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FEDERAL INCOME TAX DISCRIMINATION BETWEEN MARRIED AND SINGLE TAXPAYERS

In an era replete with myriad complaints of discrimination, contentions that the federal income taxation system is discriminatory are hardly surprising. Most recent claims of tax discrimination have focused on tax preferences that allow high-income taxpayers to significantly reduce or eliminate tax payments and that are inherently unavailable to a majority of low- and middle-income taxpayers.¹ A new allegation of unfair discriminatory treatment in taxation has recently been voiced, however, by certain married taxpayers and their sympathizers.² Their claim is based on the fact that a married couple in which both spouses work bears a greater tax burden than two single persons with an identical total income;³ the married couple pays a larger tax bill solely because of their marital status.⁴

The recent complaints by married taxpayers are not the first allegations of tax discrimination based on marital status. Although the roots of differential tax rates go deep into the history of the federal income tax, the reduction of tax rates for singles included in the Tax Reform Act of 1969⁵ precipitated these new complaints of a "marriage penalty."

This article explores the present tax rate structure and its implications, considers the historical events and policies which created four separate tax rates, analyzes the tax policies embodied by the different rate treatment of married and single taxpayers, and examines the constitutional problems involved in maintaining the present disparate tax treatment. An

¹ See, e.g., P. STERN, *THE RAPE OF THE TAXPAYER* (1973); Pecham & Okner, *Individual Income Tax Erosion*, in JOINT ECONOMIC COMM., 92D CONG., 2D SESS., *THE ECONOMICS OF FEDERAL SUBSIDY PROGRAMS—A COMPENDIUM OF PAPERS 13-40* (Comm. Print 1972).

² See Nussbaum, *Tax Structure and Discrimination Against Working Wives*, 25 NAT'L TAX J. 183 (1972); Richards, *Discrimination Against Married Couples Under Present Income Tax Laws*, 49 TAXES 526 (1971); Richards, *Single v. Married Income Tax Returns Under the Tax Reform Act of 1969*, 48 TAXES 301 (1970); Shanahan, *Tax Help for the Two-Income Family*, N.Y. Times, Aug. 12, 1973, § 3, at 12, col. 3.

³ INT. REV. CODE of 1954, § 1(a) & (c).

⁴ For example, two single persons with gross incomes of \$20,000 and \$10,000 respectively in 1973 would pay a total tax bill of \$5,785 (\$4,255 tax on \$20,000 income plus \$1,530 tax on \$10,000 income), if both claimed the percentage standard deduction. If these two taxpayers were to marry each other, however, their tax liability, again assuming the use of the percentage standard deduction, would immediately rise to \$6,560, essentially meaning a \$775 "penalty" for marriage.

⁵ Act of Dec. 30, 1969, Pub. L. No. 91-172, § 803, 83 Stat. 487 (codified at INT. REV. CODE of 1954, § 1 (c)). For a complete listing of the Act's provisions and the Code sections modified see U.S. CODE CONG. & AD. NEWS, 91st Cong., 1st Sess., at 509-822 (1969).

alternative tax rate treatment, which will avoid the discrimination inherent in the present system, is suggested.

I. PRESENT DIFFERENTIAL RATE TREATMENT OF MARRIED AND SINGLE TAXPAYERS

The federal income tax originally imposed its burdens on an individual basis,⁶ making each recipient of income totally responsible for any tax due on his own income.⁷ Over the intervening years, however, various reforms have created new taxation units and additional rate structures.⁸

The most significant of these reforms occurred in 1948, when Congress extended the benefits of "income splitting"⁹ to all married couples. Because of a combination of political and economic forces, Congress made available to married couples in all states a tax preference previously available only to couples in community property states.¹⁰ The combination of progressive tax rates¹¹ and the split-income plan created a tax saving for nearly all married couples. Only couples in which both spouses earned identical incomes received no benefit from the split-income plan. Since these couples' incomes were, in fact, already split, the couples continued paying tax at the higher singles' rates.

After this reform, Congress was confronted by those who could not make use of the split-income plan because of their single status. Single persons claimed that the plan gave too great an advantage to married couples. In 1969, Congress responded by reducing singles' tax rates. This action resulted in fairer tax treatment of single taxpayers, but no relief was granted to two-earner married couples. As a result, married couples in which both earn income now pay higher rates than any other taxpayer group.¹²

Because of the 1969 reduction in singles' tax rates, income-splitting now benefits only couples in which one spouse works or in which the disparity between the two spouses' incomes is large enough to force the couple's income, once aggregated and split, into a tax rate bracket lower than that for two single persons with identical incomes. If both individuals work, the advantage of income-splitting diminishes as the lower-paid spouse's income increases and consequently the tax "reduction" below singles' rates decreases. Additional tax is imposed as interspousal income parity is approached. The tax "penalty" on marriage is greatest where

⁶ Revenue Act of 1913, ch. 16, § II(a)(1) & (2), 38 Stat. 166-81.

⁷ *Id.*

⁸ See part II *infra*.

⁹ Income-splitting allows a married couple to aggregate the income of both spouses, halve this figure, and then have each be taxed, as married individuals filing separately, on half of the total income. Because of the progressive rate schedules, splitting the couple's total income evenly allows a tax saving in some cases.

¹⁰ See part II *B infra*.

¹¹ See INT. REV. CODE of 1954, § 1. Progressive rates are based on the theory that persons with larger incomes have a greater ability to pay.

¹² J. PECHMAN, FEDERAL TAX POLICY 88 (rev. ed. 1971).

there is income equality between spouses. Figure 1 presents, for various income levels, the amounts of additional tax imposed on two people as a result of marriage.

While the marriage penalty is greatest for couples with equal incomes, many other income combinations also result in higher taxes for two-earner married couples than two singles with identical incomes would pay. Fig-

Figure 1
MARRIAGE PENALTY*
Tax on two persons electing either
the low income allowance or optional standard deduction
(No itemized deductions)

<i>Adjusted Gross Income of Each Person</i>	<i>Single</i>	<i>Married</i>	<i>Marriage Penalty</i>	<i>Percentage Increase in Tax Resulting From Marriage Penalty</i>
1000	0	0	0	—
2000	0	170	170	170%
3000	275	484	209	76%
4000	603	848	245	41%
5000	981	1190	209	21%
6000	1361	1534	173	13%
7000	1779	1930	151	9%
8000	2199	2385	186	9%
9000	2652	2885	233	9%
10000	3060	3400	340	11%
12000	3905	4590	635	16%
14000	4855	5840	985	20%
16000	5985	7295	1310	22%
18000	7195	8870	1675	23%
20000	8510	10565	2055	24%
25000	12180	15310	3130	26%
50000	37080	43080	6000	16%
100000	102385	108565	6180	6%

From INT. REV. CODE of 1954, § 1(a) & (c).

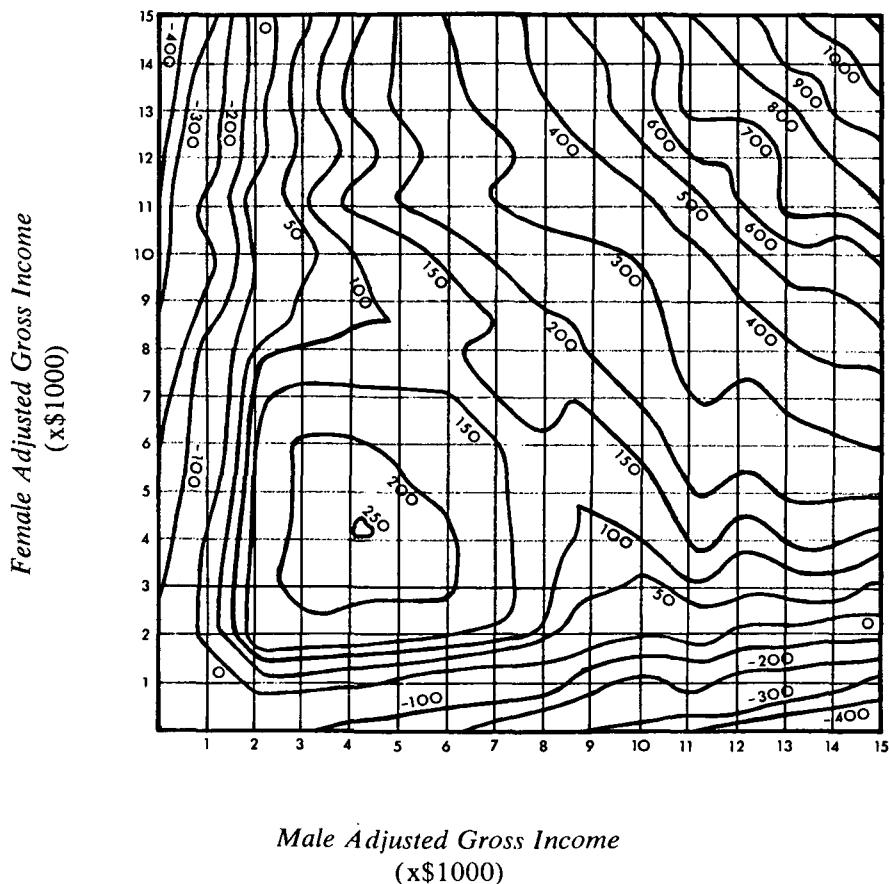
*The relatively large amount of marriage penalty at low-income levels is largely the result of the Internal Revenue Code provisions pertaining to the percentage standard deduction and low-income allowance. INT. REV. CODE of 1954, § 141. Since a single individual is entitled to a standard deduction equal to that of a married couple, two single individuals, each taking the standard deduction, can earn a larger amount before having to pay tax than can two married individuals earning identical amounts.

For example, for a single individual claiming the \$1,300 low income allowance, the first \$2,050 of income is exempted from tax (\$1,300 low income allowance plus \$750 personal exemption). Thus, two single taxpayers could evenly split \$4,100 of income and pay no tax. If these two were to marry, however, they would lose the use of one low income allowance, thereby subjecting \$1,300 to the higher two-income married rates, which results in a tax liability of \$185. The combination of higher rates and loss of one standard deduction penalizes marriage for most low- and medium-income couples where both work.

ure 2 graphically shows the tax penalty on marriage at various low- and middle-income levels and relative-income combinations. As can be seen from this graphic representation of the marriage penalty, almost any earnings by the spouse of a wage earner eliminates the advantage of income-splitting and results in higher taxes for the couple because of their marriage. Recognizing the implications of this increased tax burden on working cou-

Figure 2

MARRIAGE PENALTY AT VARIOUS INCOME LEVELS*



From INT. REV. CODE of 1954, § 1 (a) & (c).

INSTRUCTIONS FOR USE: To find the approximate amount of the marriage penalty at a given income combination, locate the point on the graph representing the intersection of the adjusted gross incomes of the male and female taxpayers. The amount of the marriage penalty is shown by the amounts associated with the isopleth lines of increased tax resulting from marriage. A negative number indicates a tax saving for the married couple resulting from the use of income-splitting.

*The form of the graph is based on a similar analysis in White, *The Tax Structure and Discrimination Against Working Wives: A Comment*, 26 NAT'L TAX J. 119, 122 (1973).

ples, various authors have criticized the present tax laws as discouraging marriage, encouraging cohabitation, and discriminating against married women who wish to work.¹³

II. HISTORY OF TAX DISCRIMINATION BASED ON MARITAL STATUS

A. Geographic Inequality

When the Revenue Act of 1913 was enacted¹⁴ there was only one rate schedule;¹⁵ the individual was the sole taxation unit¹⁶ and each taxpayer was taxed on his own earned income.¹⁷ Because the rate structure was progressive,¹⁸ taxpayers with large incomes who could shift their income to other family members benefited if each family member filed an individual return. This device enabled the family to claim several personal exemptions and to have family income taxed at lower rates than it would have been if only one return was filed on the entire amount. Thus, income-shifting produced the lowest possible tax on the family's total income.¹⁹

This shifting of income was simple with unearned income—income arising from the ownership of property—since title to the property could be actually transferred to another family member.²⁰ Attempts to shift unearned income without formal transfer of title²¹ and attempts to shift earned income,²² however, came under government scrutiny.

Much of the controversy concerning the validity of earned-income-shifting devices stemmed from the variation in treatment of marital property by different states. A majority of state property laws were based on the English common law system, which predicated ownership on taking an active role in acquiring income or property, but eight southern and western states²³ had marital property laws based on the Spanish or French

¹³ See Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFFALO L. REV. 49 (1971); Cooper, *Working Wives and the Tax Law*, 25 RUTGERS L. REV. 67 (1970); Nussbaum, *supra* note 2; Richards, *Discrimination Against Married Couples Under Present Income Tax Laws*, *supra* note 2; White, *The Tax Structure and Discrimination Against Working Wives: A Comment*, 26 NAT'L TAX J. 119 (1973).

¹⁴ Revenue Act of 1913, ch. 16, 38 Stat. 166-81.

¹⁵ *Id.* § II(A)(1) & (2).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ The rate scale ranged from 1 percent of the first \$20,000 of taxable income to 7 percent of taxable income in excess of \$500,000. Revenue Act of 1913, ch. 16, § II(A)(1) & (2), 38 Stat. 166-81.

¹⁹ For example, a taxpayer with \$250,000 of taxable income and a wife and child could have decreased his tax liability for the year 1915 from \$13,850 to \$7,290 by making use of a three-way income split.

²⁰ See *Blair v. Comm'r*, 300 U.S. 5 (1937).

²¹ See *Helvering v. Horst*, 311 U.S. 112 (1940).

²² See *Lucas v. Earl*, 281 U.S. 111 (1930).

²³ The original community property states were Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. *Hearings on Community Property and Family Partnerships Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. 834 (1947) (statement of Wesley Disney).

community property systems, which gave each spouse a half share of any property or income acquired by either spouse after marriage. Thus, community property states mandated a tax-saving equal split of marital income, while most states attributed income solely to the spouse who earned it.

The federal Treasury acquiesced in the states' determination of title to income for tax purposes. In 1921, the Attorney General determined that husbands and wives could each report half of all community property income on individual tax returns in all community property states in which a spouse's interest vested when the income was earned.²⁴ Attempts by families in common law states to achieve a similar effect through contractual arrangements were disapproved by the Supreme Court in 1930 in *Lucas v. Earl*,²⁵ which declared that income was to be taxed to the one who earned it.²⁶ In spite of this rule, the Court validated interspousal income-splitting for tax purposes in community property states later in the same year in *Poe v. Seaborn*²⁷ and a series of related decisions.²⁸ Since no state law operated to split earned income between spouses in common law states, the tax treatment accorded married taxpayers living in community property states differed greatly from that accorded married taxpayers earning the same income in common law states.

²⁴ 32 OP. ATT'Y GEN. 298, 435 (1920-21).

²⁵ 281 U.S. 111 (1930).

²⁶ The Court interpreted the Internal Revenue Code to:

[T]ax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it.

281 U.S. at 114-15.

²⁷ 282 U.S. 101 (1930). *Seaborn* involved construction of the Code. The Court held that absent some further congressional guidance, a state's property laws must control in determining what constitutes individual income.

The case requires us to construe Sections 210(a) and 211(a) of the Revenue Act of 1926 (U.S.C. App., tit. 26 §§ 951 and 952), and apply them, as construed, to the interests of husband and wife in community property under the law of Washington. These sections lay a tax upon the net income of every individual. The Act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income. The use of the word "of" denotes ownership. It would be a strained construction, which, in the absence of further definition by Congress, should impute a broader significance to the phrase.

The Commissioner concedes that the answer to the question involved in the cause must be found in the provisions of the law of the State, as to a wife's ownership of or interest in community property.

282 U.S. at 109-10 (footnote omitted).

²⁸ For other Supreme Court decisions concerning the validity of income-splitting in community property states see *Goodell v. Koch*, 282 U.S. 118 (1930) (Arizona); *Hopkins v. Bacon*, 282 U.S. 122 (1930) (Texas); *Bender v. Pfaff*, 282 U.S. 127 (1930) (Louisiana); and *United States v. Malcolm*, 282 U.S. 792 (1930) (California). In each of these cases, the Court concluded that in a community property state one-half of all income vested in each spouse at the time the income accrued.

The resultant discrimination was slight, however, because of the relatively low tax rates prevailing at the time of the *Seaborn* decision.²⁹

The low federal income tax rates could not generate enough income to offset the expenditure burdens placed on the federal Treasury by the Depression and World War II. Therefore, the tax base was enlarged and tax rates were increased sharply.³⁰ This change in the tax law made the advantages to married taxpayers in community property states both significant and conspicuous. Consequently, the legislatures of several common law states, recognizing the comparative advantages enjoyed by residents of community property states, enacted community property legislation in an attempt to extend those same advantages to their own constituents.³¹ The wholesale disruption of local property laws which accompanied these change-overs and the prospect of many more states making the same switch prompted swift action by Congress in 1948.³²

B. The Congressional Response

Prior to 1948, several proposals designed to eliminate the advantage gained from income-splitting by married couples in community property states were placed before Congress.³³ The number and variety of these

²⁹ The Revenue Act of 1928 taxed the net income ("net income" was equivalent to present-day "taxable income") of every individual at a rate equal to the sum of: (1) 1½ percent of the first \$4,000 of the amount of net income in excess of allowable credits; (2) 3 percent of the next \$4,000 of such an excess; and (3) 5 percent of the remainder of such excess. Revenue Act of 1928, ch. 852, § 11, 45 Stat. 791.

³⁰ 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 \$4,265, an increase of more than 500 percent. *Hearings on H.R. 4790 Before the Senate Finance Comm.*, 80th Cong., 2d Sess. 92 (1948) (testimony of John Hanes).

³¹ For a brief overview of state actions toward adopting community property legislation in the period 1939-1947 see B. BITTKER & L. STONE, *FEDERAL INCOME, ESTATE AND GIFT TAXATION* 345 (1972). For a fuller explication of the spread of community property laws see Polisher, *The Recent Trend Toward Community Property—Its Federal Income, Gift, and Estate Tax Implications*, N.Y.U. 6TH ANN. INST. ON FED. TAX 1105 (1948).

³² Revenue Act of 1948, ch. 168, § 301, 53 Stat. 5, 17. See also *Hearings on Community Property and Family Partnerships Before the House Ways and Means Comm.*, 80th Cong., 1st Sess., pt. 2, at 886 (1947) (testimony of Rep. Albert Reeves); S. REP. NO. 1013, 80th Cong., 2d Sess. 23 (1948).

³³ The proposals included:

1) A mandatory joint return provision, which would have required aggregation of all the income of both spouses so that division of income between spouses would cease to be a factor in determining their total tax liability. Married couples with the same income would therefore pay equal taxes in every state. The married couple would become an independent taxation unit. These mandatory joint returns would have resulted in increased tax burdens for married taxpayers, who would be forced into a higher rate bracket by aggregation than would have been imposed on them separately if division was allowed.

2) A dual rate schedule, which would have equalized the amount paid by married couples filing separately and those filing jointly by retaining the current rate schedule for those filing jointly and creating a new individual rate schedule with tax brackets only half as wide as those in the joint return. This scheme would have eliminated any

proposals³⁴ suggest that difficulty in selecting the means of achieving equalization of treatment, and not doubt concerning the desirability of equalization, constituted the major obstacle to congressional action prior to 1948.

The need for action culminated in the first session of the Eighteenth Congress. During extensive debates in the House Ways and Means Committee and the Senate Finance Committee on the best means of attaining geographic equality of treatment of married taxpayers,³⁵ mandatory joint return and "management and control" proposals were rejected as politically unfeasible.³⁶ Despite recognition that it was not a complete solution

advantage from filing separate returns on split income, but would also have greatly increased the relative tax burden on single taxpayers.

3) A legislative repeal of the advantage granted to married couples in community property states by *Seaborn*, which would have required that all earned income be taxed to the earner (under the doctrine of *Lucas v. Earl*) and all unearned income be taxed to the person exercising management and control over the income. This proposal would have eliminated the advantage gained through automatic income-splitting between community property spouses, and their taxes would have been brought back into parity with the taxes paid by all other taxpayers.

4) A universalization of income-splitting. This proposal for equalizing tax burdens was not a plan for restoration of complete equality. It contemplated extension of the advantage of income-splitting to all married couples in all states by legislative fiat. This would have equalized the treatment of married couples in common law and community property states, but would have left single taxpayers with an unjustifiably high tax burden. U.S. Treasury Dep't, *The Tax Treatment of Family Income, in Hearings on Community Property and Family Partnerships Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. 846, 852-66 (1947) [hereinafter cited as *Tax Treatment of Family Income*].

³⁴ In 1921, a revenue bill was proposed, and passed in the House, which would have required that community income be included in the gross income of the spouse exercising management and control over that income. The bill failed in the Senate. H.R. 8245, 67th Cong., 1st Sess. § 208 (1921); S. REP. NO. 486, 67th Cong., 1st Sess. (1921). In 1924, a similar provision was proposed by the Secretary of the Treasury. [1922-1923] SECRETARY OF THE TREASURY ANN. REP. 9. However, the provision contained in the Treasury Draft of the Revenue Act of 1924 was deleted by the Ways and Means Committee from the final draft presented to Congress. H.R. 6715, 68th Cong., 1st Sess. (1924). Following a 1933 recommendation by the Acting Secretary of the Treasury, the Ways and Means Committee included a provision requiring mandatory joint returns from all married couples in the tentative draft of the Revenue Act of 1934, but drafting difficulties forced the proposal to be dropped. *Hearings on H.R. 8396 Before the House Ways and Means Comm.*, 73d Cong., 2d Sess. 6 (1934) (testimony of Rep. Treadway). Hearings were held in 1934 on a bill which would have taxed community income to the spouse controlling it, but no committee action was taken. *Hearings on the Revenue Act of 1934 Before the House Ways and Means Comm.*, 73d Cong., 2d Sess. 112-32, 538-49 (1934). Abortive attempts to create equality in the tax treatment of all married couples by means of mandatory joint returns or "management and control" provisions were made in 1937, 1941, and 1942. *Tax Treatment of Family Income, supra* note 33, at 853.

³⁵ See *Hearings on H.R. 4790 Before the Senate Finance Comm.*, 80th Cong., 2d Sess. 1-647 (1948); *Hearings on H.R. 4790 Before the House Ways and Means Comm.*, 80th Cong., 2d Sess. 1-264 (1948); *Hearings on Community Property and Family Partnerships Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. 747-970 (1947).

³⁶ *Hearings on H.R. 4790 Before the Senate Finance Comm.*, 80th Cong., 2d Sess. 271-72, 378 (1948).

to the unequal taxation problem,³⁷ the split-income plan was chosen by Congress as the method of achieving geographic uniformity in taxation of married couples.³⁸

In 1947, income-splitting amendments were added to two tax reduction bills.³⁹ Both bills were passed by Congress but vetoed by President Truman,⁴⁰ who opposed any tax reduction not focused on alleviating the plight of the low-income taxpayer.⁴¹ In 1948, tax reduction coupled with a split-income plan was again attempted. Repeal of the 1942 Estate and Gift Tax Amendment⁴² was included in the bill in order to gain the support of representatives from community property states, who were initially opposed to the income-splitting plan.⁴³ With this additional support, the bill was passed and sustained over the President's veto.⁴⁴

³⁷ It was recognized that implementation of the split-income plan would result in increased relative tax loads on single taxpayers and therefore would not restore complete equality in taxation. See *Tax Treatment of Family Income*, *supra* note 33, at 852.

³⁸ The income-splitting plan was popular both in and out of Congress. The proposal was simple since it involved no adjustments in the rate schedule and it at least partially satisfied the proponents of mandatory joint returns, since it called for joint returns from all married couples wishing to split marital income. No constitutional challenges to the split-income plan were expected, a worry which had frequently been expressed in regard to the joint return and "management and control" proposals. Income-splitting was also the most painless means of restoring equal tax treatment of married couples, since it was the only proposal considered which would result in a tax reduction rather than an increase. This last consideration was important to the Republican-controlled Eightieth Congress, which was publicly committed to a tax reduction. The income-splitting plan also had the active support of the American Bar Association, the United States Chamber of Commerce, the National Association of Manufacturers, and the Committee for Economic Development. See generally B. BITTKER & L. STONE, *supra* note 31, at 348; H. GROVES, *FEDERAL TAX TREATMENT OF THE FAMILY* 64 (1963); P. STERN, *supra* note 1, at 124.

³⁹ H.R. 1, 80th Cong., 1st Sess. (1947); H.R. 3950, 80th Cong., 1st Sess. (1947).

⁴⁰ H.R. Doc. No. 322, 80th Cong., 1st Sess. (1947); H.R. Doc. No. 407, 80th Cong., 1st Sess. (1947).

⁴¹ See State of the Union Message to Congress by President Harry S. Truman, U.S. CODE CONG. SERV., 80th Cong., 2d Sess. 2393, 2400 (1948).

⁴² Act of Oct. 21, 1942, ch. 619, 53 Stat. 121-22. The 1942 amendment substituted economic origin of property for legal ownership as the taxability criterion. This treatment conflicted with community property law and resulted in taxation of an entire estate when the husband died first on the basis that his activity had created the estate; yet if the wife died first, her share of the community property was held to be subject to the estate tax on the theory that she had the right to make a testamentary disposition of that property. This inconsistent treatment was extremely unpopular in community property states. See *Hearings on Community Property and Family Partnerships Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. 837 (1947) (Statement of Wesley Disney). See also H. GROVES, *supra* note 38, at 65.

⁴³ The community property states originally attempted to block passage of the income-splitting plan in order to retain the full advantage of income-splitting exclusively for their residents. H. GROVES, *supra* note 38, at 65.

⁴⁴ H.R. 4790, 80th Cong., 2d Sess. (1948); H.R. Doc. No. 589, 80th Cong., 2d Sess. (1948); Revenue Act of 1948, § 301, 53 Stat. 5, 17.

Once the tax advantage of community property law was removed, the "new" community property states lost little time in repealing their statutes. See Note, *Epilogue to the Community Property Scramble: Problems of Repeal*, 50 COLUM. L. REV. 332-33 (1950).

The 1947 Treasury Study of Family Income⁴⁵ warned Congress of the inadequacy of available data on the relative taxpaying abilities of various tax units⁴⁶ and cited the need for further research before policy decisions concerning the proper allocation of tax burdens and identification of tax units were made.⁴⁷ Yet the movement for immediate equalization of treatment of married persons through income-splitting had acquired sufficient inertia to prevail in 1948. While adoption of any of the other proposals for equalization⁴⁸ would have restored complete equality in rate treatment,⁴⁹ the one incomplete solution, income-splitting, was adopted.

In enacting universal income-splitting, Congress ostensibly sought to restore the equality of tax treatment that had been lost when *Seaborn* was decided,⁵⁰ but Congress failed to acknowledge that *Seaborn* had given married couples in community property states an advantage over *all* other taxpayers, not just over married couples in common law jurisdictions. Both the Treasury Department Report⁵¹ and testimony before the House Ways and Means Committee⁵² warned that income-splitting was not a complete solution to the inequity problem, since it left single taxpayers, especially those with dependents, with an unjustifiably high tax burden. The congressional committee reports⁵³ did not mention this shortcoming of the income-splitting proposal. Faced with a situation in which a small group was receiving favored tax treatment, Congress acted in the name of equality by treating the symptom of unequal taxation of married couples without curing the underlying malady. The need for haste and for a politically expedient solution caused Congress to enact a provision which was inadequate to forestall future claims of tax discrimination.

C. Post-1948 Adjustments

Soon after the income-splitting provision was passed, Congress began to doubt whether the income-splitting solution was fair to the taxpayers who could not take advantage of its provisions. Congress made a series of rate concessions to reduce the advantages of income-splitting. These rate reductions confirm the failure of Congress' 1948 plan to provide equality of tax treatment.

⁴⁵ *Tax Treatment of Family Income*, *supra* note 33.

⁴⁶ *Id.* at 852.

⁴⁷ *Id.*

⁴⁸ The other proposals for equalization were mandatory joint returns, taxation of income to the person exercising "management and control," and dual-rate proposals. *See* note 33 *supra*.

⁴⁹ *See* note 33 *supra*.

⁵⁰ S. REP. NO. 1013, 80th Cong., 2d Sess. 24 (1948).

⁵¹ *Tax Treatment of Family Income*, *supra* note 33, at 858.

⁵² *Hearings on Community Property and Family Partnerships Before the House Ways and Means Comm.*, 80th Cong., 1st Sess. 898 (1947) (testimony of Murray Flack).

⁵³ S. REP. NO. 1013, 80th Cong., 2d Sess. (1948); H.R. REP. NO. 1274, 80th Cong., 2d Sess. (1948).

In 1951, Congress began to mitigate the inequities of income-splitting by establishing a special category of taxpayers called "heads of households"⁵⁴ and allowing single taxpayers who maintained a home for both themselves and a dependent to pay taxes at a new rate rather than at the high singles' tax rate.⁵⁵ The new head-of-household tax rate schedule was halfway between the married and single rates.

This extension of favored tax treatment to one class of single taxpayers was only a prelude to enlargement of the favored class. The head-of-household category was expanded in 1954 to allow single persons who maintained a parent or parents in a separate abode to take advantage of the reduced rates.⁵⁶ In addition, a new "surviving spouse" category was added to enable a decedent's spouse to use income-splitting married rates for two years after the year in which his or her spouse died.⁵⁷

These changes resulted in a three-tiered rate schedule, with one-earner married couples enjoying the lowest rates, followed by heads of households and then single taxpayers. Any rate advantage to a two-earner married couple depended on the magnitude of the difference between the spouses' income levels. If the spouses' incomes were identical, the couple theoretically, but not actually,⁵⁸ received the same tax rate treatment afforded to two single individuals earning the same amounts.

In 1969, Congress responded to public pressure calling for tax relief for singles⁵⁹ by enacting a new reduced single taxpayer rate schedule as part of the Tax Reform Act of 1969.⁶⁰ Despite testimony revealing that

⁵⁴ Revenue Act of 1951, ch. 521, § 301(a), 53 Stat. 6 (codified at INT. REV. CODE of 1954, § 2(b)).

⁵⁵ The situation of such a single taxpayer was much like that of a single earner in a marriage. H.R. REP. NO. 586, 82d Cong., 2d Sess. 23 (1951).

⁵⁶ INT. REV. CODE of 1954, § 2(b)(1)(B).

⁵⁷ INT. REV. CODE of 1954, §§ 1(a), 2(a)(1).

⁵⁸ Because of the loss of one optional standard deduction by the married couple through marriage (see INT. REV. CODE of 1954, § 141), the married couple could pay a larger total tax bill. While the effective tax savings enjoyed by the parties in a two-earner marriage could range from the full amount of savings accorded to a one-income couple (in cases where one spouse's income was extremely low) to no effective savings (where the spouses' incomes were equal), a married couple *could not* pay a tax rate *significantly* higher than the rate imposed on two singles who earned the same amounts.

⁵⁹ The organized movement for reform in singles tax rates was led by the National Association of Single Taxpayers, 1010 Vermont Ave. N.W., Washington, D.C., and its organizer, Vivien Kellems, and by Single Persons' Tax Reform, of San Francisco, and its President, Dorothy Shinder. Ms. Kellems, in addition to her role as organizer, advocate, and writer for the cause of singles tax relief, instituted a private action in the Tax Court of the United States to obtain refund of the amount "overpaid" by herself as a single taxpayer under pre-1969 procedure on the grounds that differential rate treatment was a denial of equal protection. *Kellems v. Comm'r*, 58 T.C. 556 (1972), *aff'd*, 474 F.2d 1399, *cert. denied*, 414 U.S. 831 (1973). The Tax Court denied any refund and found the disparate treatment of married and single taxpayers had a "rational basis"—congressional desire for geographically uniform treatment of married couples and recognition that married persons generally have greater financial burdens than single persons. For other, more unorthodox theories attacking higher singles' tax rates see *Shinder v. Comm'r*, 25 CCH Tax Ct. Mem. ¶ 1967-73, at 373 (1967); *Rau v. Comm'r*, 25 CCH Tax Ct. Mem. ¶ 1966-254, at 1313 (1966).

⁶⁰ Act of Dec. 30, 1969, Pub. L. No. 91-172, 83 Stat. 487, § 803 (codified at INT. REV. CODE of 1954, § 1(c)).

two-earner married couples bore at least as much of an inequitable tax burden as did singles,⁶¹ Congress retained the pre-1969 singles' tax rate schedule as the schedule for married taxpayers filing separately.⁶² The result of this series of rate changes is the tax penalty on two-earner married couples.⁶³

In 1948, 1951, 1954, and 1969, Congress acted in the name of tax equality.⁶⁴ Each time, Congress had the opportunity to restore full equality, yet, in each instance, Congress did no more than was immediately necessary to halt current complaints. Prompted by a judicially and administratively imposed favored rate for one-earner married couples in community property states, Congress resolved part of the inequity by enacting the most politically expedient solution. Later, faced with the patent inequities which the ill-advised income-splitting plan had allowed to continue, Congress was gradually forced to extend favored rate treatment to heads of households, surviving spouses, and singles. Today, the only group without favored rate status is two-earner married couples, but the events of the past several decades indicate that this heavier tax burden was never carefully considered or even intended.⁶⁵

III. POLICY IMPLICATIONS OF DIFFERENTIAL RATE TREATMENT OF MARRIED AND SINGLE TAXPAYERS

The historical development of the current tax rate structure raises significant doubt that the discrimination between married and single taxpayers is indicative of any conscious congressional plan or policy. Rather, it appears that the present allocation of tax burdens is the unintended and conglomerate result of a series of ad hoc congressional reactions to public pressure. Even if the present tax structure does reflect congressional policy, the prevailing situation can be criticized as an example of bad tax policy.

The Internal Revenue Code's (IRC) progressive rate structure⁶⁶ is

⁶¹ *Hearings on H.R. 13270 Before the House Ways and Means Comm.*, 91st Cong., 1st Sess. 4269 (1969) (testimony of Carl Schoup).

⁶² If Congress had allowed married couples to file separate returns using the new lower singles' rate schedule, which imposes rates less than half as great as the schedule for married couples filing jointly, married couples from community property states could have split their income and filed separate returns, thereby reducing their tax liability and renewing the advantage to community property married couples.

⁶³ See part I *supra*.

⁶⁴ See H. GROVES, *supra* note 38, at 82-83 (1963); S. REP. NO. 91-552, 91st Cong., 1st Sess. 272 (1969); S. REP. NO. 1013, 80th Cong., 2d Sess. 22-24 (1948); H.R. REP. 586, 82d Cong., 2d Sess. 23 (1951).

⁶⁵ H. GROVES, *supra* note 38, at 82 (1963).

⁶⁶ The IRC's present tax rate scales range from a minimum of 14 percent of the first \$500 or \$1,000 of taxable income (depending on marital and household status and filing unit) to a maximum of 50 percent of earned taxable income over \$44,000 (married, joint return), \$38,000 (head of household), \$32,000 (single), or \$22,000 (married, separate return) and 70 percent of unearned taxable income over \$200,000 (married, joint return), \$180,000 (head of household), or \$100,000 (single and married, separate return). INT. REV. CODE OF 1954, §§ 1, 1348.

based on the tenet that persons with the greatest ability to pay should pay the greatest tax.⁶⁷ Yet, the imposition of the lowest tax rate on one-earner married couples runs counter to this principle. The one-earner married couple enjoys comparative economic advantages over a two-earner married couple earning the same total income. This comparative advantage was noted by Joseph Pechman during hearings in 1959:

[D]epartures from the principle that taxpayer units with the same taxable income should bear the same tax are likely to create many more problems than they solve.

An exception from this generalization might be made, however, for married couples with both spouses working. Aside from the fact that such a couple does not enjoy as much imputed income as it would enjoy if the wife stayed at home, it incurs other money outlays that are directly attributable to the wife's employment.⁶⁸

Thus, a married couple with one income-earner is better able to bear a given tax burden than a couple with the same income and two income-earners, yet the IRC imposes equal tax burdens.⁶⁹ No economic justification has ever been given for this aberration.

Income-splitting violates the principle of taxation in accordance with the taxpayer's ability to pay in another way. Calculations made by Philip Stern indicate that the only recipients of a significant reduction in taxes as a result of income-splitting are high-income married taxpayers.⁷⁰ He estimates that more than half of the tax reduction advantages of income-splitting are restricted to the wealthiest 8 percent of American families.⁷¹ Thus, those married taxpayers with the greatest ability to pay receive the largest reduction in taxes and therefore pay less tax than strict adherence to the doctrine of ability to pay would dictate.

Furthermore, the imposition of higher relative tax burdens on married couples in which both husband and wife work compared to the burden imposed on one-earner married couples indicates at least a tacit congressional policy that the place for one spouse is in the home.⁷² Because of

⁶⁷ The principle has been expressed as follows: "Forced exactions should be levied upon various individuals with reference to their ability to pay." H.R. REP. NO. 1040, 77th Cong., 1st Sess. 19 (1941).

⁶⁸ Pechman, *Income Splitting*, in TAX REVISION COMPENDIUM BEFORE THE HOUSE WAYS AND MEANS COMM., 86th Cong., 1st Sess. 473, 480-81 (1959).

Imputed income is the value created when a person consumes his own goods and services. Imputed income is not taxed as real money income. For example, a woman who remains at home and cares for a house and children will not be taxed on the value of the services she provides. If two homemakers agreed to do each other's work for pay, however, both would be taxed on the money income they received for doing the same work as before in another house. See also R. GOODE, *THE INDIVIDUAL INCOME TAX* 150-51 (1964).

⁶⁹ The IRC imposes equal taxes on married couples with equal taxable income, no matter what the actual distribution of income between spouses happens to be.

⁷⁰ P. STERN, *supra* note 1, at 119-23.

⁷¹ *Id.* at 125.

⁷² See note 13 and accompanying text *supra*.

traditional role pressures and lower earning potential, the stay-at-home spouse will almost invariably be the wife.⁷³ This tax policy directly opposes the expressed congressional demand for equality of opportunity for both sexes.⁷⁴ The tax laws should not be used to negate gains made toward women's equality.

A comparative study of the tax treatment of married couples in various countries indicates that it is desirable for a tax system to pursue a reasonable allocation of burdens.⁷⁵ The piecemeal assignment of tax burdens by Congress since 1948⁷⁶ has created a system with unsatisfactory implications. The continued success of the American self-assessment system of revenue collection is directly related to public confidence in those entrusted with making and administering the tax laws and public belief that the taxes imposed are fairly allocated.⁷⁷ If the present tax system is to survive, the IRS and Congress must move to eliminate the current tax rate structure which is the result of shortsightedness and is fraught with inequity.

In view of Congress' prior tax reform efforts, however, it appears that congressional action will not be forthcoming without some prompting. A successful attack on the constitutionality of the present disparate tax rate structure might well provide the needed impetus.

IV. THE MARRIAGE PENALTY UNDER THE CONSTITUTION

Although the federal income tax is explicitly authorized by the sixteenth amendment,⁷⁸ the procedure for and the substantive effects of the collection of the tax must conform to the requirements of other constitutional provisions.⁷⁹ The most relevant constitutional provisions in this

⁷³ Blumberg, *supra* note 13, at 49.

⁷⁴ See Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 701, 78 Stat. 253 codified at 42 U.S.C. § 2000-e2 (1965).

⁷⁵ Oldman & Temple, *Comparative Analysis of the Taxation of Married Persons*, 12 STAN. L. REV. 585, 605 (1960).

⁷⁶ See part II B *supra*.

⁷⁷ See generally Pechman, *The Problem of Personal Exemptions*, in TAX REVISION COMPENDIUM BEFORE THE HOUSE WAYS AND MEANS COMM., 86th Cong., 1st Sess. 380, 383-85 (1959); H.R. REP. NO. 91-413, 91st Cong., 1st Sess. 1 (1969); S. REP. NO. 91-552, 91st Cong., 1st Sess. 1 (1969); Thrower, *Administrative Aspects of the Tax Reform Act of 1969*, 22 THE TAX EXECUTIVE 161, 162 (1970).

⁷⁸ The sixteenth amendment states:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

U.S. CONST. amend. XVI. This amendment is a legislative reversal of *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), which held that the recently enacted federal income tax was not consistent with the proportionality requirement of article I, section 9, clause 4 of the Constitution. B. BITTKER & L. STONE, *supra* note 31, at 4-10.

⁷⁹ *Smith v. United States*, 250 F. Supp. 803 (D.N.J. 1966), *appeal dismissed*, 377 F.2d 739 (3d Cir. 1967). *Cf. Boylan v. United States*, 310 F.2d 493 (9th Cir.), *cert. denied*, 372 U.S. 935 (1962) (dealing with the commerce clause rather than the sixteenth amendment).

context are the tenth amendment⁸⁰ and the due process clause of the fifth amendment.⁸¹ The considerations under the fifth amendment are three-fold: has the taxpayer received procedural due process;⁸² has the taxpayer received substantive due process;⁸³ and has the taxpayer enjoyed the equal protection of the law.⁸⁴ The question under the tenth amendment is whether the federal government has impermissibly invaded a state interest.⁸⁵

A. Due Process and Equal Protection

Procedural due process presents two issues: whether the statute in question was properly enacted and whether the government has "followed the rules" in a particular taxpayer's case.⁸⁶ Neither issue is likely to be a successful ground for contesting the marriage penalty. A challenge to the formal validity of the IRC seems unreasonable, and the due process objections would not be directed toward the specific tax collection procedures applied to one particular taxpayer.

Substantive due process raises more significant concerns, but is also an insufficient ground for overturning the marriage penalty. Although the boundaries of substantive due process are incapable of exact delineation, the idea of fundamental fairness is often put forward.⁸⁷ A taxation statute would be fundamentally unfair if it were confiscatory⁸⁸ or lacked any rational basis.⁸⁹ The marriage penalty is not so odious as to fail to pass these tests. Another substantive due process formulation is that a statute must not be "arbitrary, capricious, or unreasonable."⁹⁰ The relevant considerations are whether there is fair warning of the effect or requirements of the law,⁹¹ whether the object of the law is permissible,⁹² whether the means chosen have a real and substantial relationship to the object,⁹³ and whether the means are themselves reasonable.⁹⁴ These concerns are

⁸⁰ The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST. amend. X.

⁸¹ The fifth amendment provides in part, "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

⁸² See note 86 and accompanying text *infra*.

⁸³ See notes 87-98 and accompanying text *infra*.

⁸⁴ See notes 99-121 and accompanying text *infra*.

⁸⁵ See part IV B *infra*.

⁸⁶ *Burton v. Platter*, 53 F. 901, 904 (8th Cir. 1893).

⁸⁷ *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673 (1930).

⁸⁸ *Morris Inv. Corp. v. Comm'r*, 134 F.2d 774 (3d Cir. 1943).

⁸⁹ *Quincy College & Seminary Corp. v. Burlington Northern, Inc.*, 328 F. Supp. 808 (N.D. Ill. 1971).

⁹⁰ *Lapides v. Clark*, 176 F.2d 619 (D.C. Cir.), *cert. denied*, 338 U.S. 860 (1949).

⁹¹ *Cf. United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932). This aspect arises most often in criminal cases; no claim of a lack of fair warning is tenable for the provisions of the Internal Revenue Code, a far from unknown even if otherwise obscure source.

⁹² *City of Atlanta v. National Bituminous Coal Comm'n*, 26 F. Supp. 606 (D.D.C.), *aff'd sub nom. City of Atlanta v. Ickes* 308 U.S. 517 (1939).

⁹³ *Lapides v. Clark*, 176 F.2d 619 (D.C. Cir.), *cert. denied*, 338 U.S. 860 (1949).

⁹⁴ *Williamson v. Comm'r*, 100 F.2d 735 (6th Cir. 1938), *cert. denied*, 307 U.S. 623 (1939).

more important when the challenged statute is regulatory rather than revenue-raising.⁹⁵ A true revenue-raising scheme has a permissible and obvious connection between means and ends, and generally can be challenged only as providing insufficient warning⁹⁶ or as unreasonable.⁹⁷ Although reasonable persons might differ on the merits of the marriage penalty, it is difficult to say that it is arbitrary, capricious, or unreasonable.⁹⁸ Consequently, the marriage penalty aspect of the Internal Revenue Code does not seem to violate substantive due process.

Equal protection of the laws, explicitly granted in the fourteenth amendment,⁹⁹ is not specifically guaranteed by the fifth amendment, but has been read into it as an aspect of substantive due process.¹⁰⁰ Although it is not clear whether the federal government should be held to a stricter, identical, or more flexible standard than the states, the cases seem to apply the same standards.¹⁰¹ Equal protection analysis, as applied to the states, involves a two-step process. First, the degree of judicial scrutiny is determined on the basis of whether or not the plaintiff is asserting a fundamental right or challenging a classification as suspect.¹⁰² If the plaintiff does not trigger strict judicial review by asserting a fundamental right¹⁰³ or challenging a suspect classification,¹⁰⁴ the court accords the state's action a presumption of legitimacy, thereby placing the burden on the plaintiff to show either that the discrimination lacks a reasonable basis or that the means chosen have no rational relationship to a reasonable end.¹⁰⁵ This task is difficult for a plaintiff, but not impossible.¹⁰⁶ If, on the other

⁹⁵ See generally *United States v. Kahriger*, 345 U.S. 22 (1953). See also *United States v. Hudson*, 299 U.S. 498 (1937), which sustained retroactive taxation for revenue.

⁹⁶ With widespread publication and no restriction on short-term retroactivity, the federal income tax seems immune to complaints of no warning.

⁹⁷ See, e.g., *Heiner v. Donnan*, 285 U.S. 312 (1932), which struck down a rule making all gifts completed during the last two years of a decedent's life gifts in contemplation of death.

⁹⁸ *Faraco v. Comm'r*, 261 F.2d 387 (4th Cir. 1958), cert. denied, 358 U.S. 925 (1959).

⁹⁹ Section 1 of the fourteenth amendment provides in part, "No state shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. CONST. amend XIV, § 1.

¹⁰⁰ *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹⁰¹ No analytical distinction was drawn between *Bolling v. Sharpe*, 347 U.S. 497 (1954), and *Brown v. Board of Educ.*, 347 U.S. 483 (1954), although *Bolling* was decided under the fifth amendment and *Brown* was decided under the fourteenth amendment.

¹⁰² *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). See also Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

¹⁰³ See notes 119-122 *infra*.

¹⁰⁴ See notes 123-127 *infra*.

¹⁰⁵ *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

¹⁰⁶ E.g., *Reed v. Reed*, 404 U.S. 71 (1971). In *Reed*, Idaho was unable to show a rational basis for distinguishing between males and females in making appointments as administrators for the probate of intestate estates.

hand, the plaintiff triggers strict review, the burden falls on the state to show that it has a sufficiently compelling interest to justify denying this plaintiff what would seem to be his deserved rights.¹⁰⁷ According to Chief Justice Burger, no state has ever successfully made this showing.¹⁰⁸

Since the result of a particular case will most often be determined by the decision concerning the appropriate degree of review, rather than the result of the review itself, attention has focused primarily upon which rights and classifications trigger strict review. Fundamental rights seem to include voting,¹⁰⁹ procreation,¹¹⁰ and travel,¹¹¹ but not education.¹¹² Suspect classifications seem to include race,¹¹³ alienage,¹¹⁴ ancestry,¹¹⁵ and possibly sex¹¹⁶ and wealth.¹¹⁷

It is unlikely that the federal government could show a compelling interest to support the marriage penalty.¹¹⁸ The question is whether there is a basis for triggering strict review. It may be that marriage is a fundamental right. The Supreme Court struck down Virginia's antimiscegenation statute in *Loving v. Virginia*,¹¹⁹ and that case can be read to stand for either or both of the following propositions: that racial classifications are suspect or that marriage is a fundamental right. The former is patently true and is sufficient to sustain the decision. The latter, however, is also explicitly supported by the language of the case,¹²⁰ and consequently, until the Court clarifies this question, both propositions must be regarded

¹⁰⁷ *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 806 (1969).

¹⁰⁸ *Dunn v. Blumstein*, 405 U.S. 330, 363-64 (1972) (Burger, J., dissenting).

¹⁰⁹ *E.g.*, *Carrington v. Rash*, 380 U.S. 89 (1965).

¹¹⁰ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹¹¹ *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹¹² *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

¹¹³ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹¹⁴ *In re Griffiths*, 413 U.S. 717 (1973).

¹¹⁵ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Korematsu v. United States*, 323 U.S. 214 (1944).

¹¹⁶ *Frontiero v. Richardson*, 411 U.S. 677 (1973). Mr. Justice Brennan, joined by Justices Douglas, White, and Marshall, held that sex should be a suspect classification.

¹¹⁷ *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963). In *Harper v. Virginia Bd. of Elections*, the Court noted that "Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored." *Harper v. Virginia Bd. of Elections*, 383 U.S. 668 (1966) (citation omitted). *But see James v. Valtierra*, 402 U.S. 137 (1971). *Contra*, *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹¹⁸ Indeed with simple alternatives available and a history of contrary practice, the federal government is almost estopped from claiming a compelling interest in this particular means of raising revenue.

¹¹⁹ 388 U.S. 1 (1967).

¹²⁰ The opinion states: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." 388 U.S. at 12. The Court went on to suggest that "To deny this fundamental freedom . . . is surely to deprive . . . citizens of liberty without due process of law." *Id.* Although the Court simultaneously condemned the racial restriction included in and implemented by the Virginia antimiscegenation statute, it also tied together the threads of due process and equal protection. Consequently, whether or not the implied federal guarantee of equal protection is identical to the explicit guarantee in the fourteenth amendment, the federal guarantee, resting as it does on a due process basis, should be read to include marriage as a fundamental right.

as valid.¹²¹ Therefore, while taxing schemes which discriminated against single persons did not deny equal protection, the current scheme, which discriminates against some married persons, arguably denies equal protection of the laws.

B. States' Rights

The fifth amendment guarantees of due process and implied equal protection¹²² are not the only grounds upon which the constitutionality of the present disparate rate treatment of married and single taxpayers might be contested. The tenth amendment to the Constitution guarantees that the sovereign power of the states over matters reserved for their control may not be abridged by federal action.¹²³ This division of sovereignty is the essence of a federal system.¹²⁴

Under the tenth amendment, marriage is a legal relationship over which the states have exclusive control.¹²⁵ The strength of the states' interest in the unencumbered exercise of control over marriage is apparent from the number of cases heard by the Supreme Court dealing with conflicts arising when two or more states apply their marriage and divorce laws to one married couple.¹²⁶

While the federal government is undoubtedly within the scope of its express sixteenth amendment constitutional power in implementing an income taxation system,¹²⁷ it is also clear that the disincentives to marriage inherent in the IRC's present allocation of tax burdens¹²⁸ undercut, to some extent, the states' power to determine marriage policy. Without a sufficient basis in tax policy, the federal government's imposition of higher tax rates on two-earner married couples represents an exercise of what is, at best, only an implied power, secondary to the express taxing power, and constitutes an effective, albeit partial, usurpation of the states' constitutional power to control policy concerning marriage.

When the exercise of power by both states and federal governments results in a conflict, the supremacy clause of the Constitution¹²⁹ nor-

¹²¹ See also *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (dealing with the sterilization of prisoners and, therefore, procreation); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (sanctifying the right of privacy in the context of marriage); *Roe v. Wade*, 410 U.S. 113 (1973) (the abortion case). These cases indicate that governmental restrictions on marriage in the traditional sense will be disfavored. That is not to say that government encouragement of marriage will also be disfavored. See part IV B *infra*.

¹²² See part IV A *supra*.

¹²³ U.S. CONST. amend. X.

¹²⁴ See generally A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 114-66 (3rd ed. 1963).

¹²⁵ See, e.g., *Haddock v. Haddock*, 201 U.S. 562 (1906); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859).

¹²⁶ See, e.g., *Williams v. North Carolina*, 325 U.S. 226 (1945); R. CRAMTON & D. CURRIE, *CASES, COMMENTS, AND QUESTIONS ON CONFLICT OF LAWS*, ch. 6 (1968).

¹²⁷ See note 78 and accompanying text *supra*.

¹²⁸ See Figures 1 and 2 *supra*.

¹²⁹ U.S. CONST. art. VI.

mally dictates that the state interest give way and the federal interest take precedence.¹³⁰ In cases involving conflicts between implied congressional powers and the powers reserved to the states by the tenth amendment, however, the supremacy clause is not immediately invoked. A more flexible standard, first stated in *McCulloch v. Maryland*,¹³¹ is employed as an interpretive application of the necessary and proper clause,¹³² a fertile source of implied powers.

Such a conflict between the express taxation power of Congress and a power reserved to the states by the tenth amendment was considered by the Supreme Court in *United States v. Butler*.¹³³ The receiver for a Massachusetts cotton mill attacked the constitutionality of taxes assessed against the mill under the Agricultural Adjustment Act (AAA) of 1933. These taxes were to be used as crop-reduction subsidies paid to cotton growers under individual acreage-reduction contracts between the growers and the Secretary of Agriculture.

The Court held that the standing requirements of *Massachusetts v. Mellon*¹³⁴ were not a bar to suit by the taxpayer since the tax was being resisted as an unauthorized means of regulating agricultural production, not as a source of unauthorized expenditures. While Mr. Justice Roberts, writing for the Court, recognized that taxation solely for the purpose of raising revenue to "provide for the general welfare" is normally granted a presumption of constitutionality,¹³⁵ the mandate of the Child Labor Tax case,¹³⁶ which requires that nonfiscal taxation motives be examined, was followed, and the Court found that regulation, rather than revenue-raising, was the underlying purpose of the tax.

The Agricultural Adjustment Act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government.

....

The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to

¹³⁰ See e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

¹³¹ 17 U.S. (4 Wheat.) 316 (1819). The Court said:

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Id. at 421 (emphasis added).

¹³² U.S. CONST. art I, § 8.

¹³³ 297 U.S. 1 (1935).

¹³⁴ 262 U.S. 447 (1923). In that case, the Court held that individual taxpayers may not question federal expenditures on the ground that the alleged unlawful expenditures deplete the treasury and thus increase future taxation.

¹³⁵ See *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1927).

¹³⁶ *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible.¹³⁷

Congress has never expressly communicated a desire to regulate marriage through implementation of the tax laws, yet the result of the present individual tax system is the "marriage penalty" previously described. The alternatives to a judicial finding that Congress is using the income tax as a means of eliciting desired action in the area of marriage policy are the following: that the congressional policy behind differential taxation was equality, in which case Congress has failed to effectuate its policy goal; or that Congress had no policy at all, in which case the marriage penalty must fall to the equal protection challenge, which requires a compelling governmental interest. Under any of these views, the marriage penalty should not be allowed to continue. In addition, other cases appear to direct the courts to a finding that the present tax rate structures of the IRC are unconstitutional.

In *Tank Truck Rentals, Inc. v. Commissioner*,¹³⁸ Tank Truck Rentals was attempting to deduct fines imposed on its trucks and drivers for violation of state maximum weight laws as "ordinary and necessary" business expenses of operating a trucking business under section 162(a) of the Internal Revenue Code.¹³⁹ The Court held that strict adherence to the meaning of section 162(a)'s deductibility guidelines would dictate allowance of the deduction, but that federal tax statutes should not be used as a means of frustrating an express state policy concerning highway safety. Given the choice between partially frustrating the goals of the federal tax statute in question and completely frustrating the state's goals, the Court chose the former. This same reasoning can be applied to the conflict between goals and means involved in the present allocation of tax burdens.

The end sought by federal income taxation is revenue collection.¹⁴⁰ While raising revenue is an important function of the federal government and one expressly authorized by the Constitution, the means used to attain this valid end clearly infringe on the power of a state to control the institution of marriage. The federal goal of raising and collecting revenue need not frustrate the states' promarriage policies,¹⁴¹ but the

¹³⁷ 297 U.S. 1, 68-69 (1922). While the role of *Butler* in the Court packing attempt of 1937 and the subsequent congressional enactment of most of the provisions of the AAA minus the processing tax have caused doubt as to the validity of the holding in *Butler*, the case has never been overruled and no attempt has been made to levy a similar tax.

¹³⁸ 356 U.S. 30 (1958).

¹³⁹ INT. REV. CODE of 1954, § 162(a).

¹⁴⁰ See generally J. PECHMAN, *supra* note 12, at 1.

¹⁴¹ The courts of various states have recognized marriage as a valuable social institution and have granted it a favored status under the law. See, e.g., *Sanders v. Sanders*, 52 Ariz. 156, 171, 79 P.2d 523, 529 (1938); *Dunham v. Dunham*, 162 Ill. 589, 607, 44 N.E. 841, 847 (1896); *Jones v. Jones*, 63 Okla. 208, 210, 164 P. 463, 464 (1917); *Gress v. Gress*, 209 S.W.2d 1003 (Tex. Civ. App. 1948).

means presently used by the federal government to assess and collect individual taxes do frustrate state aims¹⁴² and, therefore, are not "appropriate" even if "plainly adapted" to raising revenue.

Although the Court has recognized that federal overstepping into an area normally reserved for state control may be constitutionally upheld if a proper governmental objective may only be implemented thereby,¹⁴³ it has been adamant in maintaining that federal control over areas reserved for state regulation may not be achieved by means of an authorized action which sweeps unnecessarily broadly.¹⁴⁴

In *Aptheker v. Secretary of State*,¹⁴⁵ the Court held that a statutory restriction upon the right of registered Communists to obtain passports was an overbroad application of the congressional right to protect national security. Such a restriction infringed upon the right of American citizens to travel,¹⁴⁶ and, absent a showing that Congress had no other means of protecting national security from the damaging impact of espionage, the Court held that the rights of citizens far outweighed the congressional goal. Since other, less restrictive means of protecting national security were available to Congress, the statute was held unconstitutional.

While *Aptheker* dealt with a claim of denial of due process to individuals, the same reasoning should apply to a federal statute which, in its sweep, subjugates an exclusive state power. When subjected to the stringent test of overbreadth of scope, it is apparent that the congressional goals of raising revenue and providing equality of treatment for all married taxpayers in all states could be attained by means that do not undercut the promarriage policies of the states.

State courts have also stated that marriage is of vital interest to society and to the states. *See, e.g.*, *Sweigert v. State*, 213 Ind. 157, 165, 12 N.E.2d 134, 138 (1938); *French v. McAnarney*, 290 Mass. 544, 546, 195 N.E. 714, 715 (1935); *Fearon v. Treanor*, 272 N.Y. 268, 271-72, 5 N.E.2d 815, 816 (1936); *Holloway v. Hallway*, 130 Ohio St. 214, 216, 198 N.E. 579, 580 (1935).

The favored status of marriage in the states is also indicated by the relative ease with which a valid marriage can be entered into and by the statutory obstacles to terminating marriage by divorce. For example, Illinois imposes no waiting period on two residents who apply for a marriage license after having submitted to a blood test. (ILL. REV. STAT. ch. 89, §§ 6, 6a (Smith-Hurd 1966)). However, a divorce can be obtained only after showing cause (ILL. REV. STAT. ch. 40, § 1 (Smith-Hurd 1956)) and only after six months continuous residence by one party within the state. (ILL. REV. STAT. ch. 40, § 3 (Smith-Hurd 1956)). For comparisons of the state statutory regulations governing marriage and divorce in all 50 states see 19 THE BOOK OF THE STATES—1972-73, at 409-11 (1972).

The states' preference for legally sanctioned marriage relations rather than for more informal relationships between couples is indicated by the fact that all states make provision for formalized marriage, while only 14 states recognize the validity of common law marriages. See 19 THE BOOK OF THE STATES—1972-73, at 409 (1972).

¹⁴² See notes 13, 141 and accompanying text *supra*.

¹⁴³ *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

¹⁴⁴ *See, e.g.*, *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958).

¹⁴⁵ 378 U.S. 500 (1964).

¹⁴⁶ *Id.* at 504.

V. A PROPOSAL FOR REFORM

While a taxation system that allocates tax burdens among individuals in accordance with the congressional goals of equal taxation of equal income¹⁴⁷ and taxation by ability to pay¹⁴⁸ could be achieved by retaining the current four-tiered rate structure modified by further rate concessions, the resulting system might well be unmanageable because of the multiplicity of rate treatments. A simpler and more desirable solution would be for Congress to discard the present multiple rates in favor of one universal rate.¹⁴⁹ Equity and rationality in individual taxation could be achieved through rate equalization and the use of mandatory joint returns for married couples¹⁵⁰ or alternatively through individual taxation of persons according to their exercise of management and control over income or income-producing property.¹⁵¹

Unfortunately, experience indicates that neither of these proposals is likely to be enacted.¹⁵² Twenty-five years under income-splitting and the long-standing vested interest of sole-earner married individuals, who benefit most from the status quo, militate against passage of any proposal for change. In addition, any reform that eliminated income-splitting in community property states would surely be constitutionally challenged if adopted.¹⁵³ Nevertheless, equity and rationality in the tax system could be restored without incurring the stigma of historical unpopularity reflected by the mandatory joint return and "management and control" plans, or denying income-splitting to community property married couples by moving to a dual-rate system.¹⁵⁴

¹⁴⁷ H.R. REP. No. 91-413, 91st Cong., 1st Sess. 10 (1969).

¹⁴⁸ See note 67 *supra*.

¹⁴⁹ Use of only one rate would return the individual tax system to pre-income-splitting simplicity, but would force a congressional decision on the proper tax units to use for assessment of tax. See generally H. GROVES, *supra* note 38, at 69-77; *Hearings on American Families: Trends & Pressures Before the Subcomm. on Children and Youth of the Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. — (1973) (testimony of Harvey Brazier).

¹⁵⁰ See note 33 *supra*.

¹⁵¹ See note 33 *supra*.

¹⁵² See note 34 and accompanying text *supra*.

¹⁵³ While the Supreme Court has not ruled on the constitutionality of denial of the use of income-splitting to married taxpayers in community property states in the income tax context, the question of the constitutionality of denial of the use of income-splitting through the estate and gift tax has been addressed by the Court. In *Fernandez v. Wiener*, 326 U.S. 340 (1945), the Court made it clear that Congress was not bound by the limits of a state's property laws in determining ownership for the purpose of taxation. Since *Poe v. Seaborn*, 282 U.S. 101 (1930), was decided on the basis of statutory interpretation and not constitutional grounds, it should not bar legislative repeal of the use of the preference.

For a prior Attorney General's view of the constitutionality of tax treatment contrary to community property income division see 61 CONG. REC. 5909-22 (1921). See also INT. REV. CODE of 1954, § 1402(a)(5)(B) (denies split-income treatment on partnership income and requires that all such income be considered self-employment income of the partner who earned it).

¹⁵⁴ Use of a dual-rate system to equalize tax burdens between married couples from community property states and all other taxpayers was often discussed informally in Congress prior to 1947. *Tax Treatment of Family Income*, *supra* note 33, at 846,

The proposed dual-rate system would use one rate schedule for single taxpayers and married couples who aggregate their income and file joint returns, and another for married persons who file separately after splitting marital income. Married persons who wished to continue splitting their income would be able to do so, but their split income would be taxed at the rate for married persons filing separately. This rate schedule would have brackets half as wide, and therefore twice as progressive, as the regular schedule. Since the effect of splitting income between spouses is to double the width of the tax rate brackets applied to the split-income, the total impact of using the special rate schedule for split-income returns would be neutralization of the advantage of income-splitting.¹⁵⁵

A dual-rate schedule would completely eliminate the rate reduction advantage of income-splitting for married couples and would result in equal rates for all tax units with equal taxable income, regardless of marital status. Rate equalization coupled with a retention of present exemptions and deductions would impose tax burdens much more nearly in conformity with the policy of taxation according to ability to pay. If

854. A specific proposal for equalization of taxation by the use of a dual-rate scheme was offered by William Vickrey in 1947. W. VICKREY, *AGENDA FOR PROGRESSIVE TAXATION* 274-87 (1947). The dual-rate system has been proposed as a solution to the post-1948 inequity problem by several authors. See, e.g., Pechman, *supra* note 68, at 483-86; P. STERN, *supra* note 1, at 128-30.

¹⁵⁵ The following is a simple hypothetical application of the dual-rate system:

SCHEDULE A

(for single persons and married couples filing joint returns)

If taxable income is:	Tax
\$0-1000	15%
\$1000-4000	\$150 + 20% of excess over \$1000
\$4000-8000	\$750 + 25% of excess over \$4000
\$8000-12000	\$1750 + 30% of excess over \$8000

SCHEDULE B

(for married couples filing separate returns on split income)

If taxable income is:	Tax
\$0-500	15%
\$500-2000	\$75 + 20% of excess over \$500
\$2000-4000	\$375 + 25% of excess over \$2000
\$4000-6000	\$875 + 30% of excess over \$4000

The consequence of using a schedule with brackets half as wide as the normal brackets for those who split income is that the bracket-doubling effect of income-splitting is exactly neutralized and all equal-income taxpayers pay at equal rates. For example, a single person with \$10,000 taxable income will pay $\$1,750 + (2,000 \times .30) = \$2,350$ in tax. A married couple with \$10,000 total taxable income will pay a) $\$1,750 + (2,000 \times .30) = \$2,350$ total tax if they file jointly; or b) $\$875 + (1,000 \times .30) = \$1,175 \times 2 = \$2,350$ total tax if they split income and file separate returns.

Exemptions and deductions can be used to make whatever adjustments are appropriate to compensate for the extra expenses incurred and for the value of the labor at home, i.e. the imputed income lost when the second spouse goes to work. See note 68 *supra*.

all other factors were equal, a single person with only one exemption would pay a tax higher than either a single person who supports a dependent or a married couple with two personal exemptions.

This allocation of tax burdens coincides with ranking according to ability to pay as suggested by Pechman,¹⁵⁶ Groves,¹⁵⁷ Oldman and Temple,¹⁵⁸ and Richards.¹⁵⁹ However, all of these commentators state that a strong case can be made for granting some concession to two-earner families because of the extra work-related expenses incurred and the tax-free imputed income due to a stay-at-home spouse's home labors that is lost when a second family member goes to work outside the home.¹⁶⁰ The concession most often proposed is an earned-income allowance.¹⁶¹ Adoption of a percentage-of-income earned-income allowance, available only to the second earner in a family with a specific ceiling limiting any significant tax reduction impact to families with low- and moderate-incomes, would yield a result consistent with the policy of taxing in accordance with the taxpayer's ability to pay.

The tax system resulting from enactment of a rate-equalizing dual-rate plan with an earned income concession for two-earner married couples would be more nearly marriage-neutral than the current system and would also remedy any constitutional defects. The improvement in tax policy alone is sufficiently desirable to commend this reform to Congress, even in the absence of actual litigation presenting a constitutional challenge to the present rate structure.

VI. CONCLUSION

Present taxpayer dissatisfaction with governmental allocation of income tax burdens is the product of political, legal, and historical factors, but analysis of these factors indicates that there is considerable doubt that Congress intended to alter the distribution of tax burdens in the manner which has ultimately resulted. Significant evidence shows that the present system does not impose tax burdens in accordance with the express congressional desire to tax according to ability to pay, and there is some question about the constitutionality of the present rate system.

¹⁵⁶ Pechman, *supra* note 68, at 480-81.

¹⁵⁷ H. GROVES, *supra* note 38, at 56-83.

¹⁵⁸ Oldman & Temple, *supra* note 75, at 603-04.

¹⁵⁹ Richards, *Discrimination Against Married Couples in the Present Income Tax Laws*, *supra* note 2, at 530-34.

¹⁶⁰ See note 68 and accompanying text *supra*.

¹⁶¹ An earned-income allowance is a deduction which grants a taxpayer an exemption from income for some of the work-related expenses incurred in the production of income. Several foreign countries grant earned-income allowances in lieu of or in addition to standard deductions from income. See generally Oldman & Temple, *supra* note 75, at 586-96, 604. The United States gave a special \$15 tax credit to working wives in 1944-45, which was in essence an earned-income allowance for a second worker in a family. J. PECHMAN, *supra* note 12, at 92-93. For a further explanation and rationalization of the need for an earned income allowance for working wives see Blumberg, *supra* note 13, at 59-62.

For these reasons, it is imperative that Congress review its income tax goals and policies and enact a new individual tax system that no longer arbitrarily differentiates between taxpayer units on the basis of marital and household status.

A tax system imposing equal taxation on all taxation units with equal taxable income and differentiating between taxpayer units with the same adjusted gross income solely through the availability and use of personal exemptions, dependency deductions, an earned income allowance, and other realistic expense allowances would create a tax system which comes much closer to the goal of equitable treatment of all taxpayers. For that reason, this proposal should be considered and quickly enacted by Congress to end tax discrimination against one group or another.

—*Michael W. Betz*