “marriage penalty” when their incomes are approximately the same. Eliminating the anachronistic joint return and its accompanying marriage bonuses and penalties would reduce tax-based work disincentives for a lower-earning spouse in a married couple. The issue of income attribution can be mitigated by taxing a lower-earning partner’s income from property at the higher-earning partner’s tax rate.

The inequity imposed on low-income families by a return to the individual filing system can be alleviated by the incorporation of a secondary earner schedule. This schedule would help only those families who earn income and pay taxes, but the EITC still would be available to those who qualify. A broad range of families could qualify for this tax benefit so long as they had dependents. Child care costs are burdensome for low-income families and, even without child care costs, overall costs for a family are increased with children. The secondary earner schedule, if adopted, would better reflect today’s families than the “married filing jointly” filing status we have today.

172. See U.S. CENSUS BUREAU, SAME-SEX COUPLE HOUSEHOLDS 3 tbl. 2 (2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-03.pdf>; TABLE HH-1, *supra* note 79.

173. See *supra* notes 82–84 and accompanying text.



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