

1978

For Richer, for Poorer: Federal Taxation and Marriage

Michael A. Mess

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Michael A. Mess, *For Richer, for Poorer: Federal Taxation and Marriage*, 28 Cath. U. L. Rev. 87 (1979).
Available at: <https://scholarship.law.edu/lawreview/vol28/iss1/2>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

FOR RICHER, FOR POORER: FEDERAL TAXATION AND MARRIAGE

*By Michael A. Mess**

Four Canons of Taxation:

- (I). *The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state.*
- (II). *The tax which each individual is bound to pay ought to be certain, and not arbitrary.*
- (III). *Every tax ought to be levied at the time, or in the manner, in which it is most likely to be convenient for the contributor to pay it.*
- (IV). *Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the state.*

—Adam Smith (1776)¹

No longer is the choice of marriage a simple, romantic decision. Under the present Internal Revenue Code, a taxpayer's marital status results in a variety of tax consequences. It is difficult to imagine that Congress consciously and deliberately intended to establish marital status as an important factor in federal income taxation. Nonetheless, through its amendments to the tax code, Congress has used marital status as a primary determinant of numerous tax questions. The quintessence of these changes is contained in the Tax Reform Act of 1969.² This Act created four separate tax rate schedules, each of which imposes a different liability based solely on the taxpayer's present or former marital status.³

* B.A. Purdue University, 1973; J.D. George Washington University, 1976; LL.M. in Taxation, George Washington University, 1978.

1. A. SMITH, *WEALTH OF NATIONS* (1776).

2. Pub. L. No. 91-172, 83 Stat. 487 (1969) (codified in scattered sections of I.R.C.).

3. The present four tax rate schedules are:

- (1) Single taxpayers;
- (2) Married filing joint returns;
- (3) Married filing separate returns; and

Although the tax rate schedules are not the only provisions in the tax code which rely on marital status in determining tax liability, they are the most visible example of the importance of marriage in federal income taxation.⁴ Their creation was the culmination of three separate changes previously enacted by Congress⁵ each resulting from political pressure exerted by various competing interest groups. Congress created the separate tax rate schedules as a simple and expedient means of placating these groups.⁶ Its solution, however, ignores the basic issues of who the proper tax unit should include and what role marital status should have in income taxation.⁷ Through this piecemeal approach, Congress could temporarily pacify the most vocal interest groups, but only at the expense of creating greater problems for those less vocal.⁸ Addressing the basic issues would necessitate a complete re-examination of the federal tax code as well as

(4) Head of household (single individuals with at least one dependent).

I.R.C. § 1.

4. Another highly visible tax provision based on marital status is the zero bracket amount, I.R.C. §§ 63(d), (e) (formerly known as the standard deduction). For married taxpayers filing jointly the amount is \$3,200, while for unmarried taxpayers (both single and head of household) the amount is \$2,200. For married individuals filing separately, the amount is \$1600. I.R.C. §§ 63(d), (e). Under the Internal Revenue Act of 1978, the zero bracket has been increased for tax years beginning after December 31, 1978. For married taxpayers filing jointly, the zero bracket amount will be \$3400; for unmarried taxpayers, \$2300; and for married individuals filing separately, \$1700. Internal Revenue Act of 1978, Pub. L. No. 95-600, § 901(b) (Nov. 6, 1978).

5. For a discussion of the legislative history of these congressional changes, see Section II *infra*.

6. Note, *Federal Income Tax Discrimination Between Married and Single Taxpayers*, 7 J.L. REF. 667, 678 (1974). See generally, *Tax Treatment of Single Persons and Married Persons Where Both Spouses are Working: Hearings Before the House Comm. on Ways and Means*, 92d Cong., 2d Sess. (1972) [hereinafter cited as *1972 Hearings*].

7. The tax unit refers to the group on which an income tax is imposed. The several alternatives are the individual unit, the marital unit (husband and wife), the family unit (spouses plus minor children), and the household unit (all individuals sharing a common abode). Thorson, *An Analysis of the Sources of Continued Controversy over the Tax Treatment of Family Income*, 18 NAT'L TAX J. 113, 114 (1965).

8. The competing interest groups include single and dual income married taxpayers, single taxpayers, and heads of household. The manner in which the head of household classification was created exemplifies Congress' stopgap approach to the discrimination issue. The Revenue Act of 1948, Ch. 168, § 301, 62 Stat. 114 (now I.R.C. § 1), permitted married couples to split their income thereby reducing their total tax burden. The head of household provision was enacted in 1951 to mitigate what was regarded as the harsh treatment accorded to widows, widowers and other single persons with dependents under this Act. The example of a widower with dependent children is particularly poignant:

Assume two executives, each with a wife and two children, have identical homes. They receive the same incomes and, in general, spend their incomes in substantially the same manner. Now, suppose the wife of one of the executives dies. In the following year, he was required under the original income splitting amendment to pay much higher taxes than his neighbor—even though he had to incur larger expenses to run the household than when his wife was alive—because he was auto-

tough political decisions concerning the role of taxation in American society. Since Congress is not likely to face these basic issues in the near future, the tax rate schedules will continue to be the focal point of any legislative action aimed at alleviating or minimizing the claims of tax discrimination based on marital status.

Congressional reluctance to undertake any thorough restructuring of the tax system stems from the difficulty of balancing conflicting equities. Married working couples criticize the present system because they pay more tax than do single taxpayers with comparable income who use either the single or head of household tax rate tables. Likewise, single persons complain of excessive taxation because they pay more than married couples with one spouse earning little or no income.⁹ Horizontal equity

matically denied the benefits of the double tax brackets used by married couples by virtue of his status as a single person.

1 HOUSE COMM. ON WAYS AND MEANS, 86TH CONG., 1ST SESS., TAX REVISION COMPENDIUM, COMPENDIUM OF PAPERS ON BROADENING THE TAX BASE 481-82 (Comm. Print 1959) (material submitted by Joseph Peckman) [hereinafter cited as TAX REVISION COMPENDIUM]. See notes 34-36 and accompanying text *infra*.

9. See Rothblum, *Tax Equity for Marrieds and Singles: A Permanent Dilemma?*, 4 TAX NOTES 3 (1976).

The difficult task of devising a solution to the marital status issue within the parameters of the present structure was explained by Edwin Cohen in testimony before the House Committee on Ways and Means:

Mr. Chairman, if you will forgive me for indulging briefly in a mathematical analysis, I think this problem may be well illustrated if you consider four cases that illustrate the nature of the problem and show the impossibility of a solution for all of them.

Case 1 is a single person who earns \$20,000.

Case 2, two single persons each earn \$10,000.

Case 3, a husband earns \$20,000 and a wife earns zero.

Case 4, a husband and wife each earn \$10,000.

If we want no penalty on remaining single—and a large group insists upon this—Case 1 must pay the same tax as Case 3. Single person earning \$20,000 pays the same as married couple earning \$20,000.

If we want no penalty on marrying, Case 2 must pay the same tax as Case 4. Two single persons earning \$10,000 each pay the same tax as a married couple each earning \$10,000.

If we want husband and wife to pay the same tax however they contribute to the family earnings, Case 3 pays the same tax as Case 4.

To summarize the tax results:

Case 1 equals Case 3.

Case 2 equals Case 4.

Case 3 equals Case 4.

Based on the fundamental mathematical principle that things equal to the same thing must be equal to each other, the result should then be that Case 1 equals Case 2, or, in other words, that the tax on a single person earning \$20,000 equals the tax on two single persons each earning \$10,000.

But that cannot be so if we are going to have a progressive income tax structure, and progressive taxation is a basic tenet of our income tax system. The tax on a

between married couples and single taxpayers with equal incomes¹⁰ and vertical progressivity¹¹ are difficult to achieve simultaneously. The problem is compounded when a distinction is also sought between married couples with one wage earner and those with two.

Although a solution to the problem may appear impossible, the purpose of this article is to discuss proposals for placing less reliance on marital status in federal income taxation. Each proposal will be analyzed in terms of neutrality, horizontal equity and vertical progressivity. Thus, any proposed solution will be viewed in terms of (a) the neutrality of its structure with respect to marital status,¹² (b) the equality of its treatment of taxpayers, irrespective of marital status, and (c) the extent to which it correlates tax liability with the taxpayer's ability to pay.¹³ A final solution to the problem of discrimination in federal income taxation by reason of marital status will be offered which will attempt to harmonize these three principles.

I. DISCRIMINATION CLAIMS

Two specific complaints of tax discrimination have been asserted. Single taxpayers complain that they are penalized by their choice of remaining unmarried, while dual income married taxpayers complain that they are penalized by their choice of remaining married. Although these claims appear to be contradictory, the enactment of the four tax rate schedules in 1969 makes each claim accurate.

The discrimination against single taxpayers has existed longer than the discrimination against dual income married taxpayers. The joint return provisions of the Revenue Act of 1948 created the single taxpayers' prob-

single person earning \$20,000—Case 1—must be greater than the total tax on two single persons each earning \$10,000 if we are to have a progressive rate structure. 1972 *Hearings*, *supra* note 6, at 78-79 (statement of Edwin S. Cohen, Assistant Secretary of the Treasury for Tax Policy).

10. Horizontal equity refers to taxing equally married couples and single individuals with the same income as well as married couples with one and two incomes.

11. Vertical progressivity means taxing higher incomes at higher rates. Our personal income tax structure is based partially on this principle. For example, single individuals with incomes of \$12,000 pay 18.83% of that income as federal tax while single individuals with incomes of \$16,000 pay 20.38%. See I.R.C. § 1(c).

12. Neutrality is achieved when the income tax on two persons who marry is neither more nor less than they paid on the same income before marriage. Bittker, *Federal Income Taxation and the Family*, 27 *STAN. L. REV.* 1389, 1395 (1975).

13. There is a prevailing sentiment in favor of progressive taxation. A. MURAD, *ECONOMICS, PRINCIPLES AND PROBLEMS* 222 (5th ed. 1970). Similarly, neutrality and horizontal equity are goals espoused by many authors and taxpayers. See, e.g., Alvarez, *Discrimination on the Basis of Sex and Marital Status in Tax and Related Laws*, 46 *CONN. B.J.* 496 (1972); Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *BUFFALO L. REV.* 49 (1972); Sjostrand, *Income Tax System Needs a New Motor, Not Just an Overhaul*, 54 *TAXES* 419 (1976).

lem.¹⁴ Later, when Congress sought to provide a degree of relief to the single taxpayer,¹⁵ it created the dual income married taxpayers' problem. The single taxpayers' discrimination claim will be illustrated first, in deference to their longer struggle against tax discrimination.

The basic argument of the single taxpayer is that the choice of marriage is a personal right; one which should not be a major determinative of tax liability.¹⁶ The addition of another dependent, after a taxpayer's marriage, can justify an additional personal exemption, which provides some tax relief. A reduction in the tax rate schedule based solely on the deci-

14. Pub. L. No. 471, § 301, 62 Stat. 114 (1948) (current version at I.R.C. § 1(a)). The joint return provision allows the married taxpayers to split their income equally between two spouses. This is referred to as income splitting. The provision works as follows. The aggregate income of the married couple is divided by two. The tax on one-half the aggregate income is determined and then multiplied by two to determine the tax liability of the married couple on their joint return. Since the tax rates are progressive, the tax on one-half the income multiplied by two is less than the tax on the full amount. TAX REVISION COMPENDIUM, *supra* note 8, at 475 (material submitted by Joseph Peckman). The different tax liability of a taxpayer as a result of his or her marital status is shown in Table 1.

TAXABLE
INCOME

TABLE 1
TAX LIABILITY

	A	B	C	D	L	M
3,200	0	145	242	140	0	0
7,200	620	900	1,042	850	418	620
11,200	1,380	1,840	2,078	1,710	1,152	1,380
19,200	3,260	4,170	5,002	3,850	2,892	3,260
31,200	7,100	8,940	10,938	8,220	6,072	7,100
55,200	18,060	22,050	24,822	20,340	14,700	18,060
103,200	45,180	53,790	56,610	49,780	39,660	45,180

This table assumes that each taxpayer has itemized deductions not exceeding the zero-bracket amount. In addition, in order to simplify the computation, the Table does not take into account the fifty-percent maximum tax limit on "earned income" provided by I.R.C. § 1348. The Revenue Act of 1978, however, has changed the zero bracket amounts, so that the actual tax liability for the respective taxpayers in Table 1 will be changed as of 1979. See Pub. L. No. 95-600 § 101(a) (Nov. 6, 1978).

The single taxpayers' complaint is reflected by comparing Taxpayer A with Taxpayer B, while the dual income married taxpayers' complaint is reflected by comparing Taxpayer B with Taxpayer C and Taxpayer E with Taxpayer F. As shown by the table, the complaints of both taxpayers are valid with the dollar discrimination increasing as the income of the taxpayer increases.

15. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (codified in scattered sections of I.R.C.).

16. See 1972 Hearings, *supra* note 6, at 26 (statement of Patty Cavin); Note, *Disparity in Federal Income Tax Rates: Discrimination Against the Single Taxpayer*, 4 IND. LEGAL F. 380 (1970-71); Rothblum, *supra* note 9, at 8.

sion to marry, however, goes too far and provides an economically unjustified and unfair tax benefit.¹⁷ The joint return provision is also contrary to the philosophy of the Internal Revenue Code because it provides the taxpayer with a clear tax benefit for a personal consumptive choice.¹⁸

A common justification for the tax benefit provided to married taxpayers is that marriage increases family responsibility and necessitates the lower tax liability.¹⁹ The problem with this rationale, however, is that the benefit is given to all married taxpayers, irrespective of any actual increase in responsibilities, such as the existence of children. Rather, the mere performance of a marriage ceremony provides the tax break.²⁰

The problem is the result of the two distinct tax units created by the joint return provision—the individual and the married couple. The Revenue

17. See TAX REVISION COMPENDIUM, *supra* note 6, at 479-80 (material submitted by Joseph Peckman). Peckman suggests that if the world consisted only of single income married couples and single persons who live alone, it would be inequitable to give any tax advantage other than an exemption to the married couples. *Id.* His rationale is that it is difficult to justify giving a tax rate reduction through the tax rate schedules to people who prefer to spend part of their income on a spouse rather than to spend it in other ways. *Id.*

Other individuals reach the same conclusion by arguing that the tax law should recognize that there are economics in marriage. The cost of housing and food, for example, may be lower for married couples than for single persons living separately. Moreover, the income tax makes no allowance for the imputed value of a housewife's services. Accordingly, it is argued, single income married couples have more ability to pay than two single persons with the same total income. *Id.*

18. Marriage is a personal consumptive choice in that the taxpayer has decided to consume some of his or her income jointly to reap the rewards of marriage. The payment of income taxes is an example of an expense that is not a personal consumptive choice while purchasing tickets for a sports event is an expense of personal consumption. See Bittker, *supra* note 12, at 1420-21.

19. See Oldman and Temple, *Comparative Analysis of the Taxation of Married Persons*, 12 STAN. L. REV. 585, 599 (1960).

20. The following examples illustrate the irrelevance of family responsibility to the tax break:

EXAMPLE 1:

Taxpayers X and Y both earned \$15,000 in 1977. Both were single until Taxpayer X married Z on December 31, 1977. Z earned no income in 1977. By filing a joint return for 1977, Taxpayer X pays \$756 less in federal taxes than does Taxpayer Y. Taxpayer X had no additional family responsibility in 1977, but saved tax dollars by merely marrying on the last day of the tax year, the date on which the determination of marital status for federal tax purposes is made. I.R.C. § 143.

EXAMPLE 2:

Taxpayers X and Y both earned \$15,000 in 1977. Taxpayer X was married for the entire year. Taxpayer Y was married until December 31, 1977, when Taxpayer Y's divorce from Z became final. Taxpayer X's spouse and Z earned no income in 1977. Taxpayer Y pays \$756 more in federal taxes than does Taxpayer X. Taxpayer Y had the same family responsibility as Taxpayer X for 1977, but paid additional tax dollars by merely becoming divorced on the last day of the year.

Act of 1951 further aggravated the problem²¹ by creating a new classification—head of household²²—which may be used when an unmarried taxpayer supports an additional person. The family responsibility rationale²³ is used to justify a tax reduction for the head of household, whose rate is halfway between those of the single and the married taxpayers.²⁴ The rationale apparently embodied in this compromise is that the head of household has family responsibilities but does not have the expenses of an additional spouse.²⁵ The head of household, however, needs to prove family responsibility to qualify for the lower tax rate schedule. In contrast, married taxpayers receive their tax benefit regardless of actual family responsibility.

A second justification offered for the married couples' tax benefit is that marriage creates additional living expenses.²⁶ Although marriage often increases living expenses, the tax benefit is received irrespective of any actual additional expenses. Furthermore, any actual expenses incurred are generally personal expenses which would not be deductible under the tax code.²⁷ Moreover, the personal exemption and the zero bracket amount are aimed at providing tax relief for such personal expenses.²⁸ Under the

21. See text accompanying note 78.

22. See Revenue Act of 1951, ch. 452, § 301, 65 Stat. 480 (1951) (current version I.R.C.

§ 1). A taxpayer qualified as a head of household if he or she:

- a. Is not married at the close of the taxable year,
- b. Is not a surviving spouse, and
- c. Maintains as his or her home a household which constitutes for the taxable year the principal place of abode of a son, stepson, daughter or stepdaughter, a descendant of a son or daughter of the taxpayer, father or mother of the taxpayer, or a dependent. I.R.C. § 2(b).

23. See notes 19 & 20 and accompanying text *supra*.

24. See, e.g., Table 1, *supra* note 14, at Col. D.

25. Jensen, *The Historical Discrimination of the Federal Income Tax Rates*, 54 TAXES 445, 449 (1976). Because heads of households did not participate in the same amount of income-sharing as did married couples, the benefits of income-splitting were not awarded to them. This compromise was adopted after the House version of the 1954 Code, giving heads of households the full benefits of income splitting, was ostensibly rejected in response to "a complaint that the provision did not treat all income groups equally and benefits primarily the middle- and upper-income groups." S. REP. NO. 1622, 83d Cong., 2d Sess. 5, reprinted in [1954] U.S. CODE CONG. & AD. NEWS 4623, 4634.

26. Support for this argument relies upon the premise that single persons do not generally maintain a household or support dependents. CONGRESSIONAL RESEARCH SERVICE, MONOGRAPH NO. 74-235E, MARITAL STATUS AS A FACTOR IN THE FEDERAL INCOME TAX TREATMENT OF INDIVIDUALS 6-7 (1974).

27. No deduction is allowed for personal, living or family expenses. I.R.C. § 262.

28. I.R.C. § 262. Each married couple gets two personal exemptions of \$750 each. The Revenue Act of 1978 raises the personal exemption to \$1000 for tax years beginning after December 31, 1978. Pub. L. No. 95-600, § 102(a) (Nov. 6, 1978). I.R.C. § 151. In addition, if the taxpayer chooses to itemize deductions, he is taxed on only those expenses which exceed the zero bracket amount. The zero bracket amount is \$3200 for either a mar-

separate rate schedules, married taxpayers thus receive another tax reduction solely because of their personal choice to marry.

The additional expense justification also ignores the theory of imputed income.²⁹ Although the married taxpayer with a single income may have additional expenses, he or she may also have additional services, primarily household chores, performed because of the additional person in the tax unit. These additional services can be performed without cost to the married taxpayer, while the single taxpayer must either pay for the services or reduce his or her free time in order to perform these tasks.³⁰

Thus, the additional expense argument looks only at one side of the marriage issue. The tax benefit provided to married taxpayers effectively grants a tax deduction for additional expenses without taxing the imputed income generated by the spouse. Since imputed income is not included in taxable income for either single or married taxpayers, the tax break given to married taxpayers effectively subsidizes their personal living expenses, with single taxpayers paying the cost by way of increased tax liability.

Regardless of any imputed income, the additional expense argument has validity only at a subsistence income level. At this level, most income is spent on necessary living expenses. Beyond the subsistence level, however, the expenses of a taxpayer are a consumptive choice based on personal preferences. Consequently, at higher income levels, the decision to

ried couple filing jointly or a surviving spouse, \$2200 for a single individual who is not a surviving spouse and \$1600 for a married individual filing separately. I.R.C. § 63. The Revenue Act of 1978, however, raises the zero bracket amount, effective 1979. See note 4 *supra*.

29. Imputed income is defined as the economic value of an asset or service to a taxpayer based on the taxpayer's ownership or receipt of the benefit from the asset or service. For example, the potential rental income from a personal residence would be imputed income to the owner. Imputed income is not taxed under the present tax code. See Bittker, *supra* note 12, at 1425-26. The following example demonstrates how imputed income of a married taxpayer can offset the additional expenses incurred:

Taxpayers X and Y each earned \$15,000 in 1977. Taxpayer X was married to Z, who earned no income in 1977. Taxpayer Y was single. In 1977, Taxpayer Y paid \$2,000 to Q to perform necessary household tasks. Z performed the same household tasks for Taxpayer X. Taxpayer X had additional living expenses of \$1,500 in 1977 because of the two persons in the household. Taxpayer Y paid \$756 more in federal taxes. So Taxpayer X had \$1,256 more spendable income because of being married. Taxpayer X received \$2,000 of imputed income from Z's service, yet only had to spend an additional \$1,500 to obtain those services. In addition Taxpayer X receives the tax benefit of paying lower federal taxes by filing a joint return.

30. Dual income married couples are also "treated unfairly" with respect to single income married couples under income splitting. This occurs not "because a system based on the combined income of married couples is unfair, but because the taxable income of the single income couple is understated in that it does not include the value of services provided by the spouse who stays at home." See G. BREAK & J. PECKMAN, *FEDERAL TAX REFORM, THE IMPOSSIBLE DREAM?* 34-35 (Brookings Institution 1975).

remain single should not penalize the taxpayer by increasing his or her tax liability. Even accepting the common assumption that single member households require less income than two member households, the argument that single taxpayers have a greater ability to pay³¹ loses its persuasiveness once the subsistence needs of a taxpayer have been satisfied.³²

In summary, the single taxpayer's argument is that the horizontal equity between taxpayers must be measured between individuals with the same income, notwithstanding their marital status. The tax should be imposed on the individual as the basic tax unit, since it is the individual's ability to pay prior to his or her consumptive choices that is the proper measuring rod. The marriage of a taxpayer is a personal preference and does not in itself produce family responsibilities to justify lower tax. An additional exemption is available to offset the additional expenses of choosing to take on a spouse. Family responsibility justifies a reduction of tax liability for both married and unmarried individuals who actually have dependents in their care. Only when the issue of family responsibility is considered separately from the issue of marriage will neutrality with respect to marital status be achievable.

The ranks of single taxpayers are growing;³³ therefore, the issue of justification for the additional tax burden will not quietly disappear. The reduction of the single taxpayer's tax rate by the Tax Reform Act of 1969 illustrates the political pressure exerted by single taxpayers.³⁴ The tax rate reduction, however, did not eliminate discrimination against single taxpayers and, in fact, created a new discrimination against dual income married taxpayers. Because of the reduction, married taxpayers who are both employed are penalized for being married.

31. Cf. BUREAU OF LABOR STATISTICS, UNITED STATES DEP'T OF LABOR, REVISED EQUIVALENCE SCALES FOR ESTIMATING EQUIVALENT INCOMES OR BUDGET COSTS BY FAMILY TYPE 4 (1968) [hereinafter cited as BUREAU OF LABOR STATISTICS]. This report attempts to compare "budget costs for specific standards of living for various types of families." *Id.* at iii. The report is currently undergoing a major revision.

32. As Professor Bittker stated:

[T]he fact that a single taxpayer could survive on \$3,000 a year while a married couple would need \$4,000 for a similar survival kit is a flimsy need for concluding that a single taxpayer with \$75,000 of income can live as well, and hence has about the same taxpaying capacity, as a married couple with a \$100,000 of income.

Bittker, *supra* note 12, at 1424.

33. The number of unmarried individuals had declined steadily from 1920 to 1970. See note 81 *infra*. Since 1965, however, the percentage of the population over 18 which is married has begun to decrease. In 1976, 69.0% of the population was married compared to 73.2% in 1965. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 48 (1977) (Marital Status of the Population, by Sex 1940 to 1976).

34. See e.g. CONGRESSIONAL RESEARCH SERVICE, *supra* note 26, at 8; Jensen, *supra* note 25, at 452; Richards, *Discrimination Against Married Couples Under Present Income Tax Laws*, 49 TAXES 526, 534-36 (1971); Note, *supra* note 6, at 677 n.59.

The basic argument of the dual income married taxpayers echoes the argument of single taxpayers; the choice of marriage is a personal right and should not be determinative of a taxpayer's tax liability. After the Tax Reform Act of 1969, dual income married taxpayers filing separately continue to be taxed at the prior law's single taxpayer's rate, while single taxpayers are taxed at the new reduced rate.³⁵ Therefore, the dual income married taxpayer is forced to bear a comparatively higher tax burden than the single taxpayer.

This discrimination can only be shown by a comparison with single taxpayers. The joint return provision requires that the income of two spouses be added to determine the tax liability.³⁶ No distinction is made for the allocation of the income earned between the two spouses since only the total income is necessary to determine tax liability. Because the tax rates are progressive, the aggregation of income of both spouses increases the marginal tax rate to be paid on the total income of the married taxpayers.³⁷ Thus when compared to two single taxpayers, the tax penalty for dual income married taxpayers is the greatest when the incomes of two spouses are equal.³⁸ With equal income, the advantage of income splitting under the joint return provision is negated because the average income of the two spouses equals their actual income and the marginal tax

35. Prior to the Tax Reform Act of 1969, the difference between tax rates applied to the incomes of single persons and married couples was as great as 42% at some income levels. Under the rate schedule established by the Act, the difference is never greater than 20%. The Act also provided a new head of household rate schedule halfway between the schedule for joint returns and the new schedule for single persons. CONGRESSIONAL RESEARCH SERVICE, *supra* note 26, at 8.

36. See I.R.C. §§ 1(a), 6013. The difference in tax liability imposed by this requirement is shown in Table 1, note 14 *supra*.

37. Marginal tax rate is defined as the tax rate percentage a taxpayer pays on an additional unit of income. J. GWARTNEY, *ECONOMICS, PRIVATE AND PUBLIC CHOICE* at 483, 488 (1976). For example the tax on \$15,000 for a single taxpayer is \$2,630 plus 29% of \$800. The marginal tax rate is 29% since each additional dollar of income will be taxed at 29% until the taxpayer's income reaches \$16,200. I.R.C. § 1(c). The Revenue Act of 1978 has widened the rate brackets for tax years beginning December 31, 1978. For example, the tax on \$15,000 for a single taxpayer would be \$2,605; until the taxpayer's income reaches \$18,200. Moreover, the marginal tax rate is 30% for each additional dollar of income. Pub. L. No. 95-600, § 101(a) (Nov. 6, 1978).

38. Since the income is aggregated, divided by two and the same tax schedule applied to each half, and because the schedule is progressive (the marginal tax rate increases with income), the marginal tax rate applied to each half is lower than the average rate that would be applied to each spouses' income. If the spouses had equal incomes, the marginal tax rate applied to each income would be the same as that applied following income aggregation which consequently would have no benefit. Since the benefit of income splitting offsets the marriage penalty, the penalty is greatest when spouses have equal income. See *TAX REVISION COMPENDIUM*, *supra* note 8, at 474-79 (material submitted by Joseph Peckman). Note that income splitting is permitted only when a couple files a joint return.

rate, as applied to the income of each spouse, is not reduced.³⁹

On the other hand, the basic justification for the additional tax burden on dual income married taxpayers is that all married taxpayer units, whether single or dual income, which achieve the same level of income should pay the same tax. While this justification does satisfy the principle of equality between like tax units, it does not satisfy the principle of equality between two individuals who recognize the same income. A married taxpayer unit which has the same income as a single taxpayer increases its tax liability when part of its income is earned by each spouse. The inability to choose the proper tax unit for federal taxation has created this inconsistency. On the same amount of income, the tax paid by the single income married taxpayer is less than that paid by a single taxpayer, whose tax is less than that paid by a dual income married taxpayer. The single income married taxpayer unit, however, pays the same tax as the dual income married taxpayer unit.⁴⁰ By comparing the married couple tax unit with the single taxpayer unit, the principle of tax equality is difficult to achieve. Only by comparing equal income earning units and ignoring marital status can the principle of tax equality be achieved.

The additional expense argument which has been used to justify the joint return provision can more effectively be used to justify a tax break for dual income married taxpayers as opposed to single income married taxpayers. Dual income married taxpayers not only have the additional living expenses of two persons, but also have the additional work expenses incurred by maintaining two jobs in the same tax unit.⁴¹ Single taxpayers who live together have the same additional expenses as the dual income

39. The following examples demonstrate the marriage penalty for dual income married taxpayers:

EXAMPLE 1:

Taxpayers X and Y are married to each other and each earned \$15,000 in 1977. Taxpayer Z earned \$30,000 in 1977. Taxpayer Z is married to Q, who earned no income in 1977. Taxpayers X and Y file a joint return and Taxpayer Z files a joint return. The tax liability for Taxpayers X and Y was equal to Taxpayer Z. In fact, if Taxpayers X and Y filed "married filing separate tax returns," their tax liability would be \$101 greater than Taxpayer Z.

EXAMPLE 2:

Taxpayers Q, X, Y and Z each earned \$15,000 in 1977. Taxpayers X and Y are married to each other. Taxpayers Q and Z live together. Taxpayers X and Y file a joint return and pay \$1,025 more federal tax than the combined tax paid by Taxpayers Q and Z, who each file single returns. The decision to remain married has caused Taxpayers X and Y a tax penalty of \$1,025, although they still pay the same tax all married couples with an income of \$30,000 pay.

See tax schedules, I.R.C. § 1. See also Table 1, note 14 *supra*.

40. See Rothblum, *supra* note 9, at 5.

41. Both spouses usually incur expenses for items such as transportation, lunches and

married taxpayers. Although no express deduction is allowed for these additional expenses, single taxpayers nonetheless pay a lower combined federal tax than dual income married taxpayers simply because they remain unmarried.⁴²

The imputed income argument raised by single taxpayers, however, does not apply to dual income taxpayers, since, in the latter case, neither spouse is available to provide household services.⁴³ The additional services performed for single income married taxpayers are without cost, while dual income married taxpayers, like single taxpayers, must either pay for the services or reduce their leisure time in order to perform such chores.

A final justification offered for the marriage penalty against the dual income couple is to discourage one spouse from working so as not to take away the job of a person who is the single breadwinner for another family.⁴⁴ This argument, however, ignores the fact that 46.3% of family units have no children and thus have no additional household and family responsibilities to be managed by the second spouse.⁴⁵ Moreover, this argu-

more formal clothing that cannot be deducted under the tax laws. See Alvarez, *supra* note 13, at 496-500; Bittker, *supra* note 12, at 1431; Blumberg, *supra* note 13, at 59-66.

42. See TAX REVISION COMPENDIUM *supra* note 8, at 480-81 (material submitted by Joseph Peckman).

43. The following examples illustrate the additional expenses and the lost imputed income of dual income married taxpayers with respect to single income married taxpayers and single taxpayers.

EXAMPLE 1:

Taxpayers X and Y are married to each other and each earned \$15,000 in 1977. Taxpayer Z earned \$30,000 in 1977. Taxpayer Z is married to Q, who earned no income in 1977. In 1977 Taxpayers X and Y paid \$2,000 to J to perform necessary household tasks. Q performed the same household tasks for Z. Taxpayers X and Y had additional work expenses of \$1,000 in 1977 because of two jobs in the household. The tax liability for Taxpayers X and Y was equal to Taxpayer Z. Taxpayer Z had \$3,000 more disposable income because Q did not work, as well as receiving \$2,000 of imputed income from Q's services.

EXAMPLE 2:

Taxpayers Q, X, Y and Z each earned \$15,000 in 1977. Taxpayers X and Y are married to each other. Taxpayers Q and Z live together. Both Taxpayers X and Y and Taxpayers Q and Z paid \$2,000 to J in 1977 to perform necessary household tasks. Both household units had additional work expenses of \$1,000 in 1977 because of the two jobs in the household. Taxpayers X and Y filed a joint return and pay \$1,025 more federal taxes than the combined tax paid by Taxpayers Q and Z. Taxpayers X and Y paid a marriage penalty of \$1,025, and also incurred the same additional expenses as Taxpayers Q and Z relating to a dual income household.

44. See Blumberg, *supra* note 13, at 92 n.172; TAX REVISION COMPENDIUM, *supra* note 8, at 491-92 (material submitted by Eugene J. Brenner).

45. The number of childless families has stayed fairly constant since 1950. It ranged from a high of 48.3% in 1950 to a low of 43.0% in 1960. The percentage has been increasing slightly every year since 1970, with the percentage of childless families in 1976 at 46.3%. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 60 (1977)

ment fails to recognize that many individuals prefer careers to household chores. Finally, many families need two incomes to keep pace with inflation.⁴⁶ Thus, although increasing the marginal tax rate results in a tax disincentive to the second spouse's working, the disincentive has not stopped the growth of dual income married families.⁴⁷

In summary, the dual income married taxpayers' argument is the same as the single taxpayers' argument: the tax should be imposed on the individual as the basic tax unit. In order to achieve neutrality with respect to marriage, family responsibility should be separated from the issue of marital status.

II. HISTORICAL DEVELOPMENT

The legislative history of the four present tax rate schedules is a vivid example of legislative indecision. The historical development clearly indicates that the role of marriage and the choice of the proper tax unit have not been carefully considered in federal income taxation. Since 1913 the effect of marital status on taxation has evolved through three distinct stages,⁴⁸ each stage implemented to cure a past problem without consideration of the additional problems it created. Although originally based on the individual, the tax unit was eventually changed to use the married tax-

(Percent Distribution of Families, by Number of Own Children Under 18 Years Old: 1950 to 1976).

46. The number of married couples in which both spouses work has been steadily increasing. In 1950, only 23.8% of married women with the husband present were employed in the labor force. By 1976, 45.0% of married women were working. *Id.*, Table 634 (Married Women (Husband Present) in the Labor Force, by Age and Presence of Children: 1950 to 1976). Since the husband is the traditional wage earner of the family, the number of working wives shows the increase in dual income married couples.

47. Discrimination has encouraged couples to attempt to avoid the marriage penalty by engaging in tax-motivated divorces and remarriages. Since tax status is determined on the last day of the tax year, couples obtain a divorce at the end of December so as to be unmarried for the tax year. I.R.C. § 143(a)(1). The couples then remarry early in January as they intended. The cost of a trip to a receptive Caribbean jurisdiction in order to obtain the divorce is far less than the tax savings involved. *See Feld, Divorce, Tax-Style*, 54 TAXES 608, 609 (1976).

In response, the Internal Revenue Service issued Rev. Rul. 76-255, 1976-2 C.B. 40, which states that the tax law does not contemplate a sham transaction that manipulates year-end marital status for federal income tax purposes. Under the ruling, such couples are considered married for tax purposes.

48. *See* notes 50, 71 and 82 and accompanying text *infra*. In the first stage, the tax unit was the individual. The Revenue Act of 1948 implemented discretionary joint returns and made married taxpayers the basic tax unit. With enactment of separate rate schedules, marital status became important for the first time. The Tax Reform Act of 1969 left married taxpayers as the basic unit, while reducing the single taxpayers' rate schedule. The 1969 Act effectively made joint returns mandatory. Thus, for the first time, marriage could mean a substantial tax penalty.

payer as the basic unit. At no time, however, was the principle of horizontal equity properly considered.⁴⁹

When the initial income tax law was enacted in 1913, only one tax rate schedule was adopted.⁵⁰ The individual was the basic tax unit for federal taxation, and the individual's marital status did not affect his tax liability. The married taxpayer was allowed an additional personal exemption, but was taxed at the same rate as the single taxpayer.⁵¹ Every individual, whether married or single, who received income from any source was responsible for filing his or her tax return. It was not until 1918 that a joint return for married couples was recognized by statute.⁵² Rather than providing a tax benefit, the joint return increased a married couple's tax liability if both recognized income during the tax year.⁵³ The 1918 joint return provision required the married taxpayers to aggregate their individual incomes and pay tax on the total.⁵⁴ With a single progressive rate for all taxpayers, the joint return usually produced a higher tax liability for dual income married taxpayers.

The legislative history behind the enactment of the original Revenue Act of 1913 is devoid of any discussion as to why the individual taxpayer, irrespective of marital status, was chosen as the proper tax unit. There are numerous plausible reasons for the choice, including the existence of a large number of single individuals,⁵⁵ the trend toward recognition of separate property rights for women,⁵⁶ and a tacit assumption that the term "individual taxpayer" referred only to the male gender. In all probability, it is likely that the issue of marital status was not considered and that the language of the Act merely reflected the contemporary drafting style.⁵⁷

49. See Note, *supra* note 6, at 676.

50. Revenue Act of 1913, ch. 16, § II(A)(1), (2), 38 Stat. 166 (1913) (now I.R.C. § 1).

51. Revenue Act of 1918, ch. 18, § 223, 40 Stat. 1074 (1919) (current version at I.R.C. § 1).

52. See Bittker, *supra* note 12, at 1400.

53. Joint filings were advantageous only in unusual circumstances. For example, a joint return could increase a couple's deductions for charitable contributions by increasing their adjusted gross income and hence raising the deduction ceiling which is determined by a percentage of adjusted gross income. *Id.* at 1400 n.20.

54. Revenue Act of 1918, ch. 18, § 223, 40 Stat. 1074 (1919) (current version at I.R.C. § 1).

55. In 1920 single individuals over the age of 14 were 41% of the population. Single individuals include those widowed and divorced. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 46 (1975) (Marital Status of the Population, by Sex 1920 to 1974).

56. See Thorson, *supra* note 7, at 115.

57. The Revenue Act of 1913 imposed a tax on every individual: "upon the entire net income arising or accruing from all sources . . . to every citizen of the United States . . . and to every person residing in the United States though not a citizen thereof . . ." Revenue Act of 1913, ch. 16, § II(A)(1), 38 Stat. 166 (1913) (current version at I.R.C. §§ 1, 61).

The single tax rate schedule provided fertile ground for artificial income shifting schemes⁵⁸ because the progressive tax structure made it advantageous to allocate income to other taxpayers. Splitting the income among several taxpayers, usually within the same family, lowered the marginal tax rate on each segment of the income and, when averaged, was less than the marginal rate on the income attributed to only one taxpayer.

In the early years of its development, the income tax was primarily a tax on the wealthy, and artificial income shifting schemes were tolerated. The loss of revenue by such schemes was not sufficient to create resentment among other taxpayers since most individuals did not pay federal income taxes.⁵⁹ During this period, all controls on income shifting were left to the courts and to the requirements of state property laws. The United States Supreme Court decided two cases in 1930 which set important parameters on the income shifting devices which could legitimately reduce an individual's tax liability. The initial case was *Lucas v. Earl*⁶⁰ in which the Court distinguished between earned income and investment income. The Court held the husband fully taxable on his earned income, even though he and his wife had legally contracted to split their income well before the enactment of the income tax law.⁶¹

After *Lucas* it became virtually impossible for a taxpayer to shift his or her earned income to another taxpayer to lower tax liability. Nonetheless, unearned income such as dividends, rents, interest, and royalties could be shifted easily in order to lower tax liability. Ownership of the underlying property was considered to be the source of the income. As long as legal ownership was effectively shifted to another taxpayer under state law, no inquiry into the relationship between parties was made.⁶²

The language used is similar to that found in the Constitution and several amendments to the Constitution, in particular the fourteenth amendment. The language reflects an attempt to encompass all possible situations through a broad and general drafting style.

58. Income is shifted when a taxpayer in a higher tax bracket transfers it to one in a lower tax bracket. Such shifts occur generally where there is a close relationship between the taxpayers. Various artificial means of shifting income, including gifts, trusts and family partnerships, are used.

59. See Note, *supra* note 16 at 383. The Revenue Act of 1928 taxed the net income ("net income" is analogous terminology to present-day "taxable income") of every individual at a rate equal to the sum of the following: (a) 1 1/2% of the first \$4,000 of the amount of net income in excess of the credits allowed, (b) 3% of the next \$4,000 of such excess amount, and (c) 5% of the remainder of such excess amount. Revenue Act of 1928, ch. 852, § 11, 45 Stat. 791 (1928) (current version at I.R.C. § 1). The current rates for single individuals progress from 14% of the excess over \$2,200 to 70% of the excess over \$102,200. See I.R.C. § 1(c). But see changes in the Revenue Act of 1978, Pub. L. No. 95-600 (Nov. 6, 1978) effective as of January 1, 1979.

60. 281 U.S. 111 (1930).

61. *Id.* at 113-15.

62. See Bittker, *supra* note 12, at 1401.

The general principle of taxing income to the one who earned it, or to the taxpayer who owned its source, was modified by *Poe v. Seaborn*.⁶³ In *Poe*, the Supreme Court distinguished community property states from common law states with respect to income splitting. The Court held that under the federal tax laws, federal taxation was dependent on state property laws to determine the ownership of property.⁶⁴ Nevertheless, it found that under community property laws, each spouse had a vested right to one-half of the income of the other spouse, whether the income was earned or unearned.⁶⁵ The Court distinguished *Lucas* by noting that the vested right in community property states arose by operation of law rather than by affirmative action on the taxpayers' part.⁶⁶ Married taxpayers in the eight community property states⁶⁷ could thus split all their income, including earned personal income.

Since income taxation was still not universal, the full impact of *Lucas* and *Poe* did not immediately reach most individuals. The low federal income tax rates, however, could not generate enough income to offset the expenditures required by the depression of the 1930's and World War II. Therefore, tax rates increased sharply.⁶⁸ Due to *Poe*, these increases created conspicuous advantages for married taxpayers in community property states. As a result, many common law states began adopting community property laws for federal tax purposes. By 1948 five states had adopted a form of community property laws and several others were seriously considering the issue.⁶⁹

63. 282 U.S. 101 (1930).

64. *Id.* at 110.

65. *Id.* at 111.

66. *Id.* at 117.

67. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. See Note, *supra* note 6, at 671-72 n.23.

Poe made it clear that state property law would override the principle of taxing income to the actual earner, in the absence of a federal definition of ownership. This allowed a geographic anomaly in the growth of the United States to play an important role in federal taxation. The eight states which had community property laws had a Spanish legal heritage as compared to the common law states which generally had an English legal heritage. *Id.* at 671-72. Although the United States had been independent over 150 years, a heritage developed well before independence became important in deciding a federal tax policy.

68. See Revenue Act of 1948, § 301, 62 Stat. 114 (1948) (now I.R.C. § 1). See Note, *supra* note 16, at 383-84.

For example, a married taxpayer with two dependents and an adjusted gross income of \$15,000 would have paid \$831 in tax in 1939. By 1943, his tax bill would have been \$4,625. *Hearings on H.R. 4790 Before the Senate Finance Comm.*, 80th Cong., 2d Sess. 92 (1948) (testimony of John Hanes).

69. Oklahoma and Oregon authorized their married citizens to elect to be governed by community property laws. The Supreme Court in *Commissioner v. Harmon*, 323 U.S. 44 (1944), however, held that these laws were substantially the same as the income splitting contract held to be ineffective for federal tax purposes in *Lucas v. Earl*, 281 U.S. 111 (1930).

Due to the difficult problems that would be faced by a state converting to community property law,⁷⁰ it was apparent that federal legislation would be a simpler solution. The end of the war brought pressure to reduce taxes; therefore to achieve that purpose, as well as to eliminate the tax advantages of the community property law states, the joint return provision was adopted in 1948.⁷¹ Adopting a second tax rate schedule solely for use by married taxpayers,⁷² the joint return provision was discretionary and legitimized income splitting between spouses by effectively adopting a nationwide community property system for federal taxation purposes. The second tax rate schedule taxed married taxpayers as if each spouse earned one-half of the aggregate income of the couple. With the progressive tax structure, this produced a substantial tax savings for married taxpayers.

Although the decision to enact the joint return provision stemmed from congressional desire to end the tax advantage enjoyed by married taxpayers in community property law states,⁷³ it unintentionally forced a major shift in the basic tax unit for federal taxation. Upon enactment, married

Oklahoma and Oregon promptly replaced their optional systems with mandatory community property systems. See Bittker, *supra* note 12, at 1411-12.

Hawaii, Nebraska, Michigan and Pennsylvania passed community property laws, and by 1948, Massachusetts and New York were considering similar steps. See Note, *Epilogue to the Community Property Scramble: Problems of Repeal*, 50 COLUM. L. REV. 332, 332 n.4 (1950) and statutes cited therein.

70. See Bittker, *supra* note 12, at 1412 n.65; Note, *supra* note 16, at 384. In addition, it is doubtful whether the Internal Revenue Service would have been able to cope with the administrative problem of passing on the thousands of close cases. See TAX REVISION COMPENDIUM, *supra* note 8, at 473.

71. Revenue Act of 1948, § 301, 62 Stat. 114 (1948) (now I.R.C. § 1). See CONGRESSIONAL RESEARCH SERVICE, *supra* note 26, at 5-6; Bittker, *supra* note 12, at 1413. Although the major justification for the introduction of income splitting was to equalize tax treatment for residents of all states, many argued that married couples generally have greater living expenses than do single persons and that married couples therefore should have a reduced tax liability. See notes 26-32 and accompanying text *supra*.

72. See Internal Revenue Code of 1939, ch. 1, § 12(d), 53 Stat. 47 (1939) (now I.R.C. § 301). See CONGRESSIONAL RESEARCH SERVICE, *supra* note 26, at 6; Bittker, *supra* note 12, at 1412-13.

73. Since the provision lowered taxes for married taxpayers in common law states and did not raise taxes for married taxpayers in community property states, it was favored by most married taxpayers. Other factors influencing the passage of the Revenue Act of 1948 included approval by the Treasury Department and recognition by politically astute legislators that splitting income would assure the votes necessary for victory in the running tax battle with the President. U.S. DEPT. OF TREASURY, *THE TAX TREATMENT OF FAMILY INCOME* (1947), reprinted in *Hearings Before the House Comm. on Ways and Means on Revenue Revisions, 1947-48*, 80th Cong., 1st Sess. 846-74 (1947). The adoption of the split income plan was stressed repeatedly in congressional debate as justifying enactment of tax-reduction legislation. See Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1104-05, 1105 nn.31 & 32 (1948).

taxpayers became the basic tax unit.⁷⁴ For the first time, the role of marital status was important in federal taxation because income splitting reduced taxes and, accordingly, made it advantageous to be married. The consequences of this change in the role of marriage for taxation purposes were not considered.⁷⁵ The resultant shift of the tax burden to single taxpayers was accomplished without a discussion of what the relationship of single taxpayers to married taxpayers should be. Legislative history is devoid of discussion of the higher tax burden placed on single taxpayers or the claim that family responsibility and additional expenses justifies the difference in the burden.⁷⁶ It was not until complaints of tax discrimination surfaced that the tax benefit afforded married taxpayers was justified as an allowance for family responsibility and the additional expenses of married taxpayers.⁷⁷

The use of the family responsibility justification led to the enactment of a third tax rate schedule in 1951.⁷⁸ The head of household tax rate schedule provided single taxpayers who had family responsibilities, such as a dependent child or parents, with one-half the benefits provided married taxpayers under the joint return provision.⁷⁹ Congress, by accepting the family responsibility justification for the joint return provision, was placed in the position of having to adjust other taxpayers' tax liability accordingly. The creation of the head of household classification was a tacit recognition by Congress that married taxpayers were now the basic tax

74. To achieve tax equity, the split income plan required a tax based on a system that disregarded, as between husband and wife, the legal ownership of income-producing property. Consequently, the married couple had to be viewed as a unit. See Surrey, *supra* note 73, at 1114.

Nevertheless, a Congressional report, containing a section entitled "Equalization of Tax Burdens of Residents of Community Property and Common-Law States", dealt only with the need for geographic equalization and ignored the decision to make the married couple the basic tax unit. H.R. REP. NO. 1274, 80th Cong., 2d Sess. 47-49 (1948).

75. A Treasury Department report and testimony before the House Ways and Means Committee both warned that income splitting was not a complete solution to the inequity problem since it left single taxpayers with an unjustifiably high tax burden. See U.S. DEPT. OF TREASURY, THE TAX TREATMENT OF FAMILY INCOME, reprinted in *Hearings on Community Property and Family Partnerships Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. 846, 852-66 (1947); *Hearings on Community Property and Family Partnerships Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. 898 (1947) (testimony of Murray Flack). The congressional committee reports, however, did not mention this shortcoming of the income splitting proposal. S. REP. NO. 1013, 80th Cong., 2d Sess. reprinted in [1948] U.S. CODE CONG. & AD. NEWS 1163; H.R. REP. NO. 1274, 80th Cong., 2d Sess. reprinted in [1948] U.S. CODE CONG. & AD. NEWS 1258. See Note, *supra* note 6 at nn.50-53 and accompanying text.

76. See authorities cited note 75, *supra*.

77. See Bittker, *supra* note 12, at 1416-17.

78. Revenue Act of 1951, ch. 521, § 301, 65 Stat. 480 (1951) (now I.R.C. § 1(b)).

79. *Id.*

unit for federal taxation. A second adjustment was made in 1954 with the adoption of the surviving spouse provision, which enabled a surviving spouse to use the joint return provision for two years after the death of his or her spouse, given the requisite family responsibility.⁸⁰

The extra tax burden on single taxpayers quickly earned the battle cry of a "singles penalty." The single taxpayers pressed their claims of tax discrimination with little success,⁸¹ however, until Congress reexamined the single tax rate schedule and enacted the Tax Reform Act of 1969. This Act created the present four tax rate schedules.⁸² The change was effectuated by reducing the single taxpayers' schedule and making a new "married filing separate returns" rate schedule from the previous singles' tax rate schedule.⁸³

In deciding to reduce the single taxpayers' rate schedule, Congress concluded that the tax burden on single taxpayers was too great. Instead of reexamining the justifications of the joint return provision, however, Congress merely provided single taxpayers with a rate reduction. By so doing, it apparently accepted the family responsibility and additional expense justifications for the tax break given married taxpayers.⁸⁴ Because of its failure to reexamine these justifications, however, the single taxpayers' rate reduction did not end the singles penalty, but in fact created a new marriage penalty. Thus for dual income married couples, when the incomes approach equal amounts, the rate of tax on each income is higher than if the couple had chosen not to marry.⁸⁵

80. I.R.C. § 2(a). A surviving spouse is defined as a widow or widower whose spouse died within one of the two previous taxable years and whose home is the principal place of abode for a dependent child. *Id.*

81. Perhaps this was due to the decrease in the number of single taxpayers. The percentage of single individuals declined from 22.8% of the population over the age of 14 in 1950 to 16.3% of the population over the age of 18 in 1970. If divorced and widowed individuals are included in the percentages, the percentage of single taxpayers declined from 33.0% of the population in 1950 to 28.4% in 1970. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, at Table 48 (1977).

82. See I.R.C. § 1(c). Under the new rate schedule, tax liability for single persons is never more than 20% in excess of that paid on a joint return with the same taxable income. The 20% excess contrasts with 42% excess under prior law. The Act also provided a new head of household rate schedule halfway between the schedule for joint returns and the new schedule for single persons. See CONGRESSIONAL RESEARCH SERVICE, *supra* note 26, at 8.

83. The current singles tax rate schedule is halfway between the current married filing separate and married filing jointly rate schedules. See I.R.C. § 1.

84. The Senate noted that although some difference between tax rates of single and married persons is justified to reflect the extra expenses of married taxpayers, the existing differential of 42% could not be justified on this basis. S. REP. NO. 552, 91st Cong., 1st Sess. 262, reprinted in [1969] U.S. CODE CONG. & AD. NEWS 2027, 2030-31.

85. See Rothblum, *supra* note 9, at 5. The 1969 granting of partial income splitting to single persons through the reduced rate schedule, without granting comparable benefits to

Prior to the 1969 reform, married persons filing separately could use the single persons' rate schedule. The 1969 reform, however, restricted these taxpayers to the old singles' rate schedule which is generally disadvantageous in comparison to the joint return schedule.⁸⁶ Consequently, dual income married couples with comparable earnings could not escape the marriage penalty. This created the third stage in the role of marital status in federal taxation. No longer was marriage solely a tax break, but now could be a substantial tax penalty. Nevertheless, the basic tax unit remained the married couple, since all married taxpayers with the same income still had the same tax liability.

The Tax Reform Act of 1969 was enacted without any discussion of the marriage penalty it created. Instead, the discussion of the new rate schedule was centered around providing tax relief to single taxpayers.⁸⁷ Although a solution to both the singles penalty and the marriage penalty would be a return to the individual as the basic tax unit,⁸⁸ unfortunately the two taxpayer groups affected by the discrimination cannot agree on a common solution. At the present time, each group is pushing for a quick solution to reduce its own tax liability and has little concern for the resulting tax consequences to other taxpayers.⁸⁹ To single taxpayers, the "married filing jointly" tax rate schedule is the quick solution; while to dual income married taxpayers, the single tax rate schedule is the answer.

Because of the increasing number of dual income married taxpayers and the publicity about tax motivated divorces,⁹⁰ the marriage penalty is being discussed more frequently. Various proposals have been mentioned as possible solutions to tax discrimination claims of dual income married and single taxpayers. No concrete proposal to deal with the marriage penalty issue, however, is being seriously discussed by Congress.⁹¹ Nor has Congress shown any willingness to discuss realistically the issue of the proper

married persons who file separate returns, is primarily responsible for the marriage penalty phenomenon. See CONGRESSIONAL RESEARCH SERVICE, *supra* note 26, at 13.

86. See Bittker, *supra* note 12, at 1429-30. The effect was a mandatory joint return. *Id.* at 1429.

87. See Note, *supra* note 6, at 678. *But see* Bittker, *supra* note 12, at 1431. Bittker views the price of the 1969 reform as either a penalty on some married couples or abandonment of the 1948 principle of imposing equal taxes on equal income couples. Certainly Congress never intended to create the marriage penalty when it attempted to alleviate the tax burden of the single taxpayer. See also Comment, *Federal Income Tax Discrimination Between Married and Single Taxpayers*, 7 U. MICH. J.L. REF. 667, 690 (1974).

88. See notes 109 and 141 and accompanying text *infra*.

89. See Rothblum, *supra* note 9, at 3.

90. See note 47 *supra*.

91. See Key, *Let's Stop the Tax on Marriage*, The Wash. Post, Jan. 29, 1978, at C8, col.

tax unit and the role of marital status in federal taxation. Thus, no major change can be expected in the immediate future.

III. PROPOSED SOLUTIONS

Most of the solutions offered to cure tax discrimination solve the singles penalty by ignoring the marriage penalty or vice versa. This occurs for two basic reasons: the proposed solution usually reflects the self-interest of its proponent and the proposed solution will likely increase some taxpayers' taxes if both claims are solved simultaneously. The proposed solutions which will be discussed show the difficulty of achieving a workable solution that meets the principles of neutrality, horizontal equity and progressivity.

A. Federal Definition of Income

Several commentators have suggested that a federal definition of income would eliminate certain inequities.⁹² Such a proposal would overrule the *Poe* decision,⁹³ which concluded that the federal tax system was dependent on state law for its definition of income because no independent federal definition had been enacted. There appears to be no constitutional prohibition to disregarding state property law, since the sixteenth amendment provided Congress with the plenary authority to levy an income tax and Congress has expressly disregarded community property law in several Code provisions.⁹⁴

By adopting a federal definition of income, the original reason for enactment of the joint return provision in 1948—geographical tax equity—would be eliminated. State law would no longer determine to whom investment income is to be taxed, and hence income splitting would be unnecessary to achieve geographical tax equity. A decision to continue the joint return provision would have to be made on the value of the provision in other respects. This proposed solution does not by itself provide a solution to the tax discrimination claims, since it does not address inequities based on marital status. Unless a decision to return to the pre-1948 single rate schedule structure or to continue to use the income splitting benefits of the joint return provision accompanies enactment of federal definition, this solution will only produce uniformity of application with

92. See, e.g., TAX REVISION COMPENDIUM, *supra* note 8, at 488-89 (material submitted by Eugene J. Brenner); Sjostrand, *supra* note 13, at 423.

93. 282 U.S. 101, 117 (1930). See notes 63-67 and accompanying text *supra*.

94. Examples of provisions which are applied without regard to community property laws are best shown in the pension area. See, e.g., I.R.C. § 402(e)(4)(a)(G).

little effect on the present tax structure.⁹⁵

B. Full Assignment of Income

Under this theory, a taxpayer could shift income in order to lower tax liability.⁹⁶ An adoption of a provision to allow the valid legal assignment of income, whether investment or earned income, for tax purposes would expand the *Lucas* decision which effectively allowed taxpayers to transfer investment income.⁹⁷ Under *Lucas*, earned income could not be assigned until the wage earner had the rights to it.⁹⁸ There appears to be no legal prohibition to assigning earned income, provided that state law recognizes an irrevocable transfer of the right to the income prior to its payment to the wage earner.⁹⁹

An adoption of this proposed solution would open the door for all types of artificial income shifting devices.¹⁰⁰ Earned income which is majority of income for most taxpayers could be shifted from the wage earner to a spouse or child possessing a substantially lower marginal tax rate in order to pay a lower combined tax. Although there is no reason that the potential for shifting income from investments and personal services should be different, the ease with which legal title to investments can be transferred nonetheless makes it more likely that this type of shifting will occur. Allowing the full assignment of all income, however, would violate the principle of progressivity, since the progressive tax rate could be circumvented by assignment of both types of income to lower marginal tax rate individuals. For this reason, this proposal, like the federal definition of income proposal, does not by itself provide a solution to the tax discrimination claims. Because it would create severe revenue problems, any serious con-

95. Both Brenner and Sjostrand discuss the elimination of income splitting and the requirement that each spouse in a community property state report, on an individual return, income earned by the taxpayer or produced by property subject to his control. See TAX REVISION COMPENDIUM *supra* note 8, at 488-89 (material submitted by Eugene J. Brenner); Sjostrand, *supra* note 13, at 423. Sjostrand appears to embrace the idea while Brenner wisely notes that it is not politically feasible. Brenner also notes that it would possibly upset the system of property law in community property states, and that it further discriminates against earned income in favor of investment income which can be shifted more easily.

96. See CONGRESSIONAL RESEARCH SERVICE, *supra* note 26, at 17; Rothblum, *Tax Equity Between the Married and Single* [sic]: *Solutions Causes* [sic] *Problems*, 4 TAX NOTES 13 (1976).

97. 281 U.S. 111 (1930). See notes 60-62 and accompanying text *supra*.

98. 281 U.S. at 114-15. An exception to this general principle is *Poe v. Seaborn*, 282 U.S. 101 (1930). Since federal law was held to be dependent on state law to define ownership of property, however, the result was distinguished from a voluntary assignment which arose out of agreements between the parties involved.

99. See, e.g., *Leschner v. Commissioner*, 38 T.C. 1003 (1962).

100. See note 58 *supra*.

sideration of full assignment of income is unlikely.¹⁰¹

C. Mandatory Joint Return

This proposed solution was first seriously considered in 1941.¹⁰² As with a federal definition of income, a mandatory joint return would curtail the advantage of married taxpayers in community property states because a married couple would be required to aggregate their income irrespective of whether the couple had single or dual incomes. Because the marginal rates of the present "married filing jointly" and "married filing separately" schedules almost compel married taxpayers to file jointly,¹⁰³ this proposal would only change the present tax system if the joint rate schedules were concomitantly altered.

If a single tax rate schedule were adopted, this proposal would continue the "marriage penalty" for dual income married taxpayers.¹⁰⁴ If two tax rate schedules were adopted with rate brackets for the married taxpayers,¹⁰⁵ twice as wide as those for single taxpayers, the singles penalty would be maintained.¹⁰⁶ This tax structure would basically resemble the one enacted by the Revenue Act of 1948. Other variations in the tax rate sched-

101. Income splitting by spouses who file joint returns is currently allowed. See I.R.C. § 1(a). Extension of such splitting to other individuals would likely result in massive shifting of income to individuals with the lowest marginal tax rates. As a consequence, tax revenue would fall substantially, resulting in an increased federal budget deficit.

102. In 1941, the Treasury Department finally convinced the House Ways and Means Committee to recommend mandatory joint returns. H.R. REP. NO. 1040, 77th Cong., 1st Sess. 17-22 (1941). See Bittker, *supra* note 12, at 1408. The 1941 proposal would have increased the tax liability of all married couples living in community property states and of all dual income couples living in common law states. Due to heavy protests from these groups, the proposal was deleted from the final bill. Revenue Act of 1941, ch. 412, § 101, 55 Stat. 687 (1941) (current version at I.R.C. § 1). See Bittker, *supra* note 12, at 1408-11.

103. For a comparison of the "married filing jointly" and the "married filing separately" tax schedules, see Table 1, *supra* note 14. See generally Bittker, *supra* note 12, at 1429.

104. Since there would be but one rate schedule, income splitting would in effect be eliminated, and the second spouse's income would be taxed as additional income to the first spouse at a higher marginal tax rate.

105. Rate brackets determine the marginal tax rate of a taxpayer. A taxpayer's rate bracket is determined by his or her income being within a specified income range. The tax brackets for "married filing joint" returns are twice as wide as the "married filing separate" returns. For example, on the joint return schedule, the marginal tax rate for the rate bracket of \$11,200 to \$15,200 is 22%, while on the separate return schedule, the marginal rate of 22% is on the rate bracket of \$5,600 to \$7,600, or one-half the joint return schedule rate bracket. I.R.C. § 1(a), (d). The rate brackets were changed by the Revenue Act of 1978 for tax years beginning after December 31, 1978. Pub. L. No. 95-600, § 101(a) (Nov. 6, 1978). See note 36 *supra*.

106. This structure would retain the benefits of income splitting for married couples. At its highest level, when the incomes of a dual income married couple are equal, the marginal tax rate for the couple would only be equal to that of a single taxpayer.

ules would only repeat the changes made in the present tax rate schedules since 1948.

Another potential variation is a two tax rate structure which would recognize only the expenses incurred by married taxpayers in excess of those incurred by single taxpayers. In essence, this two rate structure would recognize the additional expenses of married taxpayers only through the subsistence level.¹⁰⁷ Once the income level of married taxpayers exceeded the subsistence level, the two tax rate schedules would merge into one. But, while the singles penalty would be reduced as the two rate schedules merged, the marriage penalty for dual income married taxpayers would increase. The dual income married taxpayers would still be required to aggregate their income and pay taxes at a higher marginal tax rate. Thus, without some form of relief for the marriage penalty, the large number of dual income married taxpayers in the voting public should prevent the enactment of this proposed solution.

D. Dual Tax Rate Structure

Invoking a dual tax rate structure¹⁰⁸ would provide the income splitting advantage to single taxpayers and remove the singles penalty. There are two alternatives under this proposed solution. The first is to create two separate rate schedules, one for single taxpayers and one for married taxpayers filing separately.¹⁰⁹ The second is to create one rate schedule and require each taxpayer to file his or her own return.¹¹⁰

Under the first alternative, the rate brackets for the married person schedule would be half as wide as the rate brackets for the single tax rate schedule.¹¹¹ Consequently, the marginal tax rate for singles would equal that for married taxpayers with the same income, and the singles penalty

107. See notes 31-32 and accompanying text, *supra*.

108. Dual tax rate schedule is defined to mean a single rate of taxation for use by both single and married taxpayers (i.e. dual use).

109. See Harmelink and Krause, *Disparate Tax Treatment: The Case of Singles*, 51 TAXES 494, 497 (1973). Harmelink and Krause propose one rate schedule for all married taxpayers. The married couples' schedule would be one-half as wide as for each married person. Accordingly, the tax liability of singles and married couples would be identical.

110. See Sjostrand, *supra* note 13, at 423-24. Sjostrand identifies three problems that must be dealt with even if a single rate schedule can be agreed upon. The first involves the marriage penalty and is solved by the filing of individual returns. The second involves the advantage that community property state residents would have over common law state residents. See notes 63-69 and accompanying text *supra*. A final problem results from the opportunity to split income which would be available through either the joint ownership or the transfer of ownership of income-producing property.

Many states have a combined return which allows both spouses to file separate returns but on the same tax return. Maryland, the District of Columbia and Virginia use such a return.

111. These schedules would have the same relationship as the current schedule for "married filing joint" return and "married filing separate" return. See I.R.C. §§ 1(a), (d).

would be eliminated. In order to make this alternative acceptable to married taxpayers, the income splitting benefit of the joint return provision must be continued. Each spouse must be considered to have earned half of the income of the married taxpayer unit. If income splitting were not permitted and the actual income of each spouse were applied to the married tax rate schedule, the marriage penalty would be greatest for the single income couple because income splitting would not lower the marginal tax rate.

By treating each spouse as an individual for the tax rate schedule, this proposal looks to the individual as the basic tax unit. Nonetheless, it still allows an individual to lower his or her tax liability by marriage since income splitting must be used to achieve equality between the single taxpayer and the married taxpayer when both earn the same income. If income splitting were not permitted, the marriage penalty would not be cured by this alternative. A failure to permit income splitting would effectively recognize two tax units: the single taxpayer and the married couple. Consequently, equality between each individual taxpayer could not be achieved. Dual income married taxpayers with aggregated income would be taxed at a higher marginal tax rate than would two single taxpayers with the equal combined income.

Under the second alternative, a single rate schedule with each taxpayer responsible for his or her return, tax equality could be achieved and the marriage penalty eliminated. With a single rate structure each taxpayer would be taxed on his or her income. This alternative would define the individual as the basic tax unit and remove marital status as a factor in federal taxation. In essence, this proposal would effectively reinstate the 1948 tax structure without its joint return provision.¹¹²

Prior to 1948, however, the single rate structure spawned income shifting schemes in order to equalize the income of each spouse and achieve the lowest combined tax liability. The dual rate schedules in the first alternative eliminate the need for income shifting schemes, since income is automatically split between the spouses. Thus this alternative recognizes the married couple as a unit with each spouse sharing equally in the benefits and burdens of the marriage. Moreover, it justifies income splitting because each spouse is responsible for the success of the marital unit. The second alternative eliminates the marriage penalty, but makes income

112. See generally, notes 72-77 and accompanying text *supra*.

shifting devices relevant in determining a taxpayer's tax liability. The single rate schedule also eliminates the tax equality between single income married and dual income married taxpayers, since only the individual would be recognized as a tax unit.

The single rate schedule, nevertheless, also offers a viable solution to the issue of the role of marriage in federal taxation. Although the two rate schedule acknowledges marriage as a joint venture with each spouse sharing the income equally by continuing the use of the income splitting benefit, it also continues the marriage penalty. In comparison, a single rate schedule that eliminates the use of income shifting devices would treat all taxpayers alike, and it would not use a second tax unit in the structure. Such a result would, however, make equality between tax units a virtual impossibility.

E. Earned Income Allowance

An earned income allowance has been suggested to reduce the additional expenses incurred by dual income married taxpayers when both spouses earn income.¹¹³ Probably the broadest version of this approach has been suggested by Professor Bittker. The Bittker proposal would provide a deduction for all expenses attributable to the fact that both spouses, rather than only one, are working, including expenses caused by the secondary wage earner's loss of time and energy for household services.¹¹⁴ By granting a credit or deduction against the tax liability of dual income married taxpayers, the marriage penalty would be reduced. Although the marriage penalty exists for all dual income married taxpayers, whether the second income is earned from personal services or investments, current proposals have suggested only that the additional earned income expenses be recognized as a legitimate tax deduction.¹¹⁵ The reasons for this are twofold: first, most investment expenses are already deductible¹¹⁶ and second, the belief that a tax break should be provided only to those married couples who must work for a living to make ends meet. The idea of an additional tax benefit for those taxpayers who rely on passive investments

113. See Bittker, *supra* note 12, at 1433-37; Rothblum, *supra* note 96, at 14-15.

114. See Bittker, *supra* note 12, at 1433.

115. *Id.* The child care deduction, recently repealed, was designed to increase the pre-tax net income of working parents. I.R.C. § 214 (repealed by Tax Reform Act of 1976, Pub. L. No. 94-455, § 504(b)(1), 90 Stat. 1565 (1976)). The Tax Reform Act of 1976 replaced the deduction with a child care tax credit in I.R.C. § 44A. Bittker criticized this provision because it was difficult to determine "whether a taxpayer hired a babysitter in order to work, worked in order to hire a babysitter, or would have hired a babysitter anyway." Bittker, *supra* note 12, at 1434.

116. I.R.C. § 212. This includes "traveling expenses (including amounts expended for meals and lodging . . .) while away from home." I.R.C. § 162(a)(2).

for their income does not earn sufficient sympathy from taxpayers to make it a viable option.

As a result, this proposal accepts the rationale that the additional expenses of married taxpayers warrant the tax benefit of the joint return provision.¹¹⁷ Moreover, it seeks to extend the argument to cover not only increased living expenses, but also increased working expenses. The proposal, however, neither ends the marriage penalty nor addresses the singles penalty. To provide a deduction or credit for commuting and clothing expenses, as well as for additional household and other expenses of the second spouse—merely because both spouses work—creates a tax benefit for dual income married taxpayers. Such taxpayers would be granted a deduction for personal expenses, a deduction which would be provided neither to single taxpayers nor to single income married taxpayers. All taxpayers who work for their income, however, incur the same expenses for which only the second spouse of a dual income married couple would receive a tax benefit.¹¹⁸

Most of these earned income allowance proposals have set arbitrary percentages of gross earned income as a deduction or a credit without any attempt to tie the percentage to the actual additional expenses incurred because of a second job.¹¹⁹ The proposals have also set up a phase-out point as the income level of the second spouse (*i.e.*, the lower paid wage earner) rises to a predetermined income level.¹²⁰ In theory this income limitation is necessary to prevent abuse of the tax benefit.¹²¹ In spite of these considerations, however, the limitations of the earned income allowance clearly define it as a stopgap measure aimed at providing tax relief from the marriage penalty to a specific class of taxpayers. Nonetheless, the justification behind the proposal is equally applicable to all taxpayers. Each taxpayer incurs additional expenses by working which, unlike the expenses incurred in making investments, are not deductible. The proposals do indicate the need to recognize the costs of earning a living which

117. See notes 26-32 and accompanying text *supra*. But see Rothblum, *supra* note 96, at 14-15. Rothblum argues that the proposal deals with a problem caused by employment, not marriage, and consequently could be extended to all working taxpayers. This might make the proposal so costly, however, that it would no longer be feasible. *Id.*

118. Everyone who works away from home must get to the job site, have appropriate clothing, and pay for lunch if it is inconvenient to bring it. Everyone who works, not just the secondary wage earner of a married couple, has less time and energy to keep house. Bittker, *supra* note 12, at 1435.

119. Peckman, for example, has suggested either a deduction of 25% or a credit of 10% of the second salary. *Hearings on the Economic Problems of Women Before the Joint Economic Committee*, 93d Cong., 1st Sess. 254 (1973) (statement of Joseph Peckman).

120. See Sjostrand, *supra* note 13, at 424-26.

121. *Id.* at 423-24.

reduce the income available for consumption by the taxpayer. A comprehensive solution involving a job expense deduction to all taxpayers, or at least to low income taxpayers, however, is preferable to limiting the tax benefit to a single class of taxpayers.

F. Elective Filing Status

The elective filing status proposal consists of two alternatives. The first allows married taxpayers to file as single taxpayers when advantageous to do so.¹²² The second alternative permits all taxpayers to use whichever tax rate schedule produces the lowest tax liability.¹²³

The first alternative addresses only the marriage penalty issue. It ends this penalty for all dual income married taxpayers since they could take advantage of the lower single tax rate schedule. Yet inequality between married taxpayers earning the same total income would be created, because single income couples would have to use the joint return schedule while dual income couples with the same income could use the single persons' schedule.¹²⁴ Under the present tax structure, the marriage penalty is the greatest when the income of both spouses is nearly equal.¹²⁵ This proposal reverses this effect and allows for the greatest tax savings when the income of both spouses is nearly equal. Consequently, it would reestablish the tax benefit for residents of community property states since community property states automatically split income between spouses.¹²⁶ This proposal would also make income shifting schemes within the marriage advantageous.¹²⁷ Nevertheless, no solution is offered to the singles penalty by this alternative and because married taxpayers would lower

122. See CONGRESSIONAL RESEARCH SERVICE, *supra* note 26, at 16-17; Bittker, *supra* note 12, at 1437-42; Richards, *Single v. Married Income Tax Returns Under the Tax Reform Act of 1969*, 48 TAXES 301, 304 (1970). This would eliminate the need for a married filing separately tax schedule since this schedule imposes the highest tax liability and would not be used. Single income married taxpayers would use the married filing joint return tax schedule, while dual income married taxpayers would use this schedule until their incomes approached equality. As the marriage penalty began to take effect, dual income married taxpayers would file as single taxpayers. Married taxpayers desiring to file separately would always use the single taxpayer rate schedule.

123. See CONGRESSIONAL RESEARCH SERVICE, *supra* note 26, at 16-17.

124. See Bittker, *supra* note 12, at 1438-39. See also Sjostrand *supra* note 13, at 423-24. Dual income married taxpayers would each file a separate return on the income which they earned individually. In contrast, the single income married taxpayer would file only one return and would use the married filing jointly rate schedule, since that schedule would impose the lowest tax liability.

125. See notes 36-39 and accompanying text *supra*.

126. See text accompanying notes 62-67 *supra*.

127. When dual income married taxpayers found their incomes approaching equality, they would file separate returns using the single taxpayers' rate schedule. The average marginal tax rate on these returns could be minimized by equalizing the reported income on the

their tax liabilities substantially by shifting income, single taxpayers would once again bear the heavier tax burden.

In contrast, by allowing the use of any tax rate schedule, the second alternative would eliminate the singles penalty, but would not end the marriage penalty. This alternative would effectively combine the present four tax rate schedules into two. All taxpayers, except dual income married taxpayers, would use the "married filing jointly" tax rate schedule since it provides the lowest rate. Dual income married taxpayers, however, would use the single tax rate schedule whenever both incomes become substantially equal.¹²⁸ This proposal would create a large revenue loss,¹²⁹ without solving the marriage penalty.

Neither alternative addresses the dilemma underlying the discrimination claims. Both the alternatives solve one discrimination claim without solving the other. Moreover the proposal ignores the fundamental need to decide what the tax unit and the tax rate structure should be.

G. Split Tax Return

This proposed solution would provide a tax advantage to earned income as long as the taxpayer has only earned income and would eliminate both the singles and the marriage penalty.¹³⁰ A marriage penalty would still exist, however, when the second income source for the married taxpayer was primarily investment income.¹³¹ The proposal would establish a single tax rate schedule and require a mandatory joint return for all married taxpayers.¹³² The split tax return determines the tax on the earned income of each taxpayer and the tax on the aggregate investment income of the tax unit, whether the unit is the married couple or the household

returns as nearly as possible. The advantage of income shifting devices lies in their ability to do this.

128. See CONGRESSIONAL RESEARCH SERVICE, *supra* note 26, at 7.

129. As a result of this alternative, taxpayers in all categories would be using a lower rate schedule.

130. Cf. TAX REVISION COMPENDIUM, *supra* note 8, at 488 (material submitted by Eugene J. Brenner, examining alternatives to income splitting).

131. Net investment tax is determined by separately calculating the tax on a married couple's earned income and their aggregated investment and earned income. The earned income tax is then subtracted from the aggregate tax to find net investment tax. Since there is but a single rate schedule, and the earned income of both spouses is used in computing net investment tax, the tax on investment income for a dual income married couple will be at a higher marginal tax rate for a single taxpayer or a single income married couple.

132. Cf. TAX REVISION COMPENDIUM, *supra* note 8, at 488-489 (material submitted by Eugene J. Brenner, discussing the political nonfeasibility of compulsory joint returns and a one tax rate structure).

unit.¹³³ For the single taxpayer and the single income married taxpayer, the structure would operate as it did prior to 1948. The total incomes of the single taxpayer and the single income married taxpayer would be used to determine their tax liabilities. The complication arises when both spouses receive earned income in a dual income married taxpayer unit. In this situation, determining their tax liability would require five steps:

- (1) Determine the tax on the aggregate investment and earned income of the married couple.
- (2) Determine the tax on the aggregate earned income of the married couple.
- (3) Subtract the tax in (2) from the tax in (1) to find the net investment tax.
- (4) Determine separately the tax on the earned income of each spouse.
- (5) Finally, add the net investment tax in (3) to the two earned income taxes in (4) to find the tax liability of the married couple.

If the entire income of the dual income married taxpayer family were earned income, only steps (4) and (5) would be required to find its tax liability. This proposal would result in the dual income married unit paying two single taxes as was proposed in the first alternative of the elective filing status proposal.¹³⁴ The split tax return proposal, however, still penalizes dual income married taxpayers when most of their income is investment income. A justification for this distinction is that tax relief should be given only to those who must work for a living and not to those who rely on passive activities to produce their income.¹³⁵ A further justification for the aggregation of investment income in this proposal is that the ownership of the investment can be easily transferred to achieve an income splitting result.

This proposal removes marital status as a factor in taxation of earned income while recognizing the married couple as a legitimate tax unit with regard to investment income. Married taxpayers generally hold their investments for a common goal and should be taxed on them as a unit regardless of the technical ownership of the income. This proposal would also require a federal definition of income to keep the community property

133. For a thorough discussion of the current tax unit, its history and a number of alternative structures, see Thorson, *supra* note 7, at 114-32.

134. See text accompanying note 121 *supra*.

135. Cf. Blumberg, *supra* note 13, at 60-61, in which the author suggests that the costs of earning income should be excluded from taxable income. Under this suggestion taxpayers who earn their income from their labors would gain a tax benefit not available to taxpayers who receive their income from passive investments.

states from having an unfair advantage over other jurisdictions.¹³⁶ The split tax return is not likely to be given serious consideration, however, because of its harsh treatment of investment income. Given the political clout of those who rely on investments for part of their income, it is unrealistic to expect a serious discussion of this proposal. Moreover, the complicated formula required to be invoked when there is investment income also renders enactment of this proposal unlikely.

IV. AN ALTERNATIVE

A workable solution results from the combination of various parts of the solutions discussed above. This alternative includes four parts: (1) a federal definition of income,¹³⁷ (2) a single tax rate schedule,¹³⁸ (3) the use of the individual as the basic tax unit,¹³⁹ and (4) a reduced tax rate. Enactment of all four parts is necessary to permanently solve the problem of tax discrimination on the basis of marital status. A piecemeal approach would be unsatisfactory.

Part one of this alternative, the adoption of a federal definition of income, provides the uniformity in the tax law which cannot exist so long as states can define income.¹⁴⁰ The uniformity produced by this step reinforces two of the basic principles in taxation. First, geographical neutrality is achieved because the residence of a taxpayer will not alter the tax he has to pay. Secondly, equity is achieved by treating each taxpayer in the same manner in similar transactions. This simple change would also remove the need for the joint return provisions added in 1948 to offset the advantage of the community property law states. The removal of this main obstacle between equal treatment of taxpayers in different states facilitates the enactment of a total solution to the problem of tax discrimination. The remaining steps then have a uniform base upon which to be built.

The second and third steps, the single tax rate schedule and the use of the individual as the basic tax unit, should be viewed as a package, because the adoption of one without the other is virtually meaningless. To adopt a single tax rate schedule, while allowing both married taxpayers and single taxpayers, as different tax units, to use it merely reduces the

136. See notes 62-67, 92-95, and accompanying text *supra*.

137. See notes 92-95 and accompanying text *supra*.

138. See the split tax return, note 131 and accompanying text *supra*; the second alternative of the dual tax rate structure proposal, note 110 and accompanying text *supra*; and discussion of the mandatory joint return, note 99 and accompanying text *supra*.

139. See note 132 *supra*.

140. The distinction between community property and common law states is relevant here. See text accompanying notes 63-67 *supra*.

present four tax rate schedule structure to a two schedule structure.¹⁴¹ Likewise, to adopt the individual as the tax unit and still have different tax rate schedules for taxpayers based on marital status is merely ceremonial change from the present tax structure. The simultaneous enactment of these two steps, however, would be a positive step towards removing marital status as a major factor in federal taxation. They would remove the present structure's built-in-bias towards the single income married taxpayer by applying the same rate structure to income earners, whether married or single. Adopting a single rate structure also adheres to the principle of progressivity since individual taxpayers with the same taxable income would be taxed in the same rate bracket regardless of their marital status.

The impact of marital status cannot be completely eliminated from the federal tax system, however. But this alternative can confine it to a role similar to the dependency exemption granted for children on a tax return.¹⁴² An adjustment to the taxable income of a taxpayer would be allowed, but marriage would no longer provide a different rate structure, use of which is limited to certain taxpayers. Single income married taxpayers and dual income married taxpayers would not be taxed equally because the individual would be the unit from which tax equality would be measured.¹⁴³ By necessity equality cannot exist for both groups, as long as two different tax units are used as the judging criteria.

Reducing the tax rate, the final step of this proposal, would not necessarily curb the tax discrimination on account of marital status. Rather, its purpose is to ensure passage of the whole proposal. In adopting a single tax rate structure, the tax liabilities of individual taxpayers would change. The tax burden of the married taxpayer relative to that of the single taxpayer would be increased. If a lower tax rate were adopted which reduces the ultimate tax liability of a married taxpayer, the structural change would be more palatable to all taxpayers.

Only this total approach would provide a workable solution to the issue of the rate of marital status in taxation. In order to be politically successful, a proposal must consider the immediate practical effects of its components. Most importantly, however, in order to be successful over the long-run, such a proposal must address the whole issue of the proper tax unit

141. This is the same result that would follow if taxpayers were to have the use of any current schedule, which is the second alternative of the elective filing status proposal. See note 128 and accompanying text *supra*.

142. I.R.C. §§ 151, 152.

143. Bittker correctly states, "we cannot simultaneously have (a) progression, (b) equal taxes on equal-income married couples [horizontal equity], and (c) a marriage neutral tax burden." Bittker, *supra* note 12, at 1396.

and the appropriate role of marriage in federal income taxation. Until these questions are faced squarely, the tax structure will remain fundamentally unfair.

