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Shari Motro
University of Richmond, smotro@richmond.edu

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A New "I Do": Towards a Marriage-Neutral Income Tax

*Shari Motro**

ABSTRACT: The federal income tax system treats married couples as if each spouse earned approximately one-half of the couple's combined income through a mechanism called "income splitting." For many one-earner and unequal-earner couples, income splitting produces a significant advantage, a "marriage bonus," by shifting income from higher to lower rate brackets. Marriage-based income splitting relies on a presumption that marriage is a good indicator of economic unity between two taxpayers. It is not. Marriage does not require spousal sharing, and many unmarried couples share everything they earn. As a result, the current system extends the benefit of income splitting to some taxpayers who do not deserve it while withholding it from others who do. Because marriage is a poor proxy for economic unity, this Article proposes a new eligibility criterion for income-splitting: only couples legally committed to sharing their income, regardless of marital status, would be permitted to file jointly.

* Assistant Professor of Law, University of Richmond School of Law. B.A., Yale University; J.D., New York University School of Law. I am thankful to Harry Ballan, Micah Burch, Yair Benjamini, Lawrence Fleischer, Beverly Gage, James Gibson, Mary Heen, Steve Johnson, Corinna Barrett Lain, Jeremy Matz, Anna Pomykala, Alex Raskolnikov, Deborah Schenk, Christopher Smith, Mary Kelly Tate, Dennis Ventry, and Lawrence Zelenak for their helpful comments and suggestions on earlier drafts of this Article. I am also thankful to my Richmond research assistants Naomi Andrews, Katharine Fuegi, and Cuyler Lovett and to my student Andy Tank, whose persistent questions led me to solve a critical piece of this puzzle. A summer research grant from the University of Richmond School of Law helped fund this work.

I. INTRODUCTION

The current "married filing jointly" federal income tax schedule effectively treats each spouse as if he or she earns approximately one-half of the couple's combined income. This "income splitting" mechanism translates into a significant advantage for unequal- and one-earner couples by shifting income from higher to lower brackets.[1] For example, a husband and wife who earn $700,000 and $15,000 respectively owe nearly $4,000 less in federal income taxes than an unmarried couple with the same income distribution.[2] If the wife has no income at all, the spouses' "marriage bonus"—i.e., the difference between their tax liability and that of an *un*married one-earner couple making $700,000—jumps to more than $8,000.[3] Some equal-earner couples, on the other hand, suffer a "marriage penalty"—i.e., they pay more in taxes than unmarried couples in the same situation.[4]

Why should marital status matter for tax purposes?

Traditional justifications for the current joint filing system rely on the presumption that husband and wife form an economic unit, jointly owning and controlling all income regardless of who nominally earned it. This presumption is false. In fact, no necessary connection exists between marital status and economic unity. Most states require only minimal spousal sharing, and premarital agreements ensuring that spouses have no rights to each other's income are no longer a rarity. Even if marriage *were* a reasonably good proxy for income sharing, according to foundational income tax principles, economic unity does not in itself justify income splitting.

As critics like Pamela Gann, Marjorie Kornhauser, Edward McCaffery, and Lawrence Zelenak have demonstrated, the conceptual inconsistencies

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1. The Appendix to this Article illustrates the arithmetical advantage of income splitting for couples with widely divergent incomes.

2. Using the 2006 rate tables and standard deduction and personal exemption amounts, the husband's tax liability as an unmarried individual taking the standard deduction (at this income level he would not be eligible for the personal exemption), would be $223,058. The wife's tax liability as an unmarried individual taking the standard deduction and the personal exemption would be $655. Alternatively, the husband and wife's tax liability as a married couple taking a double standard deduction would be $219,895.50. Thus, the difference between the sum of their individual liabilities were they single and their liability as a married couple, is: ($223,058+$655)-$219,895.50=$3,817.50.

3. If the wife had no income of her own, her individual liability would be 0, and the couple's combined liability would be $214,645.50. Thus, the difference between the sum of their individual liabilities were they single and their liability as a married couple, is: ($223,058 + $0)-$214,645.50=$8,412.50. This calculation disregards I.R.C. § 151(d)(3)(E) (2000).

Note that the terms "marriage bonus" and "marriage penalty" may refer to various tax advantages and disadvantages of being married. This Article focuses exclusively on bonuses and penalties associated with the rate structure.

4. For a discussion of the marriage penalty, which affects fewer couples than the marriage bonus, see *infra* Part II.B.1.

and the negative effects of marriage-based income-splitting would vanish if Congress instituted a separate filer regime.[5] However, though mandatory separate filing has many appeals, it is now widely regarded as politically unrealistic.[6]

One explanation for the permanence of the income-splitting joint return is that its main alternative, a pure separate filing regime, would require that husbands and wives account for intra-marital transfers as either "gifts" or "compensation." In the case of economically united spouses, such a requirement is culturally undesirable, administratively unmanageable, and conceptually inaccurate. We are most comfortable viewing spouses who share their income as earning it "by and for" the marital unit rather than as individuals. The revenue we forgo by allowing spouses to split income may therefore be viewed as the price we are willing to pay to live in a society in which spouses need not commodify the flow of goods and services within the marital unit. The deviation from normative tax principles that results from income-splitting joint returns is tolerated in order to support and enable a unique type of relationship—a partnership of equals in which "what's mine is yours, and what's yours is mine."

Taken to its logical conclusion, this justification suggests that the proper criterion for income splitting should be economic unity, not marriage. Thus, I propose that tax law consider individuals' legally binding economic status independent of their marital status, and that only couples committed to sharing all taxable income equally should be treated as such for tax purposes. Rising public awareness of the discriminatory effects of marriage-based benefits,[7] growing support for the extension of many of these benefits to unmarried couples—gay[8] and straight[9]—and census findings over the past

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5. *See generally* Pamela Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994).

6. Zelenak's latest contribution to the debate over marriage and taxes assumes that the separate filing cause is hopeless and, more broadly, that any marriage-neutral tax system is also "out of the question." Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 3 (2000); *see also infra* note 88. This Article accepts Zelenak's first assumption—that income splitting is here to stay—but departs from the second—the notion that marital status must necessarily continue to serve as the eligibility criterion for income splitting.

7. *See* Lisa Duggan, *Holy Matrimony!*, THE NATION, Feb. 26, 2004, *available at* http://www.thenation.com/doc/20040315/duggan; Shari Motro, *The State of the Unions; Single and Paying for It*, N.Y. TIMES, Jan. 25, 2004, at 15; Alternatives to Marriage Project, http://www.unmarried.org (last visited Mar. 23, 2006); Unmarried America: An Information Service for the New Unmarried Majority, http://www.unmarriedamerica.org (last visited Mar. 23, 2006) [hereinafter Unmarried America] (highlighting the discrepancies between married and single statuses).

8. *See* Lisa Duggan & Richard Kim, *Beyond Gay Marriage*, THE NATION, July 18–26, 2005, at 25 ("Large majorities favor employment and housing rights for gay people (89 percent in the

few decades that indicate a move away from traditional family structures[10] provide an opportunity and an imperative to reexamine the assumptions that have undergirded the system of marriage-based joint returns for more than fifty years.

By including economically united unmarried couples in the joint filing system, the economic unity proposal extends income-splitting benefits to unmarried couples in a way that is sensitive to and consistent with the beliefs

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latest Gallup poll), and a clear majority of Americans support some form of partnership recognition for same-sex couples—either marriage or civil unions (60 percent at the time of the election)."); Kristin Eliasberg, *Legal Scholars Ask if Marriage Is the Only Way to Make a Family*, BOSTON GLOBE, May 16, 2004, at E1 ("When same-sex couples across the state are finally allowed to take their wedding vows tomorrow, some advocates say, the law will at last be catching up with the long-standing social transformation that has made committed gay couples, and gay families, an undeniable part of American life."); N.Y. TIMES & CBS, THE NEW YORK TIMES/CBS NEWS POLL 16 (Feb. 24–28, 2005), *available at* http://www.nytimes.com/packages/html/politics/20050303_poll/20050303_poll_results.pdf (indicating fifty-three percent to fifty-seven percent support for some type of legal recognition for gay couples, either marriage or civil union). Furthermore, John Tierney notes:

> Opinion on gay marriage and civil unions has fluctuated over the past year, but a Gallup poll last month showed increased support, with more than a third of Americans in favor of gay marriage and about half in favor of civil unions. The long-term trend has been to a great tolerance toward gays. The percentage of Americans favoring equal rights for homosexuals in employment has risen since 1977 by more than a third to about 80 percent today. Support for gay rights has become especially strong among young voters, which suggests that the trend will continue.

John Tierney, *A Nation Divided Who Says?*, N.Y. TIMES, June 13, 2004, § 4 (Week in Review), at 1. Other articles indicate:

> Public support for allowing gays and lesbians to marry legally has rebounded a bit after declining between 2003 and 2004. Today, 36% of Americans favor allowing gays and lesbians to marry, up from 32% in December 2004. The percentage favoring gay civil unions has risen as well. Currently, 53% favor allowing gays and lesbians to enter into legal arrangements providing them with many of the same rights as married couples; that compares with 48% last August.

PEW FORUM ON RELIGION & PUBLIC LIFE, STRONG SUPPORT FOR STEM CELL RESEARCH, ABORTION AND RIGHTS OF TERROR SUSPECTS TOP COURT ISSUES 12 (2005), *available at* http://pewforum.org/publications/surveys/social-issues-05.pdf; *see also* Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267, 287–88 (2002) (summarizing examples of tax treatment based on marital status that fail to meet the goal of supporting dependent children); Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 491–95 (2000) (explaining the numerous harms associated with preferential tax treatment for only heterosexual married people).

9. *See* Unmarried America, *supra* note 7.

10. *See* Dennis J. Ventry, Jr., For Richer, For Poorer: How Tax Policymakers Have Protected and Punished American Families, 1913–2006, at 3–4 (unpublished manuscript, on file with the Iowa Law Review).

of a majority of Americans—including many conservatives like President Bush[11] who support civil unions, but oppose gay marriage.[12] By excluding economically independent spouses, the proposal also comports with conservative support for stronger marital commitments. Finally, economic unity-based income splitting is consistent with the widely accepted public policy goal of greater gender equality in intimate partnerships.

Part II of this Article critiques the traditional foundations for marriage-based income splitting and describes the current system's harmful effects. Part III suggests a new theoretical foundation for income splitting—the "by and for the couple" justification—and shows why it demands that the current eligibility criterion for income splitting be replaced. Part IV introduces the economic unity proposal. At its core, the proposal amounts to a simple demand for conceptual rigor and transparency. The current system is founded on a sentimentalized ideal of marital unity, replicating and perpetuating the fairytale that has devastated so many dependent spouses. The new "I do" would force the tax system to acknowledge reality, allowing only those truly united to be taxed as one.

II. MARRIAGE-BASED INCOME SPLITTING IS INDEFENSIBLE

A. *TRADITIONAL JUSTIFICATIONS FOR INCOME SPLITTING*

The U.S. federal income tax imposes taxes on realized accessions in wealth over which the taxpayer has complete dominion.[13] Increases in wealth are generally measured by adding the taxpayer's receipts—including wage income, interest, and gains from sales or exchanges—and subtracting (deducting) expenditures made for the purpose of producing income—like compensation paid to employees and the purchase of business-related equipment. Non-business-related expenditures ("personal consumption") and investments—like buying a candy bar and depositing money into a savings account—are generally nondeductible.[14]

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11. President George W. Bush voiced his opinion in an interview:

> CHARLES GIBSON: . . . the [Republican Party] platform opposes [civil unions]. PRESIDENT BUSH: Well, I don't. I view the definition of marriage different from legal arrangements that enable people to have rights. And I strongly believe that marriage ought to be defined as between, a union between a man and a woman.

See Interview by Charles Gibson with President George W. Bush, on Good Morning America, ABC News Transcripts (Oct. 26, 2004), *available at* http://www.evervigilant.net/news/gmatranscript102604.html.

12. *See supra* note 7.

13. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). The normative base for the *Glenshaw* formulation and for the current tax system is the Haig-Simon definition of income as the sum of consumption and savings. Though Haig-Simon provides the theoretical foundation of our current system, many provisions deviate from the pure income tax model, rendering the overall system a hybrid income/consumption tax. For further discussion see *infra* note 55.

14. I.R.C. § 262 (2000).

The tax treatment of transfers between unmarried taxpayers generally (though not always) follows this logic. Transfers between unmarried individuals often fall into one of three categories for tax purposes: compensation for business-related services, compensation for personal services, or gifts. Compensatory transfers are distinguished from gifts for tax purposes if they involve a quid pro quo, i.e., if they are not made out of "'detached and disinterested generosity.'"[15] Compensation for business-related services (everything from photocopying to strategy consulting) is deductible to the payor[16] and must be included by the payee.[17] Compensation for personal services (like housekeeping, food preparation, and hairdressing) may not be deducted by the payor[18] and must be included by the payee.[19] Gifts have no income tax consequences to either the donor (they are considered a form of personal consumption[20]) or donee.[21]

These same categories govern situations in which one taxpayer assigns her income to another—e.g., by directing her employer to pay part of her salary to someone else or by contractually committing to deposit her income into an account owned jointly with another individual.[22] In other words, unless the assignment is characterized as compensation or other includable form of income to the payee, it is a gift; the assignor must pay taxes on the income and the assignee need not. One of the rationales for this "assignment of income doctrine" is to prevent high-bracket taxpayers from shifting income to friends and family in lower brackets, thereby lowering the rate at which this income is taxed. If income shifting were permitted, transfers that were in substance gifts could effectively be treated as if they were business expenses: the donor would deduct them and the donee would include them and pay taxes according to her own tax bracket. To prevent this result, a guiding principle that "'income must be taxed to him who

15. Comm'r v. Duberstein, 363 U.S. 278, 285 (1960) (quoting Comm'r v. LoBue, 351 U.S. 243, 246 (1956)).

16. I.R.C. § 162(a).

17. *Id.* § 61(a)(1).

18. *Id.* § 262(a).

19. *Id.* § 61(a)(1).

20. A man who gives his girlfriend a diamond necklace, the argument goes, is engaging in the same type of activity as someone who buys himself a fancy car. *See* Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY 97, 102–03, nn. 27–29 (1991).

21. The exclusion of gifts under I.R.C. § 102 is more difficult to square with the Haig-Simon definition of income. For a discussion of why gifts are excluded from income, see 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 10.1 (2005).

22. For a discussion of assignments of income, see *id.* ¶ 75.2.

earns it'"[23] has become, as the Supreme Court put it, "'a cornerstone of our graduated income tax system.'"[24]

This principle was established in the famous Supreme Court case *Lucas v. Earl*,[25] which was decided in 1930 before the advent of the joint return. The case concerned Guy and Ella Earl, a one-earner married couple who had privately contracted to share all income. The Earls claimed that each spouse should be taxed based on one-half of Guy's income. The Supreme Court rejected their claim on the theory that Congress intended to "tax salaries to those who earned them," and that the Earls' contract essentially represented an end-run around this rule, a skillful arrangement devised—as Holmes famously put it—to attribute the fruits to "a different tree from that on which they grew."[26]

Lucas v. Earl still applies to most taxpayers. However, transfers between spouses are subject to a different rule.[27] The current system disregards transfers between spouses,[28] and the rate schedules applicable to married individuals filing jointly[29] treat each spouse as if he or she earns approximately[30] one-half of the couple's combined income through a mechanism called "income splitting." As a result, many married couples with unequal incomes pay less in taxes than they would if each person filed individually, because income splitting effectively attributes income earned by the high wage earner to the low wage earner, thereby lowering the top rate

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23. *See* BITTKER & LOKKEN, *supra* note 21, at 75–110 (quoting Comm'r v. Culbertson, 337 U.S. 733, 739–40 (1949)).

24. *See id.* (quoting United States v. Basye, 410 U.S. 441, 450 (1973)).

25. 281 U.S. 111 (1930).

26. *Id.* at 115.

27. Note that the head of household category also establishes an exception to the doctrine for reasons that have historically related to the income-splitting joint return, though conceptually the link is erroneous. *See infra* note 122.

28. I.R.C. § 1041 (2000).

29. Note that though spouses technically have the option of filing separately, in most cases doing so imposes penalties that render separate filing rare. *See* TAXPAYER ADVOCATE SERV., 2005 ANNUAL REPORT 424 (citing TAS RESEARCH, TAX YEAR 2003 IRTF DATA (2005)) ("Ninety seven percent of all married filers . . . submitted joint returns for tax year 2003 . . . ."). Furthermore, Bittker notes:

> The split-income plan enacted in 1948 included a favorable rate schedule for joint returns; joint returns were optional in theory, but the new rate schedule was an offer "that could not be refused" (except in special circumstances) and this meant that joint returns became mandatory in fact for almost all married couples.

Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1408–09 n.55 (1975) (citation omitted). This Article therefore disregards the married filing separately option.

30. When the joint return was first introduced in 1948, married taxpayers' liability was equal to exactly that of two single taxpayers each earning one-half of the couple's combined income. Once the special brackets for married taxpayers were introduced in 1969, "pure" income splitting gave way to an approximation, which in turn produced a penalty for some two-earner couples. *See infra* Appendix.

at which this income is taxed.[31] The resulting advantage is referred to as the "marriage bonus." The Appendix illustrates the historical evolution of the taxation of married couples from *Earl v. Lucas* and *Poe v. Seaborn*[32] through the 2001 Economic Growth and Tax Relief Reconciliation Act. Although the yearly value of marriage bonuses is difficult to measure, all estimates peg it at tens of billions of dollars.[33]

Why should married couples be subject to a special rule? Leaving aside the historical circumstances that led Congress to institute marriage-based income splitting,[34] four *ex post facto* justifications for retaining the system have been proposed. All four rely on the false presumption that husband and wife necessarily form an economic unit. But even if marriage were synonymous with complete economic unity—i.e., if all husbands and wives jointly and equally owned, controlled, managed, and consumed every dollar of taxable income earned by either—the traditional justifications for income splitting are conceptually inconsistent with foundational principles of the current income tax system.

1. Joint Ownership Justification

Spouses-only income splitting is often defended as an adjustment necessary to properly account for true changes in married taxpayers' net worth. A husband whose non-wage-earning wife automatically owns part or all of his income would be overtaxed, the argument goes, if he were liable for taxes on his full salary. This approach views transfers between spouses as different from gifts between unmarried taxpayers and from personal

31. This effect exists only in systems with a progressive rate structure. *See* Zelenak, *supra* note 5, at 340 ("Under a progressive tax, two single persons with any given amount of combined income will pay the lowest combined tax if their income is divided evenly between them."). This Article presumes a progressive rate structure as a constant.

32. 282 U.S. 101 (1930).

33. *See* JANE G. GRAVELLE, THE MARRIAGE TAX PENALTY 51–52 (2003). Gravelle explains this difficulty:

> It is not possible to measure the marriage . . . bonus precisely because the taxes a married couple would pay as two singles depends on the division of unearned income, itemized deductions, and the custody of children. When children are allocated based on typical observed behavior, the Congressional Budget Office has estimated . . . that . . . 60% [of married couples] have bonuses ($73 billion).

Id.; *see also* CONG. BUDGET OFFICE, U.S. CONG., FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 1 (1997) (noting that in 1996, marriage bonuses cost the federal government approximately $33 billion in lost revenues); Ventry, *supra* note 10, at 4 ("In 2004, 30 million married couples received $49 billion in marriage tax 'bonuses' . . . ." (citing Gillette et al., Marriage Penalties and Bonuses: A Longer-Term Perspective 1 (Dec. 2004) (unpublished manuscript, on file with the Iowa Law Review))).

34. Zelenak has called the original joint return "an accident of history." Zelenak, *supra* note 6, at 5. For further discussion of the historical circumstances surrounding its adoption, see generally Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1988); Ventry, *supra* note 10.

consumption expenditures, because marriage is said to change, fundamentally and irreversibly, people's legal, emotional, and social control over their income. Once two people marry, both spouses are viewed as having the power to decide how income nominally earned by either will be spent and invested. Thus, unlike the decision to buy a new car or help an unrelated friend pay her rent, sharing income with one's spouse is not a decision at all; it is an inescapable obligation. As Bittker put it:

> Marriage affects the legal rights of each spouse to what would otherwise be "his" or "her" unfettered income by creating an obligation of support and restrictions on the right to transfer property during life and at death. Since the receipt of $10,000 of marital income does not carry with it the same rights that are embodied in $10,000 of "single" income, these two amounts should not necessarily be taxed as though they were identical. Instead, it is often argued, marital income should be attributed, and taxed, one-half to each spouse.[35]

However, though marriage does create minimal support obligations, no necessary connection exists between shared ownership over income and marriage. In the forty-one states that apply common-law principles to marital-property matters, the wage earner is the wage owner during marriage.[36] Thus, if husband and wife decide that she will raise the kids and he will support the family financially, the husband is free to deposit his salary in a separate account to which his wife has no legal entitlement. The husband would be obligated to support the family, but the extent of this support, beyond providing bare necessities, would be at his discretion.[37]

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35. Bittker, *supra* note 29, at 1420 (citations omitted). Before Congress extended income splitting to all married couples, this theoretical justification propelled demands for income-splitting tax treatment by couples in the 1920s, and it played a central role in judicial opinions granting such treatment. When income taxes were first imposed in 1913, each taxpayer's liability was calculated on an individual basis. The idea that marital status should affect income tax liability was introduced by a number of couples who were legally obligated to share their income. During early debates about the proper taxable unit, it was generally assumed that if income splitting were appropriate at all, marriage alone did not render a couple sufficiently economically united to justify income splitting treatment. Something more was needed, though there was plenty of debate over what that something was. Ella and Guy Earl, for example, petitioners in the famous *Lucas v. Earl* Supreme Court case, based their income-splitting claim on a contract they had executed as early as 1901, in which they committed to share equally all income and property. Without the legal obligation to share income, their claim would have had no logical basis. *See id.* at 1402 ("[I]t was only by equalizing their financial positions that [the Earls] put themselves in a position to claim the tax advantage of equal-income separate returns.").

36. *See* Amy C. Christian, *Joint and Several Liability and the Joint Return: Its Implications for Women*, 66 U. CIN. L. REV. 535, 546 n.75 (1998); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 124 (2004); *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2092 (2003) [hereinafter *Developments*].

37. *See infra* note 44.

Should the couple divorce, the husband's earnings accumulated over the course of the marriage would be divided according to equitable distribution principles—often leaving the wife with a less than fifty percent share.[38]

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38. Professor Joan Williams notes an anomaly in the application of the equitable-distribution principles:

> Statutes typically provide that marital property shall be divided based on each spouse's contributions to the marriage; many states include homemaking either by statute or . . . by case law. Yet, in applying this law, an interesting pattern emerges. Typically, courts treat property as jointly owned when dealing with modest estates, where splitting the property 50/50 often forces the sale of the family home in order to allow the husband to "get his equity out." Yet, where the estate is large, courts in Connecticut and elsewhere traditionally use the "he who earns it, owns it" rule, reflecting a sense that wives do not "need" half of, say, a billion dollars. . . . This sense is even more explicit in the context of alimony. In . . . most . . . states, wives' entitlement to alimony is explicitly based on need.

Joan Williams, *Do Wives Own Half? Winning for Wives After* Wendt, 32 CONN. L. REV. 249, 250 (1999) (citations omitted).

In the famous 1998 Connecticut case *Wendt v. Wendt*, corporate star Gary Wendt divorced his wife of thirty-one years, leaving her with significantly less than fifty percent of his earnings over the course of their marriage. His wife, Lorna, sued, demanding an equal share. Mr. Wednt's trial testimony reveals the gulf between the husband's and the wife's perceptions of the economic aspects of their marriage.

> [Lorna Wendt's attorney:] "You had no idea [your marriage] was an equal partnership with Lorna?"
> [Mr. Wendt:] "I can't ever recall that being discussed or thought about."
> [Attorney:] "You never thought about your marriage as a partnership?"
> [Mr. Wendt:] "In economic terms? No, I didn't."
> [Attorney:] "Did you ever tell her that?"
> [Mr. Wendt:] "No, and she didn't ask."
> [Attorney:] "You didn't think of your marriage as a team effort?"
> [Mr. Wendt:] "No, I didn't. . . . [I was] totally responsible for all creation and value of the assets. . . . I cannot find anything close to [justifying] an equal distribution of these assets."
> [Attorney:] "Is it your view that making money is more important than raising a child? . . . You have testified that the financial contribution to the marriage was almost all yours. . . . Do you believe that raising children is less important than making money?"
> [Mr. Wendt:] "Raising children should not be measured by anywhere near the same standard as making money. I don't believe they should be measured in any way next to each other; they are two different things."

ANN CRITTENDON, THE PRICE OF MOTHERHOOD 137–38 (2001) (author's commentary omitted).

Note also that even if equitable-distribution law resulted in a fifty-fifty split after marriage, basing income splitting on a future expectation of equal ownership flies in the face of our foundational definition of income: realized accessions to wealth over which the taxpayer has—not "is likely to have"—complete dominion. *See* Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955). Professor Marjorie Kornhauser explains the income-splitting principles of equitable-distribution statutes in the following way:

> Common-law equitable distribution statutes do not justify income-splitting since the rights arise only on dissolution of marriage. While the statutes might put restraints on management *during* marriage, these restraints are much too limited

In the nine community-property states, earned income acquired in the course of the marriage (other than by gift or inheritance) is automatically community, i.e., property in which each spouse holds an equal undivided interest. Thus, in these states, the non-wage-earning spouse is by default entitled to an equal share in the wage earner's income.[39] If the husband in our example deposits his check in a separate account, the law regards that account as jointly owned by him and his wife. That said, in some community-property states, taxable income from separate property (property acquired before the marriage or through gift or devise) is taxable separately.[40]

The current income-splitting rule also misses its mark because spouses are free to opt out of the community-property regime.[41] Indeed, in most states—community or common law—the standards governing pre- and post-marital agreements have become[42] so relaxed as to render default rules regarding marital sharing (already minimal in most states) essentially optional. The Uniform Premarital Agreement Act, promulgated in 1983 and, as of 2003, adopted by a majority of the states,[43] goes so far as to allow spouses to opt out of the duty of mutual support,[44] so long as doing so does not render either party eligible for public assistance.[45]

> to impose income-splitting when the majority of control of the property still rests with the earner.

Kornhauser, *supra* note 5, at 104 (citations omitted); *see also* Frantz & Dagan, *supra* note 36, at 76 n.1.

39. *See* Frantz & Dagan, *supra* note 36, at 124–25 ("[T]he basic principle of community property is that '[t]he respective interests of the husband and wife . . . during continuance of the marriage relation are present, existing, and equal interests.' Spouses are thus *equal owners* of all property acquired during marriage, regardless of how the property is nominally titled." (quoting CAL. FAM. CODE § 751 (West 1994)) (other citations omitted)).

40. *See* IRS, Internal Revenue Manual, Exhibit 25.18.1-1, Comparisons of State Law Differences in Community Property States (Feb. 15, 2005), *available at* http://www.irs.gov/irm/part25/ch13s01.html [hereinafter IRS Manual].

41. *See id.* (indicating that all community-property states recognize pre- or post- marital property-characterization agreements); *see also* BITTKER & LOKKEN, *supra* note 21, ¶ 76.2 ("Most community-property states permit a married couple to agree that community property will be held in separate ownership . . . .").

42. When marriage-based income splitting was introduced in 1948, antenuptial agreements were regarded as "per se invalid as contrary to the public policy of promoting marital stability." *Developments*, *supra* note 36, at 2078.

43. *See id.* at 2081 n.35; Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1542 n.384 (2001) (citing Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 899 (1997)).

44. The duty of mutual support is today largely symbolic. *See* Christian, *supra* note 36, at 540 n.75. Christian notes:

> Modern courts tend not to interfere or to enforce the husband's obligation to support his wife except in extreme cases, like a husband refusing to pay his wife's hospital bill. The support obligation was a creature of common law, especially before the advent of the Married Women's Property Acts. Before wives could own property of their own, they needed, and the law provided them with, support from their husbands. Once wives could own their own property under the Married

Even if marriage did create community-property-style legal entitlements, the shared-ownership justification does not explain why spouses, who co-own each other's income, should be exempt from the assignment of income doctrine. Recall that when an individual shares a portion of her income with another taxpayer, the transfer must be characterized as gift or compensation. Entering into a legal obligation to share income, one that gives the recipient binding rights to it, does not in itself transform the transfer into a deductible business expense which, arithmetically, is what income splitting accomplishes.[46] Why then should transfers between spouses be blessed with this automatic beneficial treatment? If the assignment of income doctrine were applied to married couples, the law would require husbands and wives to designate every dollar that passes between them as either gift or compensation. Couples who share earnings equally, who have decided that the family's income will be earned by one spouse while the other cleans, counsels, and carpools, would be forced to allocate the earner's fifty percent transfer into categories. As we shall see, the difficulty and discomfort that this suggestion raises contain the kernel of what I believe is the only rational justification for income splitting, though it does *not* justify income splitting only for spouses to the exclusion of unmarried couples legally committed to income sharing.

> Women's Property Acts the support obligation under common law, although not ceasing altogether, gradually became less important. . . . Not only has the support obligation lost importance over time, but it also is "not directly enforceable between the parties when married. The support obligation may be enforceable during a marriage only by third party creditors who may sue one spouse for certain very narrow categories of debts . . . undertaken by the other."

Id. (citations omitted) (quoting Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 34 (1996)); *see also* Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S. CAL. L. REV. 145, 183 (1998) ("[L]egal support obligations are very minimal and less than adequate to protect the secondary earner's legitimate expectations of benefit from marriage." (citation omitted)).

45. The Uniform Premarital Agreement Act provides:

> If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

UNIF. PREMARITAL AGREEMENT ACT § 6(b) (1983).

Note that the prevalence of premarital contracting is unclear. *See* David E. Rovella, *Pre-Nups No Longer Just for the Wealthy*, NAT'L L.J., Sept. 6, 1999, at A1; Aline Sullivan, *Kiss Me and Sign Here, Darling; Demand for Prenuptial Agreements Is on the Rise*, INT'L HERALD TRIB., Feb. 8, 1997, at 15. *See generally* Heather Mahar, *Why Are There So Few Prenuptial Agreements?*, (John M. Olin Ctr. for Law, Econ., & Bus., Harvard Law School, Discussion Paper No. 436 (Sept. 2003)), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf.

46. *See supra* notes 22–24 and accompanying text.

2. Shared Consumption Justification

Legal ownership aside, income splitting is sometimes defended as an adjustment necessary to account for behavioral patterns of shared consumption.[47] In other words, since husband and wife normally spend the earner spouse's income jointly and benefit from it more or less equally, the argument goes, treating the earner as a separate individual for tax purposes would be unfair.

But statistical evidence of marital sharing is subject to much dispute. Data on income pooling within couples is scarce,[48] is likely to be unreliable,[49] and has been interpreted as supporting[50] as well as debunking[51] the marital unity paradigm.

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47. Bittker, *supra* note 29, at 1420–22. The Carter Commission recognizes this concept:

> [T]he family is today . . . the basic economic unit in society. . . . [A]s soon as a marriage is contracted it is the continued income and financial position of the family which is *ordinarily* of primary concern, not the income and financial position of the individual members. Thus, the married couple itself adopts the economic concept of the family as the income unit from the outset. . . . Family income is *normally* budgeted between current and capital outlays, and major decisions involving the latter are *usually* made jointly by the spouses.

See REPORT OF THE [CANADIAN] ROYAL COMMISSION ON TAXATION (Carter Commission) 122–24 (1966), *cited in* Bittker, *supra* note 29, at 1393 (emphasis added).

48. *See* Kristen R. Heimdal & Sharon K. Houseknecht, *Cohabiting and Married Couples' Income Organization: Approaches in Sweden and the United States*, 65 J. MARRIAGE & FAM. 525, 525 (2003) ("[C]ouple income organization has not received much empirical attention."); Zelenak, *supra* note 5, at 348 ("There has been remarkably little empirical research into the income-sharing patterns of married couples.").

49. As Zelenak put it, "It is extremely difficult to gather reliable information on pooling behavior, partly because of the great mass of relevant behavior, partly because of privacy concerns, and partly because of the difficulty of interpreting behavior." Zelenak, *supra* note 5, at 350. It should also be noted that most studies do not distinguish between unmarried couples who choose not to marry and those who want to marry but are not permitted to.

50. *See* Heimdal & Houseknecht, *supra* note 48, at 526 ("[F]or married couples research has consistently found that pooling is the preferred arrangement. . . . In contrast to married couples, the small body of literature on cohabiting couples indicates that they are more likely to keep finances separate . . . ."); J. Treas, *Money in the Bank: Transaction Costs and the Economic Organization of Marriage*, 58 AM. SOC. REV. 723 (1993), *cited in* Heimdal & Houseknecht, *supra* note 48, at 526–27 (finding that "two thirds of married couples with a bank account kept joint accounts only"); Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 498–99 (1995), *referenced in* WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW 1058 (2004). Zelenak notes:

> [P]atterns of household income and expenditure indicate that most spouses have no choice but to share roughly equally in the consumption of their combined income. . . . If one accepts the premise that the crucial question in determining the appropriate taxable unit is "Does this person pool his income with another person for the purpose of shared consumption (and savings)?" then requiring joint returns for married couples and separate returns for unmarried persons is an easy-to-administer rule that gets it right most of the time.

Zelenak, *supra* note 5, at 353 (citations omitted).

Even if marriage did serve as a reasonable proxy for marital sharing, Pamela Gann, Marjorie Kornhauser, and Lawrence Zelenak have demonstrated that the shared consumption justification for income splitting is inconsistent with the foundational principle that income taxes should be based on who controls income rather than who consumes it.[52]

Think, for example, of three young investment bankers—Meg, Malik, and Seymour. Each makes $100,000 per year, of which they each owe

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51. *See* Richard C.E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317, 380 (1990) ("Shere Hite reports in a study . . . that seventy-five percent of wives who work are working at least in part for the financial independence it brings. . . . These women clearly do not regard their property as belonging equally to their husbands." (citations omitted)); Gann, *supra* note 5, at 26 n.97 (discussing several articles that explore the prevalence of marital sharing); Kornhauser, *supra* note 5, at 98–99 (justifying the taxation of marital couples as a single taxable unit); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1594 (1996) ("Most studies indicate . . . that Congress's assumption that families operate as a single economic unit, sharing income and expenses equally, is flawed."); Ventry, *supra* note 10, at 389 ("Between 1969 and 1995 . . . [e]mpirical research . . . undermined the pooling/sharing argument, finding that in most marriages, spouses did not split intra-household allocations of income and wealth." (citations omitted)).

Even among couples who do purportedly share equally, some scholars believe that "[b]ehind the façade of sharing is a deep-seated, though often subtle, control of the income by the earner spouse." Kornhauser, *supra* note 5, at 91. As one scholar put it, "The bread-winners are often the meat-eaters." Michael Young, *The Distribution of Income Within the Family*, 3 BR. J. SOC. 305, 314 (1952), *cited in* EDWARD LAZEAR & ROBERT MICHAEL, ALLOCATION OF INCOME WITHIN THE HOUSEHOLD 14–15, *cited in* Kornhauser, *supra* note 5, at 80 n.51 ("Young found that in British working-class families between World Wars I and II, the male earner gave his wife a flat weekly allowance and disposed of the rest of the income as he wished. The wife frequently was ignorant of how much he made and how he spent it."); *see also* EDWARD MCCAFFERY, TAXING WOMEN 24 (1997) ("Many surveys and studies indicate that who earns the money matters a great deal to the internal dynamics of families."). Also, Amy Ellen Schwartz observes:

> [T]here seems to be mounting evidence that family consumption decisions do depend upon the distribution of earnings between the husband and the wife. . . . The implication for tax policy is that while the evidence may not be fully conclusive, there is significant evidence that husbands and wives do not ignore the source of the income in making economic decisions. That means that it may be inappropriate to view them as a single economic unit.

Amy Ellen Schwartz, *Whose Money Is It?*, 16 N.Y.L. SCH. J. HUM. RTS. 135, 137 (1999) (citations omitted).

Sharing among spouses is likely to involve consumed rather than saved income. *See* Gann, *supra* note 5, at 26 (citing William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 349 n.69 (1972)) ("[C]ommentators assume that equal sharing is more likely in consumption than in savings."); *see also* Zelenak, *supra* note 6, at 28 (finding that although "the result [of pooled marital income] is technically shared consumption, it may [nonetheless] be skewed toward the earner's consumption preferences").

52. *See* Kornhauser, *supra* note 5, at 105 ("Under traditional income tax principles, control typically governs taxation. The mere receipt of a benefit does not cause a person to be taxed."); Zelenak, *supra* note 5, at 354–58; *see also* Gann, *supra* note 5, at 25–26 & n.93; Kornhauser, *supra* note 5, at 97 ("[T]he pooling rationale is criticized because it focuses on income consumption, which is more appropriate for a consumption-based tax than an income tax that measures accessions to wealth." (citations omitted)).

approximately $20,000[53] in taxes. Meg and Malik fall in love, move in together, and decide to get married. Shortly after the wedding, Meg leaves her job to fulfill a lifelong dream: becoming a trapeze artist. Malik's $100,000 supports both himself and Meg, who now has no income. Despite the money they are saving by splitting the rent, their lifestyle is not what it used to be. Still, Meg is delighted and when Meg is happy, Malik is too. Seymour, who has always dreamed of trying his hand at painting, is still hard at work with Malik. Though he is jealous of Meg and wishes it was he who had found love and a sugar daddy, he keeps his resentment to himself. But come tax time, he loses his cool. It turns out that filing jointly with Meg, Malik now owes some $6,000[54] less than Seymour on the same $100,000 of income. Essentially, the government is subsidizing Meg's new hobby. Put another way, the government has handed Malik $6,000 (in form of a tax break) for no other reason than being married to someone who has opted out of the workforce. Malik's choice to marry, and the pleasure he derives from making it possible for Meg to do the double somersault, are personal consumption choices that, the argument goes, should have no effect on his tax liability.[55]

Another consumption-related argument in favor of income splitting is that married breadwinners deserve to pay less in taxes than their single co-workers because their paycheck supports an additional person. This argument does *not* logically justify income splitting. First, the satisfaction of support obligations often does not produce fifty-fifty joint consumption.

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53. Using 2006 tax rate tables and inflation adjusted figures for the standard deduction, each individual taxpayer making $100,000 has a taxable income of $100,000 minus $5,150 (the standard deduction), minus $3,300 (the personal exemption), i.e., $91,550. Applying the rate table to this amount yields taxes owed of $15,107.50 plus 28% of the excess of $91,550 over $74,200, i.e., $19,965.50.

54. Married taxpayers making $100,000 have a taxable income of $100,000 minus $10,300 (twice the standard deduction), minus $6,600 (twice the personal exemption), i.e., $83,100. Their tax is: $8,180 plus 25% of the excess of $83,100 over $61,300, i.e., $13,890.

55. This objection to the consumption-based justification for income splitting is prone to attack for relying on an outmoded conception of the U.S. income tax system. Though it is true that our system is based on realized accretions of wealth, the Internal Revenue Code is riddled with provisions that deviate from this ideal. In a perfect accretion system, all outlays that are not costs of producing income (i.e., all "personal expenses") would have no effect on the measure of taxable income. Though the statute codifies this principle as a general rule, I.R.C. § 262 (2002), it carves out numerous exceptions to it. For example, interest on a home mortgage, I.R.C. § 163(h), interest on student loans, I.R.C. § 221, and charitable contributions, I.R.C. § 170, are deductible despite their personal nature.

The primary justification for these exceptions is that they are designed to encourage activities that stand to benefit all of society. Congress has identified home-ownership, education, and charitable giving as societal goods, the benefits of which outweigh unfairness to taxpayers who are unable to use these deductions and who therefore owe taxes on a greater portion of their income. Some people feel that this rationale holds equally true for marriage. However, if the raison d'être of marriage-based income splitting is marriage promotion, it represents an inefficient means of achieving this goal. *See infra* Part II.A.5.

Second, even if it did, for the same reasons outlined above, shared consumption does not justify income splitting in a system founded on the principle that fruits should not be "attributed to a different tree from that on which they grew."[56] That said, support obligations may well justify a reduction in tax liability through dependency exemptions that constitute acknowledged public policy-based deviations from the attribution principle.[57]

3. Collective Efforts Justification

A third traditional justification for spouses-only income splitting is that in addition to changing individuals' control over how they consume or invest their income, marriage turns independent economic agents into business partners of sorts. Spouses' monetary and non-monetary contributions to the marital unit are said to be inextricably linked; income nominally earned by either spouse therefore reflects the combined efforts of both. From this perspective, a non-wage-earning wife who provides services as homemaker, confidante, and companion to business-related events is performing one piece of a collective income-producing effort. A wage-earning husband who splits his income with a non-earner wife is simply handing over her fair share of the fruits of their combined labor.[58] A tax system that permits married couples to income split comports with this presumed collective-income-producing reality.[59]

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56. Lucas v. Earl, 281 U.S. 111, 115 (1930).

57. For a discussion of the relationship between dependency exemptions and income splitting, see *infra* note 122 and accompanying text.

58. As one marriage manual published in the 1940s—a time when the logic behind income splitting was being hotly debated—put it:

> A salary check is made payable to the husband. For this reason, many men assume that they alone earn that salary. If the wife cares for the home, children, and husband; is an expert in consumption; makes social contacts that assist the husband in his profession or broaden family experience; is a companion who enriches his life, stirs his ambitions, aids him in his work, gives him something to work for, do they not earn the income jointly? . . . She need not feel that she is a parasite. She and her husband are partners in an enterprise that includes both her work and his as component parts.

HENRY BOWMAN, MARRIAGE FOR MODERNS 370 (2d ed. 1948), *quoted in* Jones, *supra* note 34, at 281–82 & n.159; *see also* John L. McClellan, *Where You Pay Less Income Tax*, AM. MAG., Jan. 1948, at 37, *quoted in* Jones, *supra* note 34, at 271 & n.85 (noting that Arkansas Senator John L. McClellan stated the following regarding community property: "The law says, and most husbands will agree, that a wife's mental and physical labor at home is a 50 percent contribution and she should be properly paid").

59. *See* Bittker, *supra* note 29, at 1420 ("The rationale [for income splitting] is not only that the legal incidents of marital income are divided between the two spouses, but also that they both contribute to its realization."); *see also* Ventry, *supra* note 10, at 87 ("[C]ommunity property law was 'based on the theory that the women at home are keeping the home fires going, and that they are actually responsible for the accumulation of part of the property.'" (quoting *Community Property Income: Hearings on H.R. 8396 Before a Subcomm. of the H. Comm. on*

But this "collective-efforts" justification also contradicts principles applicable to unmarried taxpayers; even when taxpayers share income fifty-fifty, they are not permitted to (effectively) income split unless both are equally responsible for the production of income.

Consider Mr. CEO who earns $800,000 and whose wife has no independent income. Wife accompanies Mr. CEO to dinners and conferences, advises him on everything from dress to long-term strategy, runs the household, and raises their five children. The couple shares all income fifty-fifty—meaning that the wife has full rights over $400,000 of the husband's $800,000 salary. Is this $400,000 compensation for services? Personal or business-related? How much of it is a gift? If a full one-half of the husband's income were attributable to the wife's labor, he could hire her, pay her one-half of "his" earnings, and deduct the payments as business expenses under section 162 of the Internal Revenue Code, producing the same end result as income splitting.[60] But in many cases the market value[61] of the non-earner spouse's labor preformed strictly in the service of the earner-spouse's income production (which excludes "private sphere" labor like childrearing) is far smaller than one-half of the earner's income. According to the logic of the income tax, every one of the $400,000 transferred by Mr. CEO to his wife is theoretically allocable to one of the three categories and should be treated accordingly. But because they are married, our couple need not make this calculation; income splitting effectively treats transfers that would normally be deemed gifts or payments for personal services as if they were business-related compensation, giving the couple something that, according to the tax logic applicable to individuals, they do not deserve.

4. Couples Neutrality Justification

Finally, marriage-based income splitting is frequently defended as a means of preserving "couples neutrality." Couples neutrality derives from the principle of "horizontal equity," the notion that people in similar economic positions should be treated similarly for tax purposes. Accordingly, couples neutrality requires that as merged economic units, couples with the same combined income should owe the same taxes

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Ways and Means, 73d Cong. 137 (1934) (statement of Charles E. Dunbar, Jr., Lousiana Community Property Taxpayer's Committee))).

60. Note that if the husband is not self-employed, the payments to his wife would have to be made directly by his employer. Another possibility for achieving the same result would be for husband and wife to form a partnership. *See* BITTKER & LOKKEN, *supra* note 21, ¶ 75.2.2.

61. Market value may of course have no relationship with the value of this labor from a vantage point internal to the marriage. Indeed, it may often be regarded as more valuable, as in case of a stay-at-home mother who could earn more than her husband in the market place but who prioritizes childrearing over income.

regardless of the distribution of income between the spouses.[62] For example, if couples neutrality is preserved, a husband and wife who make $80,000 and $20,000 respectively ought to bear the same tax burden as a husband and wife who each make $50,000 or a one-earner couple whose breadwinner makes $100,000.[63]

Couples neutrality is flawed because, again, it relies on the false premise that marriage equals economic unity. A one-earner $100,000-a-year couple who share everything is in a fundamentally different position than a husband and wife with the same income profile who share a negligible portion of the earner's income. Leaving aside the assignment of income problems discussed above, equalizing treatment of economically united and financially independent marital units flies in the face of basic equity principles: the non-sharing high earner spouse receives a windfall compared with an unmarried co-worker who earns, owns, and consumes the same amount.[64]

Notwithstanding the false marital unity premise on which it is based, the couples neutrality justification is also problematic because, by equalizing treatment of couples based on their combined incomes, income-splitting exacerbates distortions attributable to the nontaxation of non-wage labor performed within the married unit. As a result, the couples neutrality justification does not hold with respect to couples who spend different amounts of time performing wage labor.[65] For example, a one-earner couple

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62. *See* Gann, *supra* note 5, at 25; Kornhauser, *supra* note 5, at 63, 96; Zelenak, *supra* note 5, at 344.

63. As a historical matter, couples neutrality did not play into Congress's 1948 decision to extend income splitting to all married couples. Nevertheless, it has taken center stage in after-the-fact justifications of the joint return. *See* Zelenak, *supra* note 6, at 5 ("Despite the overwhelming evidence that the original joint return was an accident of history rather than a principled enactment of couples neutrality, in the years since 1948 couples neutrality has become the standard justification for joint returns."); *see also* Gann, *supra* note 5, at 24; Zelenak, *supra* note 6, at 5 n.21.

64. Recall, for example, Meg and Malik from the scenario above. Meg makes nothing as a budding trapeze artist. Malik earns $100,000 per year. Assume this time that Malik is less than thrilled at the prospect of becoming the only wage earner in the family. He gives Meg an allowance that is enough to cover only her basic needs, but otherwise invests most of his income in his own stock portfolio. Tensions mount and they decide, amicably, to take a break. Meg moves in with a lion tamer. Still, she remains married to Malik, and they continue filing jointly because of the $6,000 tax advantage.

Since pooling becomes less prevalent as income levels rise, and since the breadwinner in one-earner families is usually the husband, the extension of income splitting to economically separate spouses is especially beneficial for rich, tight-fisted men.

65. Boris Bittker has argued that the failure to tax imputed income is a system-wide problem, not a unique result of couples neutrality and therefore should not affect debates about taxing married taxpayers as a unit. Bittker, *supra* note 29, at 1426, 1435. However, Edward McCaffery has insisted that the distortions attributable to the nontaxation of imputed income are particularly harmful in the context of comparisons between one-earner and two-earner couples. By ignoring the effects of social and legal realities that deter secondary earners from entering the labor force, couples neutrality is not neutral as between different models of the

in which the non-earning spouse contributes household and childcare services to the marital unit is better off than a two-earner couple that hires a maid and a babysitter. If both couples' combined incomes are $100,000, the one-earner couple gets to keep more of this income because the non-earner spouse has essentially added to the couple's disposable income by making it unnecessary for them to pay for these services, while the two-earner couple will not be allowed to deduct these services as a business expense. The fact that our system does not tax this additional "imputed income"[66] and treats all married couples with the same combined income equally, gives one-earner couples a significant advantage over two-earners.

5. Note Regarding Marriage Promotion Initiatives

Most tax policy scholars believe that absent compelling public policy reasons to the contrary, tax law should interfere as little as possible with people's behavior. Accordingly, over the years most critics have regarded the marriage bonus created by income splitting as an undesirable but tolerable side effect of the law's attempt to accommodate competing principles.[67] The justifications presented above may be understood as attempts to excuse an aspect of income splitting regarded as a defect. But outside of academia, the principle of marriage neutrality is not necessarily taken for granted. Some people believe that the government should actively promote marriage, and that the benefits of marriage-based income splitting present an appropriate means of doing so. Though Congress did not create the "marriage bonus" as a marriage-promotion vehicle, many politicians and their constituents have grown to view it and defend it as such. President George W. Bush, for example, whose "marriage penalty relief" plan increased marriage bonuses,[68] has said: "I like to remind people that the tax code ought to encourage marriage, not discourage marriage. . . . Seems like we want people to stay married, and the tax code ought to encourage that."[69]

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family. McCaffery, *supra* note 5, at 1009–10 ("[W]e are exalting single-earner households over all competing visions."). Lawrence Zelenak agrees that the imputed-income problem "undercut[s] the argument that joint returns achieve neutrality among equal-income couples." Zelenak, *supra* note 5, at 363; *see also* Gann, *supra* note 5, at 8, 30.

Note, however, that the imputed-income problem in this context could be addressed by reinstituting the two-earner deduction.

66. For a discussion of the reasons for the nontaxation of household labor—"difficulties with valuation, liquidity, and commodification"—see Staudt, *supra* note 51, at 1577–79. Staudt critiques this conventional wisdom, suggesting that Congress values and taxes nonmarket labor in the same manner as market labor. *Id.* at 1574.

67. *See* Bittker, *supra* note 29, 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.").

68. *See* Appendix.

69. President George W. Bush, President Discusses Economy, Urges Congress to Make Tax Cuts Permanent (Feb. 19, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/02/20040219-4.html. On another occasion, the President declared that "[w]e

Government-sponsored marriage-promotion initiatives are extremely controversial,[70] but even if one accepts the premise that "the tax code ought to encourage marriage," marriage-based income splitting presents a remarkably inefficient means of doing so because its benefits are unlikely to reach its main target population. The main beneficiaries of the marriage bonus are high-income couples. But one of the pillars of the marriage-promotion philosophy is that government incentives for marriage are justified because marriage functions as a panacea to poverty.[71] It follows that those who are arguably most acutely in need of the palliative effects of marriage are those least likely to benefit from marriage bonuses and therefore least likely to be induced to marry because of them.

Furthermore, marriage-promotion advocates generally do not support an "anything goes" interpretation of marriage. In fact, the assumption that marriage should be a partnership of equals, not a subordination relationship, hovers in the background of several "pro-marriage" writings. As Family Research Council senior fellow Charmaine Yoest put it in a piece arguing for a return to 1948-style "pure income splitting,"[72] "When conservatives cast income splitting as a path to full partnership for women, they are invoking ideals shared by feminists."[73] Since civil marriage does not

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want to reward and honor marriage." President George W. Bush, Remarks by the President to the Greater Manchester Chamber of Commerce (Oct. 9, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/10/20031009-15.html.

According to this view, Malik's decision to legally commit to Meg should be encouraged and rewarded; the societal benefits that accrue from turning unmarried couples into spouses are well worth the resulting unfairness to singles like Seymour.

70. *See* Theodora Ooms, *The Role of the Federal Government in Strengthening Marriage*, 9 VA. J. SOC. POL'Y & L. 163, 175–76 (2001); Katherine Boo, *The Marriage Cure*, THE NEW YORKER, Aug. 18, 2003, at 105.

71. *See* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY 172 (2000); Ooms, *supra* note 70, at 183–85; Boo, *supra* note 70, at 105.

72. For a discussion of pure income splitting, see the Appendix.

73. Charmaine Yoest, *Income Splitting: Restoring Marriage Support in the Tax Code*, 1 FAM. POL'Y REV. 37, 57 (2003); *see also* WAITE & GALLAGHER, *supra* note 71, at 172. Waite and Gallagher query:

> [I]s the full-time employment of wives in a high-earning job . . . the only route to a "fair" marriage? Can we have *equal* marriages with an employed father and a mother who works only in the home or works part-time? Steven Nock argues that coercion and inequity, not dependency, lie at the heart of the problems of traditional marriage. Dependency is not the enemy. In fact, marriage gets much of its power from the interdependency that allows each spouse to specialize. Marriage works best when husbands and wives need each other. But to achieve this alternative vision of the new family, dependencies must be freely chosen, not coerced. Both partners need to be protected against the risks inherent in even freely chosen dependency. And husband and wife must recognize themselves both as dependents in their joint project, the family—even if they have very different incomes or one has no income at all for a period. This recognition of marriage as true partnership, an interdependent relationship rather than one of domination

necessarily translate into a serious legal and financial commitment, government programs that privilege even the most tenuous of marriages may do more harm than good to conservative efforts to "revitalize" marriage.

That said, as we shall see in Part III, Americans' ideal of marriage as a financial partnership does explain the persistence of the income-splitting joint return; it also points the way towards a more logical approach to income splitting.

B. NEGATIVE SIDE EFFECTS OF MARRIAGE-BASED INCOME SPLITTING

1. The Marriage Penalty

The current system of marriage-based joint returns is not only theoretically unsound. It also produces a host of negative side effects, the most well-known of which is the much-maligned "marriage penalty"—the fact that some couples owe more in taxes once they are married than they would have owed had they remained single. The penalty disadvantages married couples who are in the same economic position as their unmarried counterparts, and it may interfere with couples' decisions to marry or divorce.[74]

The penalty represents an unintended side effect of Congress's effort to reduce the size of the marriage bonus that resulted from its first experiment with income splitting. The 1948 Revenue Act introduced what is known as "pure income splitting"—spouses filing jointly paid exactly what they would have paid had each spouse earned one-half of the combined income of the couple as separate individuals (the married-filing-jointly brackets were twice as wide as those applicable to individuals). This meant that some taxpayers enjoyed a tax savings of some forty percent as a result of being married.[75] The Tax Reform Act of 1969 lessened the bonus by narrowing the tax brackets for married couples. As a result, the tax due on a married couple's combined income was somewhat greater than twice the amount owed by a single taxpayer earning half as much. That is, pure income splitting gave way to a scaled-back version of income splitting. This had the effect of reducing the marriage bonus (enjoyed by one-earner couples and couples with unequal incomes), but it also created a penalty for couples with equal incomes, who now paid more as marrieds than they would as singles. The

> and subordination, has implications outside the home as well, affecting . . . how we treat married couples in the tax code as well as the divorce court.

Id. (citations omitted).

74. *See generally* James Alm & Leslie A. Whittington, *For Love or Money? The Impact of Income Taxes on Marriage*, 66 ECONOMICA 297 (1999), *quoted in* George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 423 n.21 (2004).

75. MICHAEL GRAETZ, THE U.S. INCOME TAX 31–32 (1999).

2001 Act reduced the penalty by reverting to pure income splitting, but only at low-income levels. The change also increased marriage bonuses.[76]

2. The Innocent-Spouse Problem

The current income-splitting paradigm also potentially imposes an unfair liability on low- and non-earner spouses who have no legal entitlement to the income on which they are taxed (the "innocent spouse" problem). In order to take advantage of the benefits of income splitting, the high-earning taxpayer must file a joint return with his or her spouse, making both spouses jointly and severally liable for any taxes due on the return (including deficiencies that may emerge years later and regardless of whether the couple stays married).[77] Every year, taxpayers abandoned by tax-cheating spouses find themselves owing thousands of dollars to the IRS. The vast majority of them are women.[78]

The joint-liability rule is sometimes erroneously defended as the price married taxpayers must pay for the benefits of income splitting.[79] But the logic of this justification only holds if income splitting for tax purposes were contingent upon income splitting as a matter of actual legal entitlements. As we have seen, income splitting for tax purposes does not require that couples share legal entitlement to income. Neither does filing a joint return

76. See the Appendix for an explanation.

77. *See generally* BITTKER & LOKKEN, *supra* note 21, ¶ 111.3.2.

78. *See* Charles Delafuente, *Your Taxes: My Spouse Did What on Our Federal Tax Return?*, N.Y. TIMES, Feb. 13, 2005, § 3, at 33. Delafuente reports:

> At the root of an innocent spouse claim, there is typically an I.R.S. finding that income has been underreported or that deductions or credits have been overstated. In such situations, the I.R.S. demands more tax; often, the I.R.S. tries to collect it from the spouse with easier-to-find income, like salary. That person—most commonly a wife, according to tax professionals—may file for innocent-spouse status.

Id. The article goes on to report CCH tax analyst Mark Luscombe as saying that some seventy-five percent of the court cases he has looked at involved women seeking relief. *Id.*; *see also* TAXPAYER ADVOCATE SERV., *supra* note 29, at 422; Beck, *supra* note 51, at 320 n.4 (noting that over ninety percent of the reported innocent spouse cases in 1987 involved wives who were forced to pay their husbands' taxes).

79. In fact, joint return liability was enacted on the basis of administrative necessity, and it applies to all taxpayers filing joint returns, whether or not they benefit from income splitting. *See* Beck, *supra* note 51, Parts IV.F, VI.A.

"effect a conveyance of the earnings from one spouse to the other for ownership purposes."[80] As a result, as Richard Beck explains:

> The cost of joint liability usually is paid by the wrong person. The husband ordinarily benefits most (or exclusively . . .) from income splitting as the higher or sole earner, but it is the wife who incurs the larger additional liability for his taxes. She may herself receive little or no benefit from the tax saving, unless one makes the assumption that reducing the husband's taxes always directly benefits the wife.[81]

The root cause of the innocent-spouse problem—the prevalence of spousal abandonment—of course has nothing to do with taxes. However, the current tax system exacerbates dependent spouses' vulnerability by making them liable for taxes on income they never earned and never owned. Under certain circumstances, innocent spouses may be relieved of their tax liability, but the numerous restrictions contained in the Code's innocent spouse relief provisions still force many low- and non-earning spouses, mostly abandoned wives, to shoulder their husbands' debt.[82]

The current system also hurts "innocent spouses" by reinforcing the fairytale that spouses are an economic unit. Many people are likely unaware that in most states the default rule is that spouses own their income separately and that divorce often does not result in a fifty-fifty split of assets. It would not be unreasonable for a non-earner spouse signing a joint return to associate joint-tax liability with joint ownership of the income that generated the liability.[83]

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80. Christian, *supra* note 36, at 586 & n.253. As Richard Beck put it:

> Aggregating income and deductions for purposes of computing the tax neither requires nor creates any actual sharing of property. Couples are permitted to file jointly even under circumstances in which it is obvious that they have no intention of sharing anything. There is no requirement, for example, that a couple even be living together in order to file a joint return.

Beck, *supra* note 51, at 378 (citations omitted).

81. Beck, *supra* note 51, at 376 (citations omitted).

82. *See* BITTKER & LOKKEN, *supra* note 21, ¶ 111.3.2 (detailing the new innocent spouse relief requirements set out by Section 6015); *see also* Delafuente, *supra* note 78, § 3, at 33 (reporting that an I.R.S. spokesman said that "in fiscal year 2004, there were 51,988 applications for innocent-spouse relief, and that 9,788 were granted and an additional 3,804 partially granted"); Tom Herman, *IRS Makes It Tougher for Spouses to Claim Innocence in Tax Fraud*, WALL ST. J., Mar. 15, 2006, at D1. Delafuente also notes that "[q]ualifying as an innocent spouse is no simple matter . . . for people who are still married, [and] the law can be a minefield." Delafuente, *supra* note 78, § 3, at 33. For a recent proposal limiting lower income spouses' liability, see TAXPAYER ADVOCATE SERV., *supra* note 29, at 407-32.

83. According to the Taxpayer Advocate Service:

> Many married taxpayers are probably unaware that they may avoid joint and several liability by filing separately. Form 1040 . . . does not warn taxpayers that filing a joint return will result in joint liability. Although the Form 1040 instruction

3. The Stacking Effect—Disincentive for "Secondary Earners" to Enter Paid Workforce

The current income-splitting joint return also creates a disincentive for "secondary earners" (taxpayers whose earning potential is low relative to their spouses') to enter the paid workforce because their earnings would be taxed at prohibitively high marginal rates. When couples file jointly, the low-earner's income must be "stacked" on top of the high-earner's income, subjecting it to taxes at the highest marginal rate applicable to the couple's combined income. In some cases this makes it more expensive for the spouse with the lower earning potential to work for a salary than to stay at home, providing untaxed non-wage labor that the couple would otherwise pay for with after-tax dollars. This "stacking effect" has been seen as a penalty on working wives because women are more likely to be cast as secondary earners.[84]

4. Marital Status Discrimination

Finally, marriage-based income splitting discriminates against unmarried couples, some of whom are indistinguishable from married couples in terms of their economic, emotional, and legal commitments to each other. While most public attention regarding marital status discrimination has focused on same-sex couples who are not able to marry or whose marriages are not recognized under federal law,[85] many committed

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> booklet discloses that joint filing may subject a taxpayer to joint and several liability, it offers a "tip," that taxpayers should "chose the one [filing status] that will give you the lowest tax." Of course, taxpayers who have delegated responsibility for family tax preparation to a spouse are unlikely to read the instruction booklet.

TAXPAYER ADVOCATE SERV., *supra* note 29, at 24 (citations omitted).

84. As McCaffery explains:

> [T]he rate structure encourages families to think in terms of a primary and a secondary worker, because there is one rate schedule applied to couples. . . . There are strong disincentives against second earners working in the paid workforce at all, because they enter it at high marginal rates. Since wives are overwhelmingly likely to be the secondary earner in potential two-earner families . . . this burden falls on women.

MCCAFFERY, *supra* note 51, at 19–20.

It is worth noting that the stacking effect is sometimes mistakenly described as a symptom of the marriage penalty. In fact, it is an outcome of the joint-filer system. *See* Zelenak, *supra* note 6, at 20.

85. *See* Ginia Bellafante, *Two Fathers, with One Happy to Stay at Home*, N.Y. TIMES, Jan. 12, 2004, at A3; Howard D. Medwed, *'Lawrence' Has Little Effect on Taxes, for Now; The Defense of Marriage Act Prevents Same-Sex Couples from Enjoying Many Federal Law Perks*, NAT'L L.J., Mar. 1, 2004, at 15 ("Same-sex households typically function as a single economic unit in much the same way as traditional spousal relationships."). Note also that model "living together" contracts, many of which formalize property sharing arrangements, abound. *See, e.g.*, TONI IHARA ET AL., LIVING TOGETHER: A LEGAL GUIDE FOR UNMARRIED COUPLES 6/10 (11th ed. 2001).

heterosexual couples choose not to marry for a variety of religious, cultural, and economic reasons, including potential loss of Social Security benefits.[86]

III. THEORETICAL FOUNDATION FOR INCOME SPLITTING RECONSIDERED

A. *SPOUSES LABORING BY AND FOR THE MARITAL UNIT*

1. Separate Filing Is Not a Realistic Alternative

The theoretical and practical problems outlined in Part II have led many critics to propose replacing joint filing with a separate-filing regime.[87] In a single-filer system each wage earner would be liable for taxes on her individual income, regardless of marital status and regardless of whether she chooses to share her income with a partner. Separate filing would overcome all of the problems outlined above.

But separate filing is not a realistic option for short-term reform.[88] Americans generally believe that couples deserve special treatment,[89] and every federal income tax bill adopted since 1948 has preserved income

86. *See generally* DORIAN SOLOT & MARSHALL MILLER, UNMARRIED TO EACH OTHER: THE ESSENTIAL GUIDE TO LIVING TOGETHER AS AN UNMARRIED COUPLE (2002); Michael J. Brien et al., *Widows Waiting to Wed? (Re)Marriage and Economic Incentives in Social Security Widow Benefits*, 39 J. HUM. RESOURCES 585 (2004).

87. *See* Alicia Munnell, *The Couple Versus the Individual Under the Federal Personal Income Tax*, *in* THE ECONOMICS OF TAXATION 247–78 (Henry J. Aaron & Michael J. Boskin eds., 1980); Bruce Bartlett, *Recent Proposals Relating to Family Taxation*, 91 TAX NOTES 153, 154 n.6 (2001) (citing Laura Ann Davis, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197 (1988)). *See generally* Gann, *supra* note 5; Kornhauser, *supra* note 5; McCaffery, *supra* note 5; Harvey Rosen, *Is It Time to Abandon Joint Filing?*, 30 NAT'L TAX J. 423 (1970); Zelenak, *supra* note 5.

88. *See* Zelenak, *supra* note 6, at 2–3 ("Although mandatory separate returns for all taxpayers would eliminate all marriage penalties (and all marriage bonuses), that does not seem to be a political possibility in the near future."); *see also* Bartlett, *supra* note 87, at 154 ("[T]he sensible thing to do would be to adopt a system in which the individual, rather than the family, is the basic unit of taxation. . . . Of course, a major consequence of this would be to eliminate existing marriage bonuses from the tax code. This is never going to happen . . . ." (citations omitted)).

89. Even some of those dedicated to fighting marital status discrimination often punt on the conflict of interests between "solo singles'" (i.e., unpartnered singles) and unmarried couples' interests. Logically speaking, solo singles should oppose *all* benefits contingent on *any* relationship between two able-bodied adults (what Martha Fineman calls "horizontal relationships")—marriage, domestic partnership, or civil union. *See infra* note 106. Support relationships between earners and those unable to provide for themselves are a different matter. *Id.* But some singles advocates back into the argument that any reforms that chip away at marital status discrimination are better than nothing. *See* Unmarried America, *supra* note 7.

splitting in some form or another.[90] The current system and all politically realistic proposals to reform it embody the notion that spouses deserve to be treated as merged economic units for tax purposes through some form of joint filing, the results of which approximate income splitting.[91]

Why are we as a society so attached to income splitting and how might the cultural underpinnings of joint filing guide our efforts to reform the current system? One reason for popular support for retaining the basic elements of the current joint return is that once income splitting was extended to all married couples, removing it came to be perceived as a tax hike on married couples.[92]

Separate filing is also unacceptable for reasons that go beyond loss aversion. Ignoring marital status and treating spouses in accordance with the rules applicable to unrelated taxpayers would, at least theoretically, force couples to commodify the flow of goods and services within the relationship.

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90. Dennis Ventry suggests that the longevity of the income-splitting joint return may be understood in light of "[t]he path dependent nature of tax policymaking." Ventry, *supra* note 10, at 15. Furthermore, Ventry notes:

> [C]hoices made in 1948 created a group of taxpayers that jealously guarded its tax benefits. While society evolved in the latter half [sic] the twentieth century, this group resisted change. Even as tax experts criticized the joint return for contributing to marriage penalties, work disincentives, and other tax inequities, policymakers preferred extending favorable tax treatment to new groups of taxpayers rather than to taking away existing tax benefits.

Id.; *see also id.* at 352 (noting Senator Eugene McCarthy's observation that "[i]t was 'unrealistic' . . . 'to require married couples to give up income splitting [because] [t]he practice is too deeply embedded in the system'" (quoting 115 CONG. REC. 22,859 (1969))).

91. Ventry notes that policymakers responsible for the 2001 Economic Growth and Tax Relief Reconciliation Act:

> [A]dhered to the longstanding allegiance to joint filing and income splitting. So long as individual filing remained absent from the policy agenda, no amount of piecemeal marriage penalty relief would eliminate the problem. Experts roundly criticized joint filing for reflecting and reinforcing a bygone era where men worked and women stayed home. Many experts acquiesced to the broad political support for joint filing, however, and endorsed incremental reforms. A few experts, particularly feminist legal scholars, persisted in advocating the abolition of the joint return. But they failed to generate support beyond a small circle of like-minded experts. Beginning in the mid-1990s, conservatives appeared prepared to join feminists and liberals in a campaign against joint filing. Conservatives attacked marriage tax penalties for undermining the institution of marriage, encouraging divorce, and threatening the American family. But once conservatives realized that removing marriage tax penalties also meant removing barriers to work for married women, they opted for more moderate forms of marriage penalty relief. Institutional constraints reinforced social fears. Neither the [P]resident nor Congressional leaders advocated abolishing the joint return, recoiling at the prospect of having to create losers in the tax policymaking game. Rather than take away marriage tax bonuses, policymakers preserved and extended the bounty.

Id. at 387–88 (citations omitted).

92. *See supra* note 84.

In other words, separate filing strictly applied would require transfers that are neither purely altruistic nor pure bargained-for exchanges to be characterized as either gifts or compensation.[93] Applying such a requirement to couples that share all income would impose administrative and psychic burdens that as a society we would rather avoid.[94] This is especially true with respect to couples that share support obligations (like parents or co-guardians) because it is especially hard and, some commentators argue, undesirable to force couples to place a dollar value on the non-wage labor of primary caregivers, most of whom are women.[95]

Consider, for example, a best-selling science fiction author married to a chess master turned stay-at-home mother who, on occasion, helps him brainstorm about his plots. In a single-filer world, the husband would hire his wife as a research assistant and pay her a portion of his royalties as compensation, producing a business deduction for him and taxable income for her, thereby shifting high-bracket income to a lower bracket. Assuming the couple shares all of the husband's income, the question then would be how much of the fifty percent of the husband's earnings transferred to the wife may be categorized as a business expense. In other words, how much is wife-as-sounding board worth? How should her ideas be valued? If the

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93. For a discussion of the difficulty in classifying transfers between intimate partners into categories applicable to unrelated parties, see Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 492, 493 (2005) ("Economic exchange between intimates . . . involves bargaining as well as altruism."). Hasday proposes a new term, "structured altruism," to describe transfers that are neither pure gift nor pure quid pro quo exchange as a category onto itself. *Id.* Hasday posits:

> [T]he social exchange of economic assets between intimates often assumes the form of what one could term *structured altruism*. A classic definition of altruism might be that it is a spontaneous act done selflessly for the welfare of another. Structured altruism, however, is neither entirely spontaneous nor entirely selfless. Anthropologists have discovered that many economic assets are exchanged between intimates in the form of gifts. This practice of gift exchange, though, involves at least implicit bargaining and self-interest in addition to altruism.

Id. at 497.

94. *See* Bruce Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 UCLA L. REV. 1240, 1247 (1980) (stating that "the application of marketplace notions to quasi-familial transactions for which such notions are often singularly inappropriate" yields "absurd" results); *see also* ARLIE RUSSELL HOCHSCHILD, THE COMMERCIALIZATION OF INTIMATE LIFE 104–18 (2003) (discussing a wide array of cultural understandings regarding interspousal gifts); Cain, *supra* note 20, at 101 (calling the application of arms length transactional principles to spousal transfers the "'fallacy of individualism'"); Zelenak, *supra* note 5, at 381–94 (discussing allocation problems in designing a separate-return system).

95. As Elizabeth Anderson put it, "When women's labor is treated as a commodity, the women who perform it are degraded." Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 75 (1990), *quoted in* Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 85 & n.16 (1997); *see also* Staudt, *supra* note 51, at 1633 ("Feminist commentators . . . are concerned that valuing . . . household labor would commodify and demean women . . . ."). On commodification, see generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

couple is truly one economic unit, they will want to put as high a value as possible on her business-related contributions because these translate into a tax savings. The value of the wife's cooking, cleaning, and childcare services performed for the husband, on the other hand, produce a tax hit; the husband's "payments" for these are not deductible from his income but must be included in hers, meaning that as a couple, our husband and wife would be paying taxes twice on the same income. Logically then, they will want to minimize their valuation of the stay-at-home-wife's housework. What are the social consequences of setting up this type of incentive structure? Do we really want spouses who view each other as equal partners to put a dollar value on their mutual contributions? Do we want a regime in which spouses have to justify the way in which they characterize their contributions to the taxing authorities?

2. Quasi-Separate Filing Is Inconsistent with Society's View of Marriage

The commodification problem inherent in a pure separate-filing regime could be cured through a hybrid separate/joint-filing system taxing each individual separately but disregarding transfers between spouses that would normally be classified as compensation. This is essentially the *de facto* situation with many unequal-earner same-sex partners who pool income.[96] The Service usually turns a blind eye to these arrangements, rarely requiring the low-earning partner who assumes more responsibility for household chores to report as compensation income received from the primary wage-earner, even where technically it would not fall under the *Duberstein* "detached and disinterested generosity" test. This was also the manner in which the Service treated married couples in noncommunity property states prior to 1948.[97]

One way of construing this quasi-separate filer system is by viewing both spouses' contributions—the low- or non-earner's household labor and the primary earner's income production—as pure reciprocal gifts rather than bargained-for exchanges.[98] According to this theory, the altruistic house-husband would continue mopping the floor even if his career-wife stopped

96. In some instances—when the high-earner provides over fifty percent of the low-earner's support, the partners live together, and the low earner's income falls below a certain threshold amount—the high earner may claim the low-earner as a dependant. I.R.C. § 152 (2000).

97. The *Lucas* opinion, for example, framed the issue as whether the income earner, Guy Earl, would be required to report as income his full salary as opposed to declaring only half of it on his own return and including the other half on his wife Ella's. The court did not entertain the possibility of requiring Guy to report one hundred percent of his income and Ella to report again some portion of the same income attributable to payments from husband to wife for her domestic labor or companionship. *See* Lucas v. Earl, 281 U.S. 111, 113–14 (1930).

98. As gifts they would therefore be exempt from income taxation. *See supra* text accompanying notes 20–21.

sharing her income with him and the wife would continue sharing her income even if the husband refused to clean the house.

This interpretation does not sit well with the partnership ideal of marriage to which we as a culture aspire. It also weakens non-earner spouses by implying that nobody owes anybody anything.[99] This is not how most people view marriage. We are uncomfortable thinking of stay-at-home husbands and wives as beneficiaries of their spouses' bounty, of their interest in the wage earners' incomes as dependent on something as uncertain and optional as his or her disinterested generosity. Similarly, we think of non-earners' contributions not merely as something they do out of the goodness of their hearts, but rather as a critical piece of couples' cooperative life plans. Marriage is often regarded as a contract, the terms of which are the subject of an ongoing process negotiation—not entirely at arm's length but not entirely with one hundred percent unity of interest either.

Another way of making sense of the quasi-separate filing approach is to regard non-earner spouses' household and childcare labor as "imputed income."[100] Generally, imputed income refers to goods or services produced *by and for* the taxpayer herself. Imputed income should be part of the tax base because it represents an increase in taxpayers' net worth. For example, the single taxpayer is better off when she mops her own house rather than paying a housekeeper out of after-tax dollars. The current tax system, however, disregards this increase by excluding imputed income from the tax base.[101] In the case of married taxpayers, when a wife mops the house that belongs to her and her wage-earning husband, strictly speaking, only half of her labor is imputed income; the other half is services performed for someone else (either as a gift or a quid pro quo service). But under the quasi-separate filing approach, a wife's household labor may be considered "by and for" *both* spouses. That is, they may be considered *one* unit with respect to her non-wage labor, but *two* units with respect to his wage labor, on which he pays taxes separately (transfers from husband to wife would again be construed as nontaxable gifts).

This asymmetrical imputed income/gift interpretation is even more jarring than the reciprocal gifts interpretation. If a wife's household labor is by and for the marital unit, a husband's wage labor should be construed with the same unitary approach.

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99. *See* Hasday, *supra* note 93, at 517 ("[L]egal efforts to mark the specialness of intimate relationships by limiting or prohibiting economic exchange within them appear to have systematically adverse distributional consequences for women and poorer people, maintaining and increasing distributive inequality.").

100. *See* MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 125 (5th ed. 2005) ("Domestic services rendered by homemakers to their families is [sic] the largest source of imputed income from services.").

101. For a discussion of the reasons for the exclusion of imputed income from the tax base, see BITTKER & LOKKEN, *supra* note 21, ¶ 5.3.

3. The True Explanation for Income Splitting: Spouses Laboring by and for the Marital Unit

This brings us to the most compelling and internally consistent justification—or, to be precise, the true cultural explanation—for income splitting. When husbands and wives share income, we are most comfortable viewing each spouse's efforts as "by and for" the marital unit. The nonearner cleans the family house for both spouses and the earner works outside of the home for the family unit. Their sharing is not detached and disinterested, but it is also not a marketplace exchange of cash for services. Income splitting avoids the commodification problem because each spouse is assumed to have earned fifty percent of the income of the couple regardless of the nominal distribution of wage- and non-wage-income; unlike quasi-separate filing, income splitting comports with a narrative of marital cooperation and unity that appeals to us culturally.[102]

Note that there is a subtle difference between this theory and the collective efforts justification discussed in Part II above. Under the collective efforts justification, a portion of the earner husband's paycheck belongs to his wife because by taking care of his personal needs, she has made it possible for him to earn more. Under the "by and for the couple" justification, the earner's check belongs to both spouses because the earner *is* both spouses.[103] This is of course a fiction, but no less so than a characterization of marital sharing as reciprocal gift giving or a compensation arrangement.

To sum up, spouses-only income splitting can be viewed as the price we are willing to pay to live in a society in which husbands and wives do not have to keep accounts of what passes between them and in which each spouse's labor is regarded as "by and for" the couple. Income splitting is the mechanism through which we enable and preserve the noncommodification[104] of labor and love within the marital unit, matching

102. *See* Frantz & Dagan, *supra* note 36, at 81–85.

103. The "by and for the couple" justification is, however, in harmony with what scholars have seen as a set of background cultural assumptions reinforcing the formal justifications for marriage-based distinctions. *See, e.g.*, Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 161 (1998). Knauer observes:

> The marital provisions are based on a series of assumptions concerning the terms, merit, and nature of the taxpayer's relationship with his or her spouse. These provisions use marital status to identify (i) a relationship where income or resource pooling occurs (or should occur), (ii) a relationship that is worthy of societal support in the form of tax deferral or other relief, and (iii) a relationship where the individuals never deal with one another at arm's length.

Id.

104. Note that the context in which this Article discusses "noncommodification"—referring solely to intramarital transfers—should be distinguished from the noncommodification of household labor when viewed from outside the marital unit, which commentators like Staudt and Silbaugh persuasively argue results in *under*valuation of women's work. *See generally*

the tax treatment of marriage to society's idealized notion of what marriage should be. Income splitting is incompatible with an accessions-based definition of income[105] because it effectively treats gifts and compensation for personal services as if they were compensation for business-related services. But from a cultural perspective, income splitting recognizes an ideal that is critically important to us.[106]

The social values that undergird the income-splitting joint return, however, are inconsistent with its extension to economically separate spouses and with its exclusion of unmarried couples that share their income.

B. Practical Implications of the "By and for the Unit" Justification: Marriage Neutral Economic Unity-Based Income Splitting

1. Excluding Economically Separate Spouses

The by-and-for-the-couple justification only makes sense with respect to couples that do not themselves commodify exchanges within their relationship, i.e., couples that do in fact earn and own[107] their income as a unit. After all, if the government is going to award hundreds, sometimes thousands of dollars in benefits so that couples can form a certain type of union, it is only fair that these benefits be limited to couples who do in fact form this special union. Husbands and wives who lead independent financial lives do not fit this model; they are separate economic units and should be treated as such.

Also, spouses committed to sharing only part of their earnings should not be eligible to income split, nor should they be allowed, as Henry Smith has suggested, to partially split their taxable income on the basis of an

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Silbaugh, *supra* note 95; Staudt, *supra* note 51. Indeed, taken to its logical conclusion, the noncommodification element of my proposed justification for income splitting elevates the value of non-wage labor within the marriage. By paying couples a marriage bonus for forming one economic unit, income splitting based on income sharing implies an equivalence in the value of spouses' labor.

105. *See supra* note 13 and accompanying text.

106. Income splitting may also be popular for economic reasons, because many believe that marriage functions as a giant buddy system, a national insurance policy of sorts that reduces the likelihood that the government will be called upon to provide social services to the needy. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) (noting that civil marriage "ensures that children and adults are cared for and supported whenever possible from private rather than public funds"). Note, however, that commentators like Martha Fineman believe that government should not shift its responsibility to provide a social safety net onto private individuals. Martha Albertson Fineman, *Why Marriage?*, *in* JUST MARRIAGE 46, 47 (Mary Lyndon Shanley ed., 2004). *See generally* Duggan, *supra* note 7.

107. Though fine distinctions may be made between couples that "share" versus those that "pool" their income, these distinctions are not dispositive for the purposes of this Article. What matters, as I discuss in Part IV.A., is that the couple shares legal entitlement to the income as they do in the community property model. Thus "sharing" and "pooling" are used interchangeably to refer to joint ownership over income.

individually determined unequal sharing ratio.[108] This is because the very reason we allow income splitting, which represents a radical deviation from the logic of the assignment of income doctrine, is because we recognize that there is something fundamentally special about two people who have tied their financial fates to one another that makes it artificial and potentially harmful to force transfers between them into categories applicable to truly independent taxpayers. In these cases, analyzing intra-marital transfers using tools applicable to unrelated parties makes no sense. Indeed, referring to sharing between spouses who co-own each other's income from its very inception as a "transfer" is misleading. They are simply one person; the notion of exchange, the attempt to allocate "transfers" into gift/compensation categories, is antithetical to the nature of their relationship. By contrast, spouses who share some but not all of their income have already introduced marketplace principles of exchange into their relationship. Indeed, Smith's intermediate joint filing would give social legitimacy to unequal partnerships, potentially weakening already powerless low- and non-earner spouses.[109] Unequal partnerships do not constitute one economic being; therefore, there is no reason to exempt them from allocating transfers for tax purposes among the three categories. Income splitting persists because we believe that equality within couples is special. Spouses who choose inequality—for whatever reason—should be regarded

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108. *See* Smith, *supra* note 44, at 146.

109. Frantz and Dagan state:

> People may engage in many joint enterprises where equality is not necessary. Joint owners in a business, for instance, may divide the ownership interest 70-30 without raising any alarm. But it would be perverse to conceive of a marriage of this sort, where one spouse has a recognized controlling interest in the property that partially constitutes the marriage, and, correspondingly, in marital decisions. . . . Disparity in the control of marital property moves beyond simple inequality—which an individual may rightly choose as a means to other ends—to subordination, which systematically denies the importance of whatever ends that individual chooses. As subordination in marriage is a threat to a spouse's basic personhood, the marital community must be bounded by a commitment to equality.

See Frantz & Dagan, *supra* note 36, at 91 (citations omitted). In addition:

> Any contract reflects the power positions of the parties. In most instances men are more powerful than women because men are more likely to control economic wealth. Thus, most contracts between husbands and wives will be unfavorable to the wife. While courts could supervise all contracts between husbands and wives for fairness, cost barriers to litigation block access to the courts in most cases. The best the courts can do is refuse to enforce all of these contracts affecting ongoing relationships. In most instances, this will avoid adding judicial power to that which husbands have as a result of their economic position.

Id. (citing sources omitted); *see also* 1 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION 253 (1995).

as having opted out of the special privilege that comes with a commitment to equality.

2. Including Unmarried Couples Who Share Their Income

Once one accepts the principle that marriage-based income splitting should be limited to income-sharing spouses, the question arises: why continue to exclude income-sharing *un*married couples? The answer depends on our cultural attitude towards unmarried unions. Though the current state of these attitudes is the subject of much speculation, several factors lean in favor of extending income splitting to unmarried income sharers.

First, the noncommodification argument applies equally well to income-sharing married and unmarried couples alike, regardless of whether they are composed of same- or opposite-sex partners.[110] Second, if applied strictly, the current separate-filing requirement applied to unmarried couples who pool their income conflicts with most people's understanding of the nature of these transfers as neither pure gift nor compensation. Most importantly, though a significant number of Americans remain opposed to government recognition of gay marriage, there is a clear trend in favor of extending marriage-based benefits to unmarried couples who formalize their commitments in other ways, including through civil union or domestic partnership registries.[111]

IV. A NEW "I DO": ECONOMIC UNITY-BASED INCOME SPLITTING

A. *PROPOSAL CORE FEATURES*

The problem before us, again, is that the marriage-based criterion for income splitting is both over- and under-inclusive; it embraces economically separate marrieds and excludes unmarrieds who pool their income. The challenge then is to devise a system that makes income splitting for tax purposes contingent on a legally binding commitment to share income equally. In other words, the current marriage-based criterion for income splitting must be expanded and contracted: expanded to include unmarried income poolers and contracted to exclude economically separate marrieds.

I propose that Congress unbundle the presumption of economic unity for income tax purposes from the institution of marriage by devising a new criterion for income splitting. Taxpayers would be permitted to file jointly if and only if they obligate to share equal legal entitlement to all taxable

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110. Patricia Cain has demonstrated, focusing on gay couples in particular, that when forced to file as separate individuals, unmarried gay partners face the same administrative and psychic burdens allocating transfers amongst themselves as married couples do. *See* Cain, *supra* note 20, at 114.

111. *See supra* notes 7–8 and accompanying text.

income.[112] Couples who wish to file jointly would be required to attach an affidavit to their return attesting that they have entered into such a commitment, whether by virtue of being married in a state that requires equal spousal income sharing,[113] through a domestic partnership registration where income sharing is an integral part of such registration,[114] or by private contract.[115]

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112. Kornhauser flags this alternative, but does not explore it in detail. *See* Kornhauser, *supra* note 5, at 72–73.

113. This would include income from separate property. Under current laws, the only states that fall into this category are Idaho, Louisiana, Texas, and Wisconsin. *See* IRS Manual, *supra* note 40, Exhibit 25.18.1-1, Comparison of State Law Differences in Community Property States.

114. Like most states' default marriage laws, most domestic partnership registries do not require income sharing. Rather, they incorporate commitments similar to the marital duty of mutual support, e.g., to "share basic living expenses," "share the common necessities and tasks of one household," and be "responsible for each other's welfare," or to be "jointly responsible for basic living expenses." CITY AND COUNTY OF S.F. HUMAN RIGHTS COMM'N, STATE AND LOCAL DOMESTIC PARTNERSHIP REGISTRIES, http://sfprospector.com/site/sfhumanrights_page.asp?id=6283. California's "Domestic Partner Rights and Responsibilities Act," on the other hand, requires that registered domestic partners take on the duties and obligations of marriage, which, in California, means income sharing as per the community property model (though for state income tax purposes a domestic partner's earned income may not be treated as community property). *See* CAL. FAM. CODE § 297.5(a) & (g) (West 2004).

115. In most states couples unable or unwilling to legally unite their finances through marriage, domestic partnership, civil union, or other marriage alternative are able to do so through private contract, just as Guy and Ella Earl did more than a century ago. *See* IHARA ET AL., *supra* note 85, at 2/9–10; 1 MACAULAY ET AL., *supra* note 109, at 275. Ihara, Warner, and Hertz note:

> [T]he courts of nearly every state and the District of Columbia now enforce written contracts between unmarried partners. . . . [However,] Illinois remains an exception to the general acceptance of contract rights for unmarried couples. There the courts still hold that the "immoral" nature of living together prevents a couple from forming a contract. (Hewitt v. Hewitt, 394 N.E. 2d 1204 (1979).) However, some progress has been made. Most Illinois courts have carefully suggested that contracts not based entirely on living together, and not resembling marriage claims, may be enforced. (Spafford v. Coats, 118 Ill. App. 3d 566 (1983).) This is not true of all Illinois courts, however. (*See* Ayala v. Fox, 564 N.E. 2d 920 (1990)[)].

IHARA ET AL., *supra* note 85, at 2/9–10. Note, however, that § 20-45.3 of the Code of Virginia prohibits any "civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage." Though it has yet to be challenged, several commentators, including former Virginia governor Mark Warner, believe that the provision is unconstitutional. *See* Press Release, Governor Mark Warner Announces His Action on HB 751, *available at* http://www.equalityvirginia.org/atf/cf/{F56F0407-AD15-456F-9A9E-EB9BC57B69AC}/Gov_Warner_press_release_on_HB_751.doc. Governor Warner stated:

> Article 1 Section 10 of the United States Constitution prohibits any state from impairing the obligations of existing contracts. The sweeping language of HB 751 plainly violates that constitutional provision by seeking to void existing contractual rights. Furthermore, HB 751 would appear to violate the Equal Protection Clause of the U.S. Constitution by prohibiting certain contracts between two people of the

1. Legal Entitlements-Based Measure of Income Sharing

In a perfect world, income splitting would be available only to couples who jointly own all their income *and* behave accordingly—functioning as equal decision makers, sharing control, and benefiting equally from their joint income. But as we have seen, behavior is extremely difficult to gauge, and requiring the Service to evaluate how any two people distribute burdens and privileges amongst themselves would be both unacceptably invasive and administratively impracticable. Recognizing the subjective and unverifiable nature of these determinations and seeing that legal entitlements are relatively easy to verify, tax law in many instances applies a rule that tax liability follows legal entitlement to income.[116] In other words, it taxes

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> same sex (regardless of their sexual orientation) while permitting the exact same contracts between men and women.

Id. Additional commentaries on the provision may be accessed at http://www.equalityvirginia.org/site/pp.asp?c=dfIIITMIG&b=181005. A state constitutional amendment that would deny legal recognition to unmarried couples will be the subject of a referendum in the fall of 2006.

116. Generally, the mere right or option to enter into a transaction has no tax consequences unless and until the transaction has actually taken place (i.e., unless legal title is actually transferred). Under certain circumstances, however, the Internal Revenue Service has ruled that "economic compulsion" may factor into its determination as to whether a taxable event has occurred. The economic-compulsion standard requires a showing that no other course of action would be economically rational. The mere expectation that a transaction will occur, a pattern of behavior, or the intent to follow through with a transaction does not rise to the level of economic compulsion. *See* Rev. Rul. 03-97, 2003-2 C.B. 380; Rev. Rul. 03-7, 2003-1 C.B. 363 (holding that, despite shareholder's intent and likelihood to use shares already under shareholder's control to satisfy a commitment to deliver shares or their cash equivalent at a future date, no sale occurred until actual delivery). Revenue Ruling 03-7, relying in part on *Richardson v. Commissioner*, 121 F.2d 1 (2d Cir. 1941), *cert. denied*, 314 U.S. 684 (1941), noted that:

> Despite the taxpayer's intent to use the purchased stock to close his earliest open short sale, and despite a showing that he followed a consistent practice of applying purchases to close out his earliest open short sale, the taxpayer was held not to have closed a short sale because the stock was not actually delivered to the stock lender. . . . Thus, *Richardson* supports the conclusion that even if the shareholder intends to complete a sale by delivering identified stock, that intent alone does not cause a transaction to be deemed a sale, as long as the taxpayer retains the right to determine whether the identified stock will in fact be delivered.

Rev. Rul. 03-7, 2003-1 C.B. 363.

Another context in which formal legal title may be disregarded for tax purposes is in situations to which the "step transaction" doctrine may apply. The doctrine "treats a series of formally separate 'steps' as a single transaction if such steps are in substance integrated, interdependent, and focused toward a particular result." Penrod v. Comm'r, 88 T.C. 1415, 1428 (1987). Three tests have developed for determining whether separate transactions will be viewed as one: the "binding commitment" test, the "mutual interdependence" test, and the "end result" test. *See* BORIS I. BITTKER & JAMES S. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 12.61[3] (7th ed. 2000).

The ample evidence of married couples who do not share income clearly demonstrates that marriage alone does not economically compel spousal sharing. As we have people based on their rights to income even when, as a practical matter, they may be unlikely to exercise these rights. Accordingly, for our purposes, economic unity must be measured in terms of legal entitlements, not statistical likelihood of sharing behavior.

Separate filing proponents like Kornhauser and Zelenak, who argue persuasively that legal entitlements matter less than cultural stereotypes and the raw power that comes with earner status, are not likely to be satisfied with this approach.[117] But given a choice between marriage-based income

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seen, marriage also does not constitute a binding commitment to pool and share income. Finally, the existence of economically separate spouses indicates that matrimony and economic union are not mutually interdependent steps such that one would be fruitless without the other, and the intended or expected end result of wedlock is not necessarily economic unity.

As Kornhauser has noted:

> Thorson states that historically, coordinating the tax unit with the legal property unit was of great importance. For example, the family was the tax unit under the Civil War income tax statutes, because under property law, the husband substantially owned both his wife's and children's income. . . . By the time the income tax was instituted under the Sixteenth Amendment in 1913, married women's property rights had been established, which necessitated considering the individual as the taxable unit. The "deep commitment" to this approach is evident in the Supreme Court's 1930 rulings in *Lucas v. Earl* . . . and *Poe v. Seaborn*.

Kornhauser, *supra* note 5, at 96 n.103 (citing Douglas Thorson, *An Analysis of the Sources of Continued Controversy over the Tax Treatment of Family Income*, 18 NAT'L TAX J. 113, 115 (1965)); *see also supra* note 30.

This argument is related to, but at bottom is quite different from Zelenak's argument for a control-, rather than consumption-based, measure of ability to pay. Zelenak's control is in the end also a behavioral measure; it is based on an earner's control over whether she will earn the income and on her decision to stay in the marriage, rather than the legal measure of who actually owns the income once it has been earned. *See* Zelenak, *supra* note 5, at 354–55.

117. *See generally* Kornhauser, *supra* note 5. Zelenak believes that taxes should be based on control of income, and he assumes that control over earned income resides entirely with the earner, regardless of whether legal ownership over this income is shared with another. *See* Zelenak, *supra* note 5, at 380 ("Under an income tax (as opposed to a consumption tax) income should be taxed to the person with the closest connection to its source, and that person is always the earner, regardless of contractual assignments or marital property regimes. Under this analysis, income splitting is not appropriate regardless of legal ownership of earned income." (citations omitted)). Zelenak justifies this assumption by explaining that "[e]arners always have a closer connection to their earnings than anyone else can possibly have. They always have ultimate control, because they can always determine whether or how much to work." *Id.* at 357. These two statements contain an unsubstantiated leap. While it is reasonable to assume that earners have *more* control over their earnings than others, this does not mean that "[t]hey *always* have *ultimate* control." *Id.* (emphasis added). The operative question, assuming control is the proper guide for tax liability, is whether an earner who is legally committed to sharing her income with a spouse controls this income *so much more* than her spouse so as to justify taxing her and only her on the income. Assume the earner exercises seventy percent control over the income—she can decide whether and how much to work, and her earning power gives her additional decision-making clout regarding how earnings will be spent (even though legally her spouse is an equal co-owner). Still, income splitting, which presumes a fifty-fifty control structure, would more truthfully represent reality than would a single filer approach (which presumes a one hundred to zero breakdown). For Zelenak to be right, earners who are legally

splitting—which requires neither legal nor behavioral equality—and my proposal—which at least demands equal legal entitlements—even firm separate-filing believers should recognize the latter as a lesser evil.

2. Rates, Bonuses, and Penalties

Recognizing that income splitting bestows a special benefit that violates assignment of income principles, the rate brackets applicable to income-pooling couples would be set so as to reflect public assessment of the relative social value of allowing committed couples to treat each member's labor as "by and for" the couple. Most likely, the new schedule would resemble the current married-filing-jointly schedule so as not to reduce present marriage bonuses for spouses who formalize income-sharing arrangements.

Couples for whom filing jointly would be disadvantageous (e.g., equal earners) would be able to file separately, using the same rates as those applicable to individual filers (i.e., there would be no special structure as there is today for married individuals filing separately). Thus, there would be no "penalty." Since couples neutrality is no longer the conceptual hook supporting income splitting, this solution to the current marriage penalty does not run into the conceptual pitfalls of previous proposals to allow optional separate filing for married taxpayers. Couples neutrality dictates that a husband and wife making $50,000 each should pay the same taxes as a one-earner couple making $100,000 because their combined income is the same. As Zelenak put it, "The purpose of joint filing is to impose equal tax on equal income couples, and optional joint filing defeats that purpose."[118] The by-and-for-the-couple explanation says that income splitting should be extended to the one-earner couple not because it is economically equivalent to the equal earners (as we have seen, it is not), but because we are uncomfortable applying the assignment of income doctrine to egalitarian partnerships or treating intra-couple transfers as detached and disinterested gifts; the mechanism through which we match tax treatment with our by-and-for-the-couple ideal is income splitting. Thus, income-sharing one-

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obligated to share their income would have to exercise more than seventy-five percent control over their earnings. Whether this is in fact the case is anybody's guess. Zelenak recognizes the futility of investigations into the power dynamics within couples. Zelenak, *supra* note 5, at 357 ("The basic [income tax] principles are very simple. Earned income is taxed to the earner, and property income is taxed to the owner. The law normally looks no further into questions of power than that, and reasonably so."). However, he insists that an earner has total control over his earnings, even if he is obligated to share it with his wife. *Id.* at 382. *See also* Jones, *supra* note 34, at 269 (referring to community property interests of nonearner wives as "'a right without a remedy'" (quoting *Revenue Revision of 1942: Hearings Before the H. Comm. on Ways and Means*, 77th Cong. 1475 (1942) (brief of Burnite [sic] Shelton Matthews, Chairman of the Lawyers Council, National Woman's Party)); McCaffery, *supra* note 5, at 1010 ("Equality of *de jure* treatment comes at the price of inequality of *de facto* effect. And, we are not being neutral in regard to different models of the family: we are exalting single-earner households over all competing visions.").

118. Zelenak, *supra* note 6, at 18.

earners get a benefit compared with financially independent couples and compared with singles making the same amount, but they need not be put in the same position as the equal earners with the same combined income. As a result the couple earning $50,000 each will pay less in taxes than the $100,000 one-earner couple.[119]

3. Related Taxpayers

Related taxpayers (excluding spouses) would not be permitted to file jointly because the cultural underpinnings of income splitting are rooted in a partnership ideal of marriage or marriage-like relationships. Also, allowing family members to file jointly would erode one of the central objectives of the estate tax.[120] Finally, the limitation on related joint filers represents an important anti-abuse measure.[121]

It should be noted that in most instances this limitation would be inconsequential because relatives do not generally share income equally. Rather, more frequently, one relative supports another with less than fifty percent of her income, and this support should be accounted for through dependency exemptions, not income splitting, which is grounded in a completely different rationale, namely an assumption that both taxpayers own and control all income *equally*. For this reason, the proposal would eliminate the "head of household" category, replacing it with more generous dependency exemptions.[122]

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119. *Cf. id.* at 13–17 (discussing politically unpopular distributional effects of previous optional separate filing proposals).

120. According to Dukeminier and Johanson, such central objective is preventing the perpetuation of large concentrations of wealth:

> With the Franklin D. Roosevelt administration . . . [t]he leveling of great inherited fortunes was formally accepted as an object of the estate tax. In a message to Congress, President Roosevelt declared: "The desire to provide security for one's self and one's family is natural and wholesome, but it is adequately served by a reasonable inheritance. Great accumulations of wealth cannot be justified on the basis of personal and family security. In the last analysis such accumulations amount to the perpetuation of great and undesirable concentration of control in a relatively few individuals over the employment and welfare of many, many others. . . . [I]nherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our government."

See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 992 (2005) (quoting H.R. REP. NO. 74-1681, at 2 (1935)).

121. Tax law is often suspicious of related-party transactions. *See, e.g.*, I.R.C. § 267 (2000) (disallowing a deduction for losses from sales or exchanges between related parties).

122. Because the proper justification for income splitting was not previously articulated, Congress has failed to distinguish the logic behind income splitting from the logic justifying

4. Friends

Though the by-and-for-the-couple framework is generally associated with romantic partnerships, in some instances, especially among the elderly,[123] platonic friendships evolve into income-sharing partnerships. This is not the type of partnership for which, as a cultural matter, the income-splitting joint return exists. Nevertheless, such pairs would be permitted to file jointly as long as they undertook the income-sharing commitments outlined above. This compromise is necessary to avoid the obvious privacy and line-drawing concerns that would arise were we to devise a standard for determining whether a given relationship is romantic. As a policy matter, extending the benefits of joint filing to the rare income-sharing friendship is not particularly troublesome as these relationships contribute to the common good in many of the same ways as marriage and other intimate partnerships.[124]

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support exemptions on two important occasions. First, in 1951, the House Ways and Means Committee report explained the rationale behind the head of household category as follows:

> It is believed that taxpayers, not having spouses but nevertheless required to maintain a household for the benefit of other individuals, are in a somewhat similar position to married couples who, because they may share their income, are treated under present law substantially as if they were two single individuals each with half of the total income of the couple. The income of a head of household who must maintain a home for a child, for example, is likely to be shared with the child to the extent necessary to maintain the home, and raise and educate the child. This, it is believed, justifies the extension of some of the benefits of income splitting.

H.R. REP. NO. 82-586, at 11 (1951). Again Congress's 1969 decision to extend income splitting to surviving spouses with dependents was explained in reference to support obligations. *See* Ventry, *supra* note 10, at 313 ("On extending full income splitting to surviving spouses with dependents, the staffs [of the Joint Committee on Internal Revenue Taxation and the Committee on Finance] explained that the House felt these individuals maintained 'full obligations of a married couple toward their children after their spouses die.'" (quoting STAFFS OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION AND THE COMM. ON FIN., 91ST CONG., SUMMARY OF H.R. 13270, THE TAX REFORM ACT OF 1969, at 103 (Comm. Print 1969))); *see also* Cain, *supra* note 20, at 101, 120, 123.

123. *See* Jane Gross, *Older Women Team up to Face Future Together*, N.Y. TIMES, Feb. 27, 2004, at A1.

124. *See supra* text accompanying note 93.

5. Enforcement, Dissolution, and Anti-Abuse Measures

Just as the current system relies on state law to establish marital status,[125] so under the economic-unity proposal the Service would not be responsible for enforcing the legal entitlements that fulfill the eligibility criterion for joint filing. Rather, the obligations of unmarried joint filers would be enforced under existing state contract law principles,[126] and the enforcement of spousal rights and obligations would be addressed according to local family law.[127] Should a union that qualifies for joint filing dissolve, the division of assets would likewise be handled under state contract or

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125. *See* Rev. Rul. 58-66, 1958-1 C.B. 60 ("The marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws."). Note, however, that the Federal Defense of Marriage Act (DOMA) defines marriage for federal purposes as a legal union between one man and one woman. Therefore, for federal income tax purposes, a same-sex couple married in Massachusetts may not file a joint return. IRS Publication 17, at 23, *available at* http://www.irs.gov/publications/p17 (last visited Feb. 4, 2006). Scholars and practitioners are currently engaged in a heated debate over whether California domestic partners—whose unions are governed by the same community property rules applicable to married couples in that state—should be permitted to income split as per *Poe v. Seaborn*. *See* Patricia A. Cain, *Relitigating* Seaborn*: Taxing the Community Income of California Registered Domestic Partners* (University of Iowa Legal Studies Research Paper No. 05-39, 2006), *available at* http://ssrn.com/abstract=881763. In a nonbinding memorandum, the Internal Revenue Service recently advised that the *Poe* decision "does not extend to registered domestic partners." I.R.S. Chief Couns. Mem. 200608038 (Feb. 24, 2006). Since the economic-unity proposal is marriage neutral, this problem would be solved. For a response to the Memorandum, see generally Dennis J. Ventry, Jr., *No Income Splitting for Domestic Partners: How the IRS Erred*, 110 TAX NOTES 1221 (2005).

126. *See generally* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (holding that in California, disputes between unmarried partners must be determined based on contract law principles). The *Marvin* rule has been widely adopted in other states. Note however that it no longer applies to California unmarried couples who have registered domestic partnerships. These couples are governed by the same regime applicable to married couples. 1 MACAULAY ET AL., *supra* note 109, at 274; *see also* IHARA ET AL., *supra* note 85, at 2/9.

127. This would likely produce some variation from state to state. From a tax perspective, the result would not be perfectly uniform, though it would guarantee a much closer match between tax treatment and legal entitlement to income than under the present system. As a constitutional matter, this lack of uniformity would not be troublesome; the Supreme Court has interpreted Article I, Section 8 of the Constitution—requiring that "all Duties, Imports and excises shall be uniform throughout the United States"—as requiring "geographic" uniformity rather than "intrinsic" uniformity. Knowlton v. Moore, 178 U.S. 41, 92–93 (1900). In other words, as long as a federal plan "operate[s] generally throughout the United States," lack of uniformity resulting from differences in state property laws does not present constitutional problems. *See id.* at 96; *see also* Pahl v. Comm'r, 150 F.3d 1124, 1128 (9th Cir. 1998) ("Courts look to the tax statutes and interpreting cases to determine what interest is sufficient to trigger tax liability, and to state law to determine whether the taxpayer had such an interest."); Ballard v. United States, 17 F.3d 116, 118 (5th Cir. 1994) ("Although federal law defines partnerships for purposes of applying the partnership income taxation scheme . . . it is state law that determines when a partner is liable for the obligations—including employment taxes—of his partnership." (citation omitted)); United States v. Hays, 877 F.2d 843, 844 n.3 (10th Cir. 1989) ("[C]ourts have assumed that the liability of a general partner for the tax obligations of the partnership is determined by state law rather than federal law.").

family law. Property settlements, alimony, and child support would receive the same income tax treatment as under the current system, and this treatment would be extended to the dissolution of other partnerships that qualified for joint filing.

There is a risk that taxpayers will enter into fraudulent agreements so as to gain access to the tax savings of joint filing without taking on the attendant income-sharing obligations. For example, income earners and non-earners could file jointly, agreeing to split the tax benefit but not the underlying income. For this reason, joint filing would not be available to family members, other than spouses. Also, the new regime would be governed by civil and criminal penalties applicable to fraudulent filers under the current system.[128] Finally, the heart of the proposed system—equal entitlement to all taxable income—itself serves as a deterrent to cheaters. The non-earner could always renege on her promise and demand more than the agreed-upon "fee" for her signature. The earner would then face a choice between criminal penalties and honoring the joint filing commitment—i.e., ceding fifty percent of her income for the year or years in question to the threatening co-party to the scam.

6. Limitation to Pairs

As a matter of tax policy, there is no reason to limit the economic unity option to pairs. Polygamous families, collectives, and three or more housemates who obligate to pool and equally share all income should, theoretically speaking, be treated accordingly for tax purposes. As a political matter, however, although societal acceptance of non-marital two-member partnerships has increased dramatically, other partnerships have not received social sanction. Thus, the economic unity proposal stands a better chance of becoming a reality if it is limited to pairs.

7. Effect on Other Provisions

In addition to affecting the rate schedules in section 1 of the Internal Revenue Code, other sections relating to marital status, like section 267—which denies deductions for losses on sales between related persons—and section 1041—which provides for nonrecognition of transfers between spouses—would be changed to apply to economically united taxpayers regardless of their marital status.[129]

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128. *See* I.R.C. §§ 6663, 7206 (2000).

129. Other I.R.C. sections, the application of which relies on marital status, include section 68 (concerning the limitation on itemized deductions), section 163(h)(3)(B) (concerning the home mortgage interest deduction), section 179 (allowing taxpayers to expense certain capital expenditures), section 221 (providing for student loan interest deduction), section 21 (household and dependent care credit), and section 32 (providing the earned income tax credit). These provisions currently create an advantage for unmarried couples. For a discussion of these provisions and their implications for the gay marriage debate, see Theodore P. Seto,

8. Effect on Case Law

In terms of the case law, the proposal calls for a legislative override of *Lucas v. Earl*[130]—income-sharing contracts would no longer be irrelevant for tax purposes—and a limitation on the principle of *Poe v. Seaborn*[131]—spouses in community-property states would still be eligible to income split but only so long as they have not contracted out of spousal sharing requirements. The proposal would also override the pre-1948 cases that struggled with the conceptual contradiction that resulted from the combination of *Lucas* and *Poe*.[132]

9. Gift and Estate Tax Implications

The proposal's gift and estate tax implications are outside the scope of this Article, but assuming that the general structure of gift and estate taxes remains constant, acceptance of the equality requirement vis-à-vis income splitting would imply that a similar principle should govern the gift and estate tax context. Currently, many federal gift and estate tax provisions treat married taxpayers as merged economic units.[133] For reasons similar to those applicable to income splitting, gift and estate tax provisions treating married taxpayers as units should theoretically be modified so as to apply only to taxpayers who, like Mr. and Mrs. Earl, legally share all of their assets during their lives together regardless of their marital status.[134]

B. Policy Implications

Equality-based income splitting would eliminate the discriminatory effects of the marriage bonus—the exclusion of economically united couples from the benefits of income splitting and the free ride now extended to economically uncommitted high-earners who happen to be married. It would also diminish the innocent-spouse problem: Couples filing jointly

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The Assumption of Selfishness in the Internal Revenue Code: Reflections on the Unintended Tax Advantages of Gay Marriage 18–19 (Loyola Law School Los Angeles, Legal Studies Paper No. 2005-33, 2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=850645.

130. 281 U.S. 111 (1930).

131. 282 U.S. 101 (1930).

132. *See, e.g.*, Comm'r v. Harmon, 323 U.S. 44, 49–57 (1944) (Douglas, J., dissenting).

133. *See* I.R.C. § 2056 (2000) (providing for a marital deduction from the estate of a decedent equal to the amount passing to a surviving spouse); *Id.* § 2523 (providing for a gift tax deduction equal to the amount of inter-vivos transfers to a spouse); *Id.* § 2513 (treating gifts made by one spouse to a third party as if they were made one-half by the donor spouse and one-half by the other spouse).

134. The number of couples prepared to merge assets is likely to be much smaller than the number of those ready to share income. A strict application of the principles of the proposal to gift and estate taxes would therefore defeat a current public policy that many believe to be important: encouraging spouses to gift and bequeath to each other. A possible solution might be to extend partial gift and estate tax benefits to couples that share only income and full benefits to those that share income as well as assets equally.

would still bear joint and several liability for taxes owed, but now this potential liability would come along with actual co-ownership of the income being taxed. The marriage penalty would be erased completely because marital status would have no income tax relevance. There would also be no marriage (or couples) penalty because the proposal allows for optional separate filing. For couples filing jointly, the stacking effect would remain, but its marginalization of secondary earners would be alleviated since they would at least have an ownership interest in their partners' wages. (It should be noted that the proposal is consistent with a reintroduction of the two-earner deduction, which would address the stacking effect directly.)

The proposed system would also create an incentive for one-earner couples to formally agree that the work of housewives/husbands and caretakers is equal to the monetary contributions of breadwinners.[135] This would likely diminish the vulnerability of dependent spouses who are already treated as equal or close-to-equal partners. Equality-based income splitting would not, of course, turn unequal partnerships into equal ones, but unlike marriage-based income splitting, it would not be complicit in perpetuating the marital-unity fairytale. Instead, it would encourage transparency in relationships early on, exposing the common mismatch in expectations that is a common cause of domestic strife.[136] Now, income splitting is based on a fiction. Under my proposal, it would at least be based on enforceable legal entitlements.

The proposal's exclusion of non-egalitarian marriages from income splitting is consistent with the broad appeal of the partnership ideal of

135. Economic unity-based income splitting might therefore reverse what Pamela Gann views as a negative incentive structure set up by the 1948 Act, which, she argues, solidified separate ownership and contributed to the financial dependence of wives on their husbands. *See* Gann, *supra* note 5, at 47; *Cf.* Jones, *supra* note 34, at 273 (discussing tax law as a vehicle for changing power between husbands and wives, and noting that "[t]he spread of community-property laws during the period from 1939 to 1947 is testimony to the efficacy of the federal tax incentive for readjustment of economic power between spouses.").

136. *See* ROBERT STEPHAN COHEN, RECONCILABLE DIFFERENCES 101 (2002) ("[T]here is no better time to assess financial expectations and individual spending habits than when two people are still getting to know each other."). *See generally* LENORE J. WEITZMAN, THE MARRIAGE CONTRACT (1981) (advocating for intimate contracts in lieu of marriage); Equality in Marriage Institute, Educating Women and Men About the Importance of Equality in Marriage and Divorce, www.equalityinmarriage.org.

marriage,[137] indirectly resurrecting a positive aspect of traditional marriage without its patriarchal taint. At the same time, the proposal does not threaten states' sovereignty over family law or freedom of contract principles that have undergirded greater acceptance for pre- and post-marital arrangements.[138] Unlike the pre-1948 period when federal tax law created an incentive for states to convert to community property law, the proposal leaves marriage law to the exclusive jurisdiction of the states.[139] Civil

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137. Frantz and Dagan articulate their vision of marriage as an "egalitarian liberal community." Frantz & Dagan, *supra* note 36, at 125. Frantz and Dagan explain:

> A regime that grants each spouse an immediate half interest in the marital estate recognizes the special relationship between the spouses and reinforces each spouse's sense of equal participation in the marriage. By contrast, a system of separate property treats spouses as proprietors in their relationship with one another, and furthermore places the non-propertied spouse in a dependent subordinate position.

Id. (citations omitted). "Because expecting women to protect themselves against marital subordination is both unrealistic and undesirable, the law must provide institutional guarantees of gender equality to support marital community." *Id.* at 93–94; *see also* SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 152 (1989).

All states have adopted some form of equitable distribution, indicating a trend toward an egalitarian view of marriage. *See Developments*, *supra* note 36, at 2098 (identifying "an internal inconsistency in divorce law" produced by the "conflict between two differing conceptions of the marital relationship: marriage as contract and marriage as partnership"). Specifically:

> While judicial deference to antenuptial agreements has grown, the United States has simultaneously experienced a trend toward equal division of marital property, reflecting the conception of marriage as partnership and rejecting the notion of a patriarchal relationship. The notion of equality inherent in the partnership conception of marriage is at odds with a system in which courts refuse to review antenuptial agreements for substantive fairness at the time of their enforcement.

Id. at 2077. The article recommends instituting a "system in which judges undertake substantive fairness review at the time of an agreement's enforcement and presumptively invalidate agreements failing to approximate equal division of marital property." *Id.* at 2098.

138. *See Developments*, *supra* note 36, at 2078 (describing a "trend in favor of enforcement [of antenuptial agreements], more limited judicial review, and greater respect for parties' freedom of contract"); *see also* Elizabeth S. Scott & Robert E. Scott, *A Contract Theory of Marriage*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 201, 205 (F.H. Buckley ed., 1999), *quoted in Developments*, *supra* note 36, at 2078 n.13 ("The law's embrace of private ordering in marriage is part of a broader policy of maximizing the freedom of individuals to pursue personal ends in intimate relationships.").

139. A nationwide, mandatory spousal sharing requirement might backfire by discouraging marriage among couples who, while they may not be prepared to share their income, *are* prepared to take on other marital obligations—such as the presumption of paternity, the (minimal) duty of mutual support, medical decision-making responsibilities, and monogamy. In an age of high divorce rates and multiple marriages, moneyed fiancés or fiancés with commitments to children or spouses from prior marriages may have good reasons for hesitating before they cede ownership over future earning at the altar. And yet, economically weak individuals, one might argue, are better off marrying their lovers even if their marriage is governed by a premarital agreement that gives them minimal ownership rights. *But see* Gann, *supra* note 5, at 50–51.

marriage supplies couples with a wide range of useful default rules, many of which do not concern property, including the presumption of paternity, hospital access, automatic power of attorney, and decision-making power over funeral arrangements. Under my marriage-blind proposal, couples could continue to marry (or not) regardless of whether they share their income, and each state's marriage laws could continue to include their own presumptions or mandatory rules regarding property sharing during marriage.

Nevertheless, serious consideration should be given to the risk that the availability of equality-based income-splitting options might gradually transform marriage by eroding spousal-sharing requirements or equal-partnership presumptions that do currently exist. For example, a married couple's choice not to file jointly might factor into an equitable distribution proceeding as a persuasive indication that the spouses did not view their partnership as a fifty-fifty proposition and that neither spouse could have reasonably relied on such an interpretation.[140] This would likely prejudice economically weaker spouses, rolling back hard-won protections. Counterbalancing this risk is the possibility that the new law would lead social and religious institutions to encourage, even demand, that couples unite their finances, thereby *bolstering* spousal sharing and encouraging other egalitarian unions. For example, a given religion might declare that marriage for purposes of that religion must be an economic partnership of equals.

Consideration should also be given to the ongoing debate regarding the relative merits of community-property versus separate-property regimes as vehicles for advancing gender equality.[141] Regardless of this debate, it is clear

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140. Equitable distribution is generally based on judicial discretion.

141. Though mandating spousal equality and unity seems appealing at first glance, there is a longstanding debate as to whether a community model would help women achieve ever-elusive equality. *See* HERMA HILL KAY & MARTHA S. WEST, SEX-BASED DISCRIMINATION: TEXT, CASES, AND MATERIALS 261–74 (5th ed. 2002).

Some argue that separate property regimes are better for women because when women and men pool their resources, men inevitably control them. Thus, even if separate property models are likely to leave women with less in terms of formal ownership rights, *total* ownership over *less* property is better than the *semblance* of ownership over *more* property. The thrust of this argument informs several commentators' views of the logic behind married women's property acts. It also inspired opposition to the trend towards adopting community property laws on the eve of the 1948 Act. *See* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 109 (1983), *cited in* Kornhauser, *supra* note 5, at 90 ("In traditional marriage, interdependence is usually achieved at the cost of the wife's autonomy and her participation on an equal basis in decision-making."); MCCAFFREY, *supra* note 51, at 11–48; Bittker, *supra* note 29, at 1399–1414; Jones, *supra* note 34, at 259; Kornhauser, *supra* note 5, at 73–76, 102. Arps and Rees write:

> [F]eminist theory undercuts the very premise that the family is an economic unit. The economic unit theory assumes that the family is a monolithic, homogeneous group in which all members share the same tastes and resources, including

that separate property-style marriage is inconsistent with income splitting. More broadly, for reasons discussed above, the current mismatch between internal economic unity and presumed economic unity for purposes of a couple's relationship with the state has a slew of negative consequences. If we are going to keep the income-splitting joint return, the only defensible criterion for joint filing is income sharing. At the same time, efforts already underway to improve community property systems[142] should be broadened beyond community-property states and beyond marriage to assist all couples seeking to form equitable personal partnerships.

The proposal's introduction of income splitting to income sharing unmarried couples is more controversial. However, once the public turns its attention to the wide state-to-state variations in what marriage means and to the broad freedom to contract out of all but the most minimal marital obligations, Americans may well agree that the relationship between income splitting and civil marriage is arbitrary. (Again, though groups that oppose extending marriage-like benefits or protections to same-sex couples would reject the proposal, they are in the minority. Most Americans oppose gay marriage but support civil unions.)

All things being equal, it is not clear whether adoption of the proposal would increase or decrease revenue. On the one hand, the proposal expands the pool of those eligible to income split by making joint filing available to economically united unmarrieds. On the other hand, the proposal contracts the pool by excluding spouses who do not commit to unite. Which group would be larger? Would newly created income-splitting benefits amount to more in lost revenues than the rise in revenue attributable to married taxpayers who will no longer enjoy marriage bonuses?[143] These questions would have to be investigated in detail in evaluating the proposal.

Finally, in addition to rationalizing the tax treatment of economically united couples and of economically separate marrieds, the proposal would begin to alleviate the growing confusion attributable to the proliferation of

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> income, equally. Under this "benign patriarch" theory of the family, the male "head of household" traditionally speaks and acts for the unit.

Patricia F. Apps & Ray Rees, *Taxation and the Household*, 35 J. PUB. ECON. 355, 355 (1988), *cited in* Kornhauser, *supra* note 5, at 97 (referring to GARY BECKER, A TREATISE ON THE FAMILY (enlarged ed. 1991)).

On the other hand, some commentators hold fast to the ideal that marital unity and equality are compatible. *See, e.g.*, MCCAFFERY, *supra* note 51, at 36 ("Reva Siegel's historical and legal research shows first that the married women's property acts emerging from the nineteenth century were actually a rather conservative attempt to forestall a claim by women for equal ownership of all marital assets . . . ."); Frantz & Dagan, *supra* note 36.

142. *See* KAY & WEST, *supra* note 141, at 269.

143. The fact that pooling is less prevalent among unequal-earners and that these earners also receive the biggest bonuses suggests significant potential revenue gains from the exclusion of nonsharing spouses.

inconsistent domestic partner mandates by state and local governments[144] by creating a clear federal standard for allocation of privileges, the rationales for which are based on a presumption of economic unity.

V. CONCLUSION

In his seminal 1975 article defending marriage-based income splitting, Boris Bittker wrote: "the concept of a marital partnership is a widespread ideal and, whether realized in fact or not, it is an appealing principle to use in fixing the tax liability of married couples."[145] Marital partnership is indeed an appealing principle. If it *were* realized in fact, and if the marriage were open to all and only to economically united couples, marriage would constitute a reasonable criterion for allocating income splitting privileges. But family law in the United States falls far short of these ideals. As a result, the current income splitting system gives a windfall to financially uncommitted high-earners, penalizes unmarried couples, exposes low- and non-earners to potential liability attributable to income they never owned, and creates a marriage penalty.

Working women spend approximately twice as much time as their male counterparts housekeeping and caring for children;[146] men spend more time at their jobs and on sports and leisure,[147] and they continue to earn

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144. *See* ESKRIDGE & HUNTER, *supra* note 50, at 791–94; Kelley Blassingame, *Domestic Partner Mandates Complicate Decisionmaking*, EMP. BENEFIT NEWS, Mar. 2004. Bowman notes:

> The legal treatment of cohabitation in the United States has been radically and rapidly transformed during the first few years of the twenty-first century . . . . There are great regional variances—from Massachusetts, where marriage [has become] available to same-sex couples . . . to Nebraska, where the state constitution was amended in 2000 to prohibit recognition not only of same-sex marriage but also of civil unions or domestic partnerships of any sort (Neb. Const, Art. I, § 29). Similar variety exists as to opposite-sex cohabitants. The state of Washington grants many of the benefits of marriage to all cohabitants, both same- and opposite-sex, while Illinois extends no recognition at all to cohabitants, for fear that to do so would somehow denigrate the institution of marriage.

Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 LAW & POL'Y 119, 119 (2004); *id.* at 146 ("The system as it now exists is clearly unstable. The various conflict of law problems . . . import a built-in instability, as couples who have been granted either the status or incidents of marriage move from state to state."); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 80 (2001) ("[A] patchwork of legal doctrines has emerged to regulate [relationships that fall outside the bounds of conventional family law]. In various jurisdictions, nonmarital affiliations are called reciprocal beneficiary relationships, domestic partnerships, meretricious relationships, and civil unions. Each affiliation is defined differently and accorded different rights and duties." (citations omitted)).

145. Bittker, *supra* note 29, at 1421.

146. Edmund L. Andrews, *Survey Confirms It: Women Outjuggle Men*, N.Y. TIMES, Sept. 15, 2004, at A23.

147. *Id.*

some twenty-eight percent more than working women.[148] Many married heterosexual couples with profiles resembling this national average conceive of themselves as merged economic units—they share their income and the tax system treats them accordingly. For these couples, the economic unity proposal would create an incentive to formalize a practice of sharing already in place, turning gratuitous spousal transfers into a legal obligation and giving low-earning wives who perform the brunt of the couples' housework the economic equality they deserve. More broadly, the system would also engender societal recognition that the non-wage labor of stay-at-home spouses and the monetary contributions of breadwinners are equally valuable.

Married equal-earners would benefit from economic-unity-based income splitting because the proposal would completely eliminate the marriage penalty.

For married unequal-earners who do not share fifty-fifty, the proposal would create an incentive to move towards egalitarian partnerships. Married high-earners who are not prepared to share their income with their spouses would face a tax hike which, though unpleasant, would be difficult to argue against. This Article does not pass judgment on such taxpayers; it simply insists that tax treatment match reality. If spouses do not share their income, they should not be treated as if they do for tax purposes. Low-earner spouses, meanwhile, would be free of potential liability on taxes for income they never owned. Finally, the economic unity proposal would eliminate marital-status discrimination from income taxes. In conclusion to his classic article, Bittker wrote:

> [T]heoreticians . . . cannot 'solve' the problem of taxing family income. . . . They can identify the issues that must be resolved, point out conflicts among the objectives to be served, propose alternative approaches, and predict the outcome of picking one route rather than another. Having performed these functions, the expert must give way to the citizen, whose judgments in the end rest on nothing more precise or permanent than collective social preferences.[149]

This Article begins with the citizen. It recognizes that attitudes towards non-marital partnerships are in a state of unprecedented flux and that young Americans are increasingly receptive to alternative family structures. This Article also acknowledges that Americans are not prepared to ignore coupledom in favor of an individual-centered approach to taxation. The economic unity proposal accepts the income-splitting joint return as a permanent element of our system and insists that the criterion for its

148. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, WOMEN'S EARNINGS 78 PERCENT OF MEN'S IN 2002, http://www.bls.gov/opub/ted/2003/oct/wk2/art03.htm.

149. Bittker, *supra* note 29, at 1463.

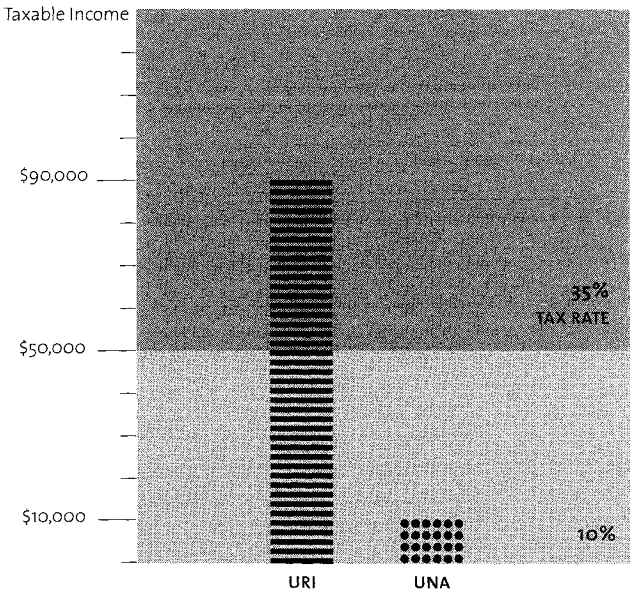
application be true to its underlying justification: taxing *all* economically united couples—and *only* economically united couples—in a manner that respects and supports their partnership of equals.

VI. APPENDIX: AN ILLUSTRATED HISTORY OF INCOME SPLITTING, THE MARRIAGE BONUS, AND THE MARRIAGE PENALTY[150]

In the early days of the income tax, all taxpayers were required to file individual (or "separate") returns and there was only one rate schedule. Mandatory separate filing meant that a married couple with one earner owed the same in taxes as a single person making the same amount. However, some one-earner couples who were legally obligated to share income equally argued that their tax liabilities should reflect their "income splitting" economic reality.

To understand why one- and unequal-earner couples benefit from income splitting in a system with graduated tax rates, consider the following example. Assume that all taxable income up to $50,000 is taxed at a 10% rate, and all income above $50,000 is taxed at a 35% rate. Now consider Uri and Una ("U" for unequal earners). Uri earns $90,000 and Una earns $10,000. (Men often make significantly more than women, a fact which is an important piece of our story.) Uri's $90,000 will be taxed at two different rates. The first $50,000 will fall into the 10% bracket, while his top $40,000 of income will be subject to the 35% rate. Una's $10,000 will be taxed at 10% in its entirety.

Separate Filing

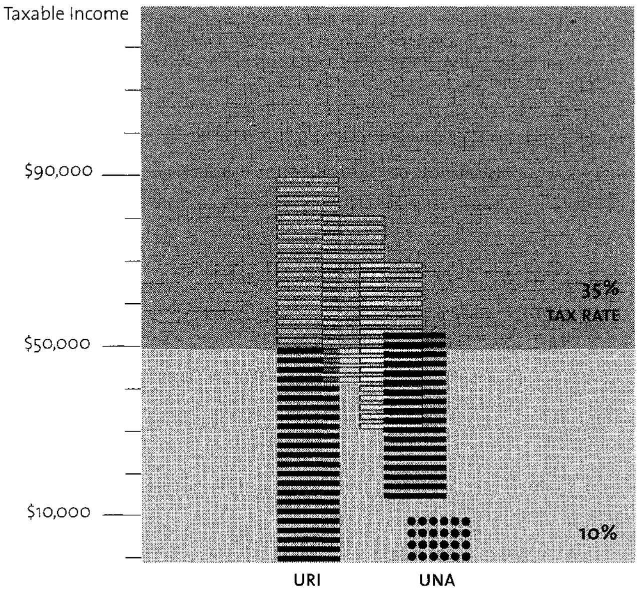


This is their tax treatment if they are treated as separate individuals.

150. The text of this Appendix was inspired by MCCAFFERY, *supra* note 51, at 12–19. The graphics were designed by Jenny Chan. I am also thankful to Jonathan Corum and Christopher Smith for their invaluable editorial suggestions.

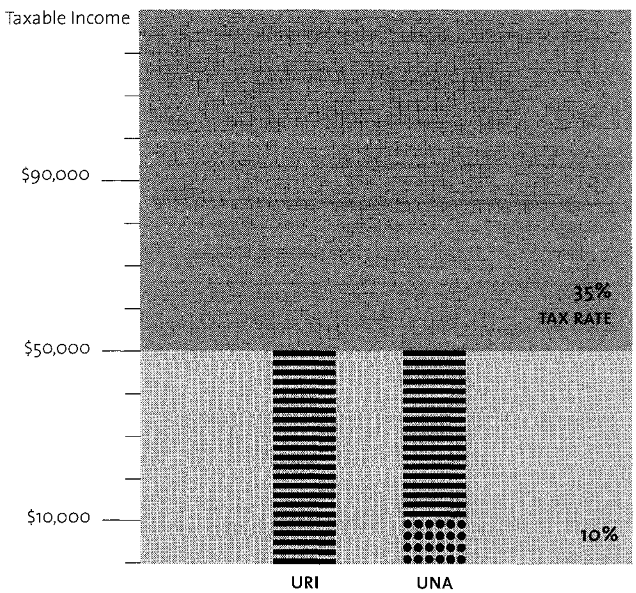
But if they are allowed to "income split," $40,000 of Uri's income will be attributed to Una, shifting it from the 35% bracket into the 10% bracket.

Income Splitting

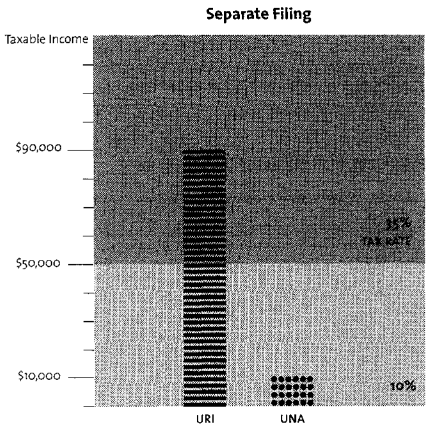


Thus, income that was subject to the 35% rate is now subject to the 10% rate.

Separate Filing with Income Splitting

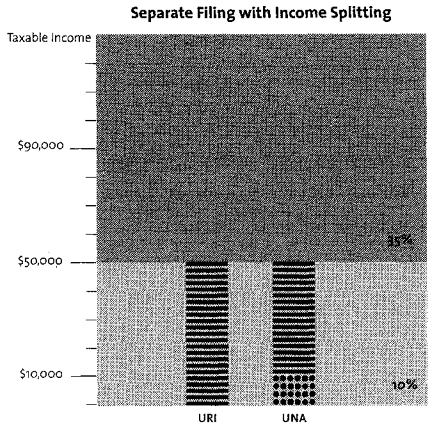


To calculate the value of the benefit, let us compare Uri and Una's combined tax liability with and without the income splitting benefit.



URI { $50,000 x 10% = $5,000
$40,000 x 35% = $14,000 }
UNA $10,000 x 10% = $1,000

total tax = $20,000
after tax income: $80,000



URI $50,000 x 10% = $5,000
UNA $50,000 x 10% = $5,000

total tax = $10,000
after tax income: $90,000

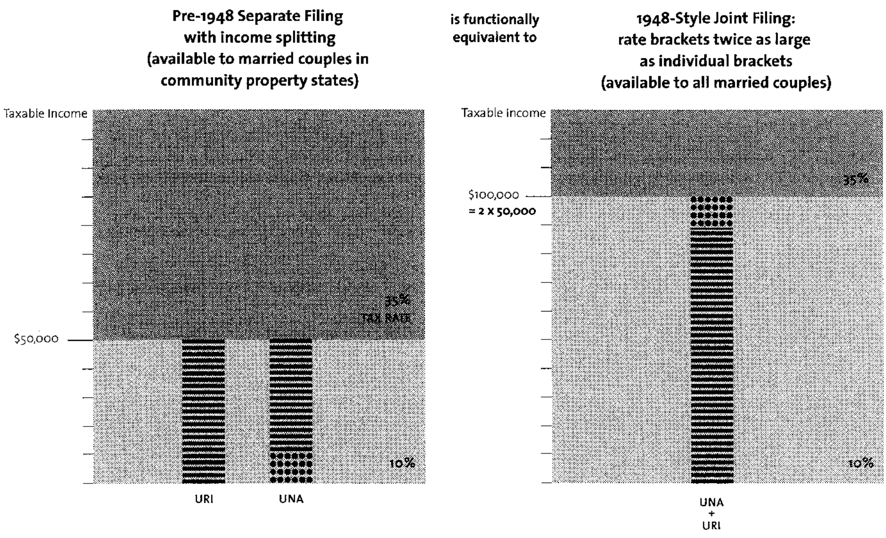
The type of income splitting described above is often referred to as "pure income splitting," and initially, in 1930, the Supreme Court ruled that only couples in community-property states—who were required to share income pursuant to state property laws—would be eligible to income split in this way.[151] Couples in non-community property states, even if they signed a private contract binding them to share as much or even more than they would be required to under community property laws, were not permitted to income split.[152] Thus, in 1930, Uri and Una's combined tax liability would be $10,000 if they lived in Texas but $20,000 if they lived next door in Oklahoma.

151. *See* Poe v. Seaborn, 282 U.S. 101 (1930).

152. *See* Lucas v. Earl, 281 U.S. 111 (1930).

In 1948, Congress extended "pure income splitting" to all married couples, regardless of where they lived and regardless of whether they were legally obligated to share their income. The 1948 Act did this by allowing married couples to aggregate or "stack" their income and file a joint return. Their combined marital income was then subject to a rate schedule composed of brackets that were twice as large as the brackets that made up the individual rate structure. Using our simplified example (in reality there were more than two brackets), a 1948-style married filing jointly schedule would tax combined marital income up to $100,000 at the 10% rate, and income above $100,000 at 35%.

This 1948-style schedule for spouses filing jointly is the functional equivalent of the pre-1948 income splitting system available to spouses in community property states whereby spouses filed separately but the high-earner's income was attributed to her low-earner spouse. Uri and Una would pay the same in taxes under either system, but the calculation would be different. Whereas before, Uri and Una split their income and then applied the individual rate structure, now they *add* their income and apply the rate structure with brackets twice as large.



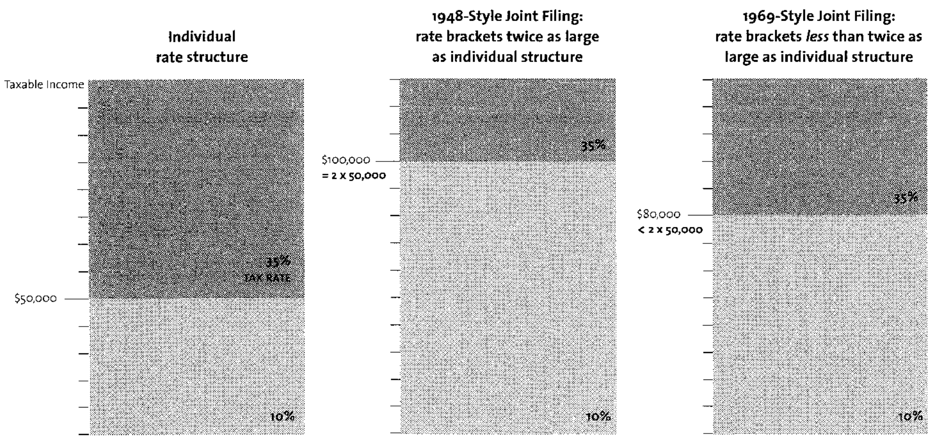
1948-style joint returns are also referred to as producing "pure income splitting" since they replicate the results of the pre-1948 system as it applied to married couples in community property states (i.e., "separate filing with income splitting").

We have already seen how pure income splitting created a significant "marriage bonus" for unequal earners like Uri and Una, who each paid the same in taxes as they would if they were two single taxpayers making $50,000.

Note that under the 1948-style system, equal-earner spouses enjoyed no advantage (or disadvantage) relative to their unmarried counterparts. Consider, e.g., Esteban and Edith who each earn $50,000. Since they already earn the same amount, they have no opportunity to shift high bracket income to a lower bracket; they already pay exactly the same as two single people making $50,000 each.

After the 1948 reform, singles' rights advocates felt that the marriage bonus associated with pure income splitting unfairly discriminated against unmarried taxpayers. To address this concern, in 1969, Congress replaced "pure income splitting" with a new system that reduced the marriage bonus and inadvertently created a marriage penalty.

The 1969 reform reduced the marriage bonus by adjusting the rate schedule applicable to married joint filers. (For simplicity, I will ignore the head of household and married filing separately categories.[153]) Instead of taxing married couples using a schedule with rate brackets twice as large as those contained in the individual schedule—as was the case between 1948 and 1969—married taxpayers would now be taxed based on a schedule with rate brackets *less than* twice as large as those making up the individual schedule.

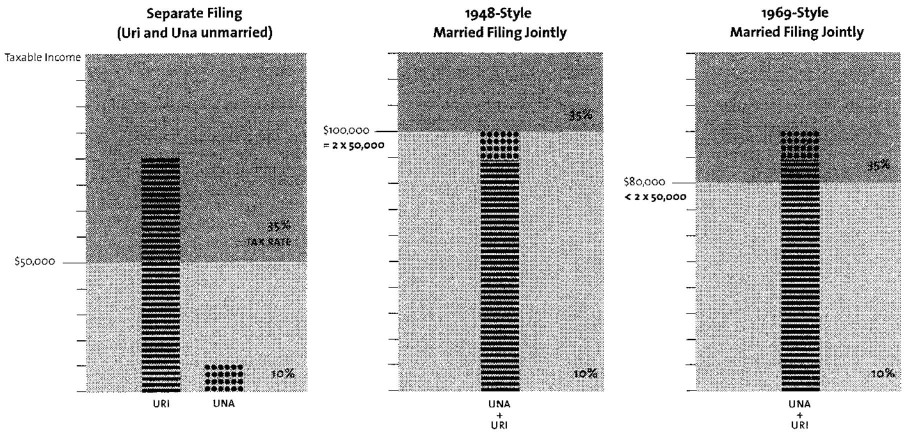


This structure produced a smaller bonus for one- and unequal-earner couples and created a penalty for equal earners.

Keeping our hypothetical individual rate structure as a constant, a post-1969 approach might set the 35% rate hike in the marrieds' schedule at $80,000. Thus, under the post-1969 style system, the unequal earners in our example still enjoy a benefit, because *some* of the $40,000 subject to the 35%

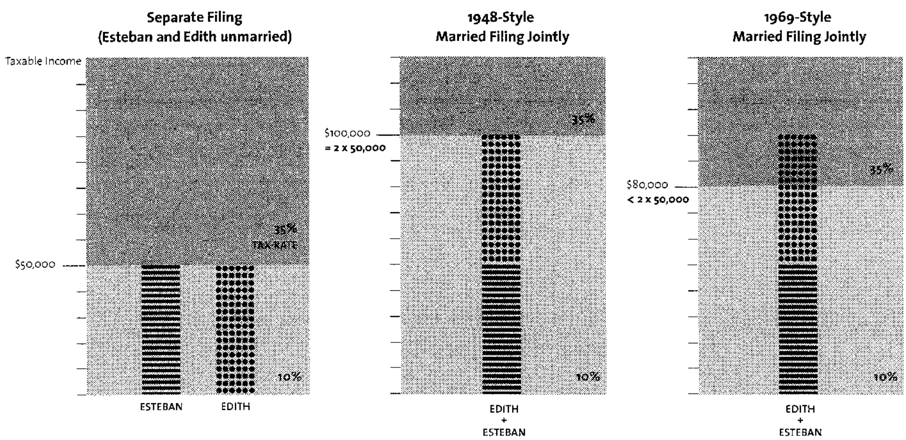
153. *See supra* note 29.

rate under the individual schedule still gets shifted into the lower 10% bracket. However, because the point at which the higher bracket kicks in in the joint filing structure—$80,000—is less than twice as large as the individual filing bracket-hike marker of $50,000, the maximal benefit of pure income splitting is no longer available.



Equal-earner Esteban and Edith on the other hand, whose tax liability was unaffected by their marital status under 1948-style pure income splitting, now suffer a "marriage penalty" because they have no income to "split" (since they already earn the same amount) but they still have to move into the married filing jointly structure.

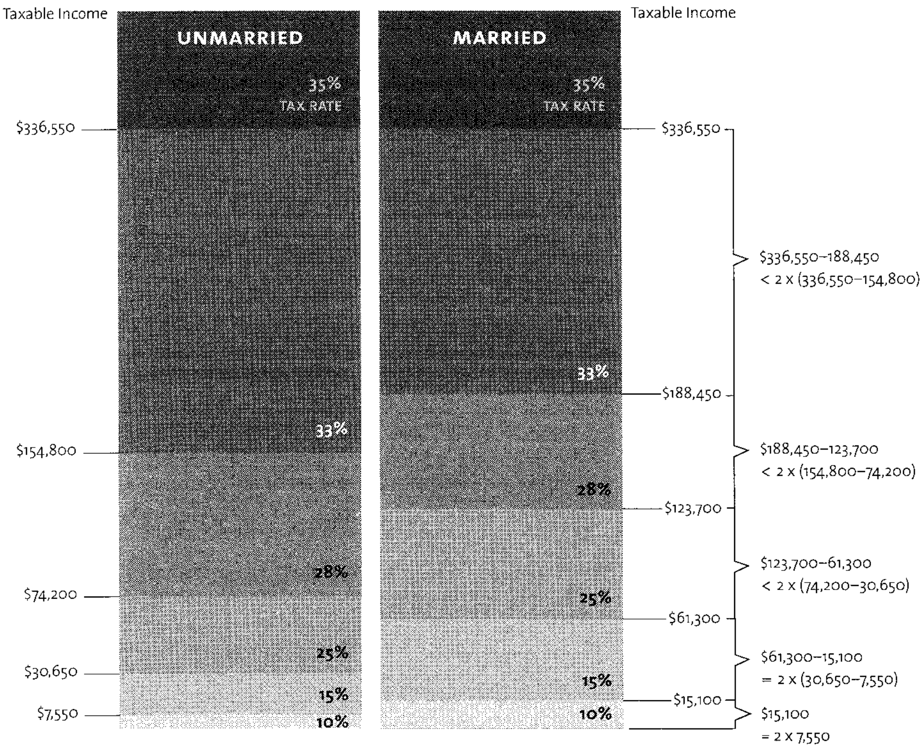
In other words, income that was subject to the 10% bracket under the schedule applicable to unmarried taxpayers becomes subject to the higher, 35% bracket, once Esteban and Edith marry.



The 2001 Revenue Act changed the post-1969 system by making the brackets applicable to married couples' aggregate income twice as large as those applicable to singles, but only at lower brackets. In other words, it returned pure income splitting at lower brackets but maintained, and in some cases exacerbated, the penalty for higher income equal earners.

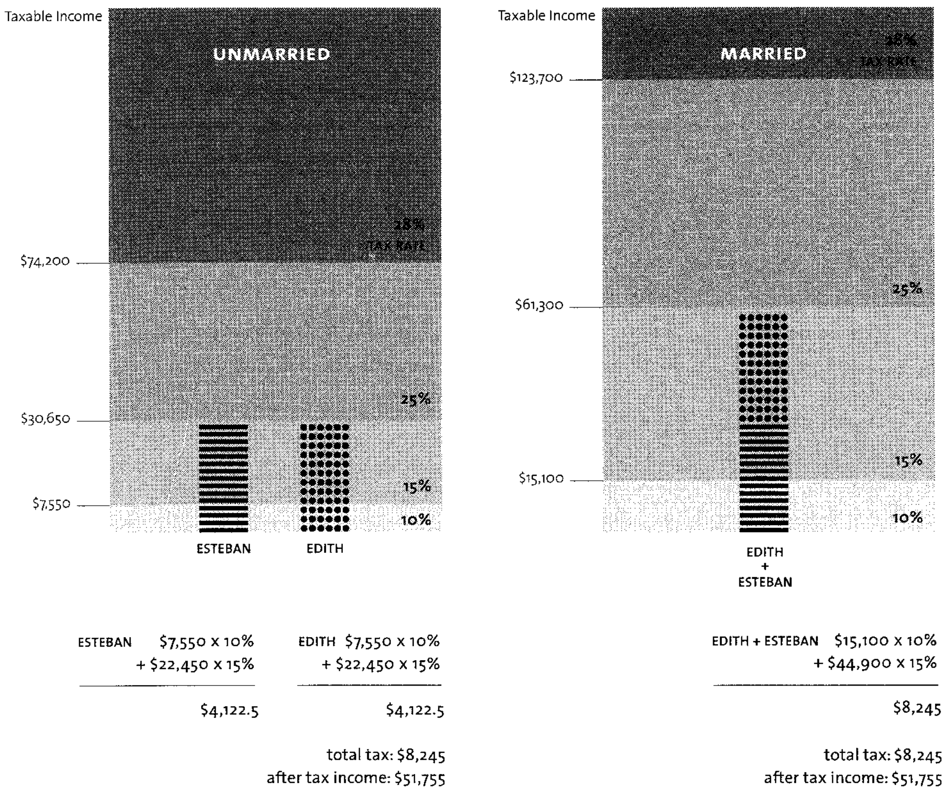
Specifically, the 10% and 15% brackets applicable to marrieds filing jointly are now twice as large as those applicable to singles, but starting at the margin between the 25% and the 28% rate brackets, the married brackets are less than twice as large as the individual brackets, producing a 1969-style penalty.

2006 Individual and Married Filing Jointly rate structures



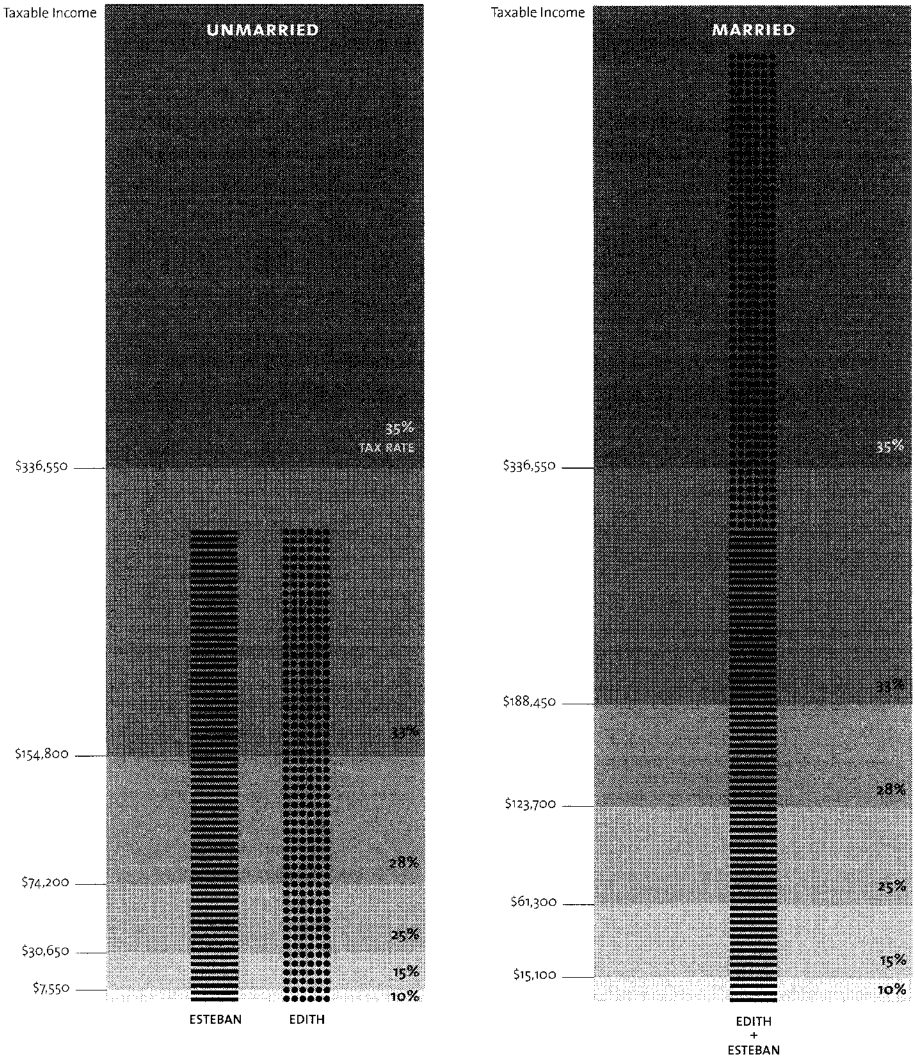
Thus, under 2001-style rates, Esteban and Edith suffer no marriage penalty if each spouse's taxable income is $30,000,

2006 Joint Filing:
No Marriage Penalty for Equal Earners at Lower Rate Brackets



. . . but if each spouse's taxable income is $300,000, they would be better off unmarried than married, i.e., they suffer a significant marriage penalty.

2006 Joint Filing: Significant Marriage Penalty for High-Income Equal Earners



ESTEBAN $7,550 x 10%
+ $23,100 x 15%
+ $43,550 x 25%
+ $80,600 x 28%
+ $145,200 x 33%

$85,591.5

EDITH $7,550 x 10%
+ $23,100 x 15%
+ $43,550 x 25%
+ $80,600 x 28%
+ $145,200 x 33%

$85,591.5

total tax: $171,183
after tax income: $428,817

EDITH + ESTEBAN $15,100 x 10%
+ $46,200 x 15%
+ $62,400 x 25%
+ $64,750 x 28%
+ $148,100 x 33%
+ $263,450 x 35%

$183,250.5

total tax: $183,250.5
after tax income: $416,749.5