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RETHINKING TAX PRIORITIES: MARRIAGE NEUTRALITY, CHILDREN, AND CONTEMPORARY FAMILIES

*James M. Puckett**

Tax scholarship has long struggled with whether married taxpayers should be taxed differently from unmarried taxpayers. Currently, married taxpayers are subject to different tax rates than unmarried taxpayers, and may file a joint tax return. A married couple may pay a higher or lower amount of tax than an unmarried couple with the same total income, and a single person generally pays more tax on a given income than a married couple with a single earner with the same income. These outcomes are difficult to reconcile with a commitment to income tax progressivity, which in theory requires that higher incomes be taxed at higher rates. Moreover, the system penalizes some marriages, and benefits other marriages. This Article takes a fresh look at the problem of marriage bonuses and penalties, acknowledges that there may be difficulties with a separate filing system, but concludes that the joint return and special rates for married taxpayers should be abolished. In addition, drawing on the work of family law scholars, this Article argues that a stronger case can be made for supporting parenting rather than marriage in the tax system.

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I. INTRODUCTION

Congress and tax scholars have struggled for decades with the question of how, if at all,¹ the federal income tax system should take into account a taxpayer's ties with a spouse, partner, child, or other family members or dependents. Currently, such considerations affect tax liability in many ways, but the fundamental structural feature is the classification of taxpayers into three basic income tax return filing statuses: married,² head of household,³ and unmarried.⁴ A taxpayer's filing status determines the applicable tax rate schedule⁵ and standard deduction⁶ and affects how credits and deductions phase in and out.⁷ Although the aggregate tax benefit or penalty generated by one filing status versus another depends on a complex set of circumstances, the stakes of filing status can be significant at all income levels.⁸ The

1. In his classic monograph on the income tax, Henry Simons argued that expenditures on children are consumption and should not affect income tax liability. See HENRY C. SIMONS, *PERSONAL INCOME TAXATION* 140 (1938); see also Lawrence Zelenak, *Children and the Income Tax*, 49 *TAX L. REV.* 349, 359–61 (1994) (“Whatever may be said in theory for the view of children as consumption, there is no political or popular support in the United States today for an income tax generally treating children as just another consumption choice, irrelevant to the determination of tax liability.”); Boris I. Bittker, *Federal Income Taxation and the Family*, 27 *STAN. L. REV.* 1389, 1448 (1975) (“No one but a tax theorist, it might be asserted, could fail to see the difference [between supporting children and maintaining a yacht].”)

2. Married taxpayers generally may file either jointly or separately. See I.R.C. § 1(a) (2006) (imposing tax rate schedule for married taxpayers filing jointly); *id.* § 1(d) (imposing tax rate schedule for married taxpayers filing separately); *id.* § 6013 (providing requirements for the filing of a joint return). Married taxpayers, however, generally will not save tax by filing separately except in unusual circumstances. See Lawrence Zelenak, *Marriage and the Income Tax*, 67 *S. CAL. L. REV.* 339, 339 n.1 (1994) (noting that separate returns can reduce the percentage floor on deductions determined by reference to adjusted gross income, but that advantages may be more than offset by higher rates).

3. See I.R.C. § 1(b).

4. See I.R.C. § 1(c). It is important to consider the treatment of both unmarried couples and single individuals. See Lily Kahng, *One is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 *HASTINGS L.J.* 651, 656–57 (2010) (coining the terms “unmarried couple’s penalty,” “unmarried couple’s bonus,” and “single person’s penalty”).

5. See I.R.C. § 1(a)–(d) (imposing tax on married individuals filing jointly, heads of household, unmarried individuals, and married individuals filing separately).

6. See I.R.C. § 63(c)(2).

7. See Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 *TAX L. REV.* 1, 22 (2000) (noting that marriage penalties from phaseouts can be “quite significant”).

8. See CONG. BUDGET OFFICE, *FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX* xiv (1997). At low incomes, the standard deduction and Earned Income Tax Credit (EITC) are most significant, while at high incomes the rate schedules and phaseout provisions are most significant.

In addition to the income tax stakes, other important tax rules are affected by family relationships. For example, gifts among married taxpayers are generally exempt from estate and gift tax.

importance of filing status will increase with the sunset of the Bush tax cuts, and if there are future rate hikes.⁹ In light of the historically high federal budget deficit, there is speculation that rate increases¹⁰ for taxpayers of all income levels could be on the horizon.¹¹

This Article assesses whether the current filing system is defensible as part of a progressive income tax system. In addition to considering the work of tax scholars, this Article draws on the contemporary debate among Congress, courts, family law scholars, and the public concerning the meaning of marriage and whether it should be supported by the government. The United States limits “marriage,” for purposes of

See I.R.C. § 2523(a). Social security contributions are calculated on a separate basis for all taxpayers, but social security benefits are calculated on a partially combined basis for married taxpayers. See Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 997 (1993).

9. See Zelenak, *supra* note 2, at 341 (“The more progressive the rate structure, the more significant the tax effects of joint returns. Effects that may have been tolerable under the low rates of the 1986 Tax Reform Act may not be tolerable under the 36% and 39.6% tax rates introduced by the Omnibus Budget Reconciliation Act of 1993.”). Our current rate structure is somewhat progressive but relatively flat by historical standards. See JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES* 18–21 (4th ed. 2008) (summarizing the history of the federal income tax system and charting top income tax rates). Rate cuts enacted under the Bush Administration are currently scheduled to sunset at the end of 2010. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 901, 115 Stat. 38, 150 (codified as amended at I.R.C. § 1); Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, §§ 103-105, 107, 117 Stat. 752, 754–56 (codified as amended at I.R.C. § 1); Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, §§ 101(b)-(e), 105, 118 Stat. 1166, 1167-69 (codified at I.R.C. § 1); see also Arthur Laffer, *Tax Hikes and the 2011 Economic Collapse*, WALL ST. J., June 7, 2010, at A19.

Although a complete discussion of nonincome taxes is beyond the scope of this Article, recent Medicare tax increases include significant marriage bonuses and penalties. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 9015, 10,906 (2010) (amending I.R.C. § 3101(b)); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1402, 124 Stat. 1029, 1060-63 (to be codified at I.R.C. § 1411); Diana Furchtgott-Roth, *Marriage Penalties Rise Under the New Healthcare Law*, 127 TAX NOTES 349 (2010).

10. By “rate increase,” I mean a rate increase through new legislation, not the scheduled sunsets.

11. See John D. McKinnon & Greg Hitt, *Middle-Class Tax Boost Is Broached*, WALL ST. J., June 23, 2010, at A2 (“When the time comes for a long-term plan, Mr. Hoyer added, ‘raising revenue is part of the deficit solution’ along with spending cuts . . . Republicans said Democrats were signaling their intent to raise taxes on the middle class.”); David Wessel, *Taxing Rich Wouldn’t Close the Gap, but Would Shrink It*, WALL ST. J., Sept. 3, 2009, at A4 (“[N]either politicians nor their constituents show any willingness to cut spending enough to avoid tax increases. So the issue is whose taxes, and the arithmetic suggests it won’t only be those who make more than \$250,000 a year.”); Bruce Bartlett, *Robin Hood Tax Policy*, FORBES, July 17, 2009, <http://www.forbes.com/2009/07/16/tax-policy-wealthy-opinions-columnists-bruce-bartlett.html> (“Historically, increases in the top rate have tended to pave the way for higher rates on the middle class. Holding down the top rate in effect places a cap on how high tax rates on the middle class can go. If the top rate rises, higher rates on the middle class probably won’t be too far behind.”); Ruth Marcus, *Obama Squelches His Truth Whisperers*, WASH. POST, Aug. 5, 2009, at A13 (noting Treasury Secretary Timothy Geithner’s and National Economic Council Director Lawrence Summers’s refusals to rule out tax increases on families making under \$250,000); Deborah Solomon, *Woes Across the Ocean Spur U.S. to Choose Sides on Debt*, WALL ST. J., June 7, 2010, at A2; Fred Barnes, *Pelosi’s Loss Could Be Obama’s Gain*, WALL ST. J., June 7, 2010, at A19.

federal law, to unions between one man and one woman.¹² A growing number of states, however, recognize same-sex marriages, civil unions, and similar arrangements.¹³ The controversy has centered on one of the primary reasons why states and the federal government promote marriage—to promote parenting. Another primary thread in the literature has been the importance of individual autonomy.

Part II summarizes the history of United States federal income tax filing statuses. Part III assesses the joint return against a potential alternative of a single filing status, drawing on the work of tax scholars. Part IV examines nontax literature on marriage and family. This Article concludes that the joint return and special rates for married taxpayers should be abolished but that a stronger case can be made for supporting parenting through credits or the rate structure.

II. HISTORY OF TAX RETURN FILING IN THE UNITED STATES

The history of tax return filing in the United States has been told many times;¹⁴ however, a summary helps explain the dilemmas that exist today. Tax scholarship traditionally has focused on the notion that there are three principal goals in taxing single individuals, unmarried couples, and married couples: progressivity, marriage neutrality, and couples neutrality.¹⁵ It is well known among tax scholars that it is impossible to achieve all three of these features.

A. Individual Filing

The Revenue Act of 1913 allowed married couples to file jointly or separately, but there was generally no advantage to filing jointly, because the same rate schedule otherwise applicable to an individual would apply to the couple.¹⁶ In other words, married taxpayers filing

12. 1 U.S.C. § 7 (2006).

13. See Matt Bai, *Queer Developments*, N.Y. TIMES, May 24, 2009, at MM15 (noting that 13% of Americans live in states with gay marriage); Philip Shishkin, *Massachusetts Sues U.S. Over Definition of Marriage*, WALL ST. J., July 9, 2009, at A9; Philip Shishkin, *Maine Becomes Fifth State to Legalize Same-Sex Marriage*, WALL ST. J., May 7, 2009, at A4; Susan Davis, *U.S. Capital To Recognize Gay Marriage*, WALL ST. J., May 6, 2009, at A6; Jim DeMint, *How Republicans Can Build a Big-Tent Party*, WALL ST. J., May 2, 2009, at A9 (opining that Republicans should “welcome a vigorous debate about legalized abortion or same-sex marriage”).

14. See Bittker, *supra* note 1, at 1399–414; McCaffery, *supra* note 8, at 989–91; Zelenak, *supra* note 7, at 4–8; Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1988).

15. See Bittker, *supra* note 1, at 1396. “Couples neutrality” means that married couples with equal combined incomes pay the same amount of tax.

16. *Id.* at 1400. Bittker notes, however, that in “unusual circumstances” aggregating income

jointly would be allowed a single set of low-rate brackets, whereas two full sets of low-rate brackets would apply if they filed separately. Under this structure, a married couple with two equal income earners generally paid a lower amount of tax than a married couple with the same income earned by one spouse. In turn, a married couple with a single earner paid approximately the same amount of tax as a single taxpayer with the same income.¹⁷ The individual filing system was essentially progressive and marriage neutral but not couples neutral (i.e., married couples with equal combined income sometimes paid different amounts of tax).

B. Joint Filing

The income tax became more progressive in 1918, which rendered the identity of the taxpayer to whom income was attributed even more important, and led to attempts to shift income more evenly between related taxpayers.¹⁸ Some taxpayers agreed to shift income to a lower-income spouse through income assignment contracts.¹⁹ Married taxpayers in community property states took the position that their income should be split for federal income tax purposes because state property law provided each spouse with a 50% interest in marital income.²⁰

In 1930, the Supreme Court in *Lucas v. Earl*²¹ held that income assignment contracts between spouses were ineffective for federal

might result in favorable treatment. *Id.* at 1400 n.20 (noting that combining income would increase the ceiling for the deduction for charitable contributions, and that capital losses of one spouse could be offset against capital gains of the other spouse on a joint return).

17. A married taxpayer living with a spouse, however, was allowed an additional \$1,000 exemption beyond the generally applicable \$3,000 exemption, but the \$4,000 exemption could be claimed only once or divided among the spouses. Revenue Act of 1913, § 2(C), 38 Stat. 114, 168; Instructions to Form 1040 (1913), <http://www.irs.gov/pub/irs-utl/1913.pdf> (last visited June 24, 2010). Assuming the highest potential combined rate of 7%, Revenue Act of 1913, § 2(A)(2), 38 Stat. 114, 166, a bonus exemption of \$1,000 was worth as much as \$70, or a \$2,000 exemption penalty (\$6,000 in total exemptions for two individuals versus \$4,000 for a married couple) was worth as much as \$140. These numbers may have been significant in 1913 dollars. On the other hand, the exemption amounts were so high that only the wealthiest 0.5% of the population filed tax returns in 1914. SLEMROD & BAKIJA, *supra* note 9, at 19. Overall, it seems reasonable to conceive of the early income tax as an “individualistic” system. *Cf.* Bittker, *supra* note 1, at 1400 (noting the “individualistic bias” of the early tax statutes without discussing exemptions).

18. See Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 808 (2008); Zelenak, *supra* note 2, at 344–45.

19. See Bittker, *supra* note 1, at 1400–01. There were other strategies to shift income, including gifts of income producing property (often in trust) to a spouse. See Zelenak, *supra* note 2, at 345. Taxpayers also attempted to shift income by forming a partnership with a spouse. See Jones, *supra* note 14, at 274–93.

20. See Bittker, *supra* note 1, at 1404–05.

21. 281 U.S. 111 (1930).

income tax purposes. In a remarkable contrast later the same year, the Court in *Poe v. Seaborn*²² held that state community property regimes were effective to split income for federal income tax purposes, even if the husband had the right to manage and control the community property.

After *Earl* and *Seaborn*, the early income tax's individualistic filing structure was no longer marriage neutral. *Seaborn* effectively allowed a single-earner married couple in a community property state two full sets of low-rate brackets.²³ *Earl* prevented married couples in common law states and unmarried couples from income splitting except through bona fide transfers of income-producing property.

The federal tax advantages of community property led to several common law states adopting community property over the succeeding years until 1948.²⁴ In 1941, the House Ways and Means Committee recommended mandatory joint filing for married couples with the same rate schedule applicable to an individual.²⁵ The Senate Finance Committee recommended a proposal to essentially reverse *Seaborn's* allowance of income splitting to spouses in community property states.²⁶

In 1948, Congress created a new filing status, married filing jointly, with rate brackets twice those of an unmarried taxpayer. Congress's stated rationale for joint filing was to equalize taxation among the states, prevent the "impetuous" enactment of community property, and reduce the incentive for tax avoidance devices.²⁷ Bittker suggested that absent the joint return, nationwide adoption of community property would have been inevitable, but enactment of the joint return allowed Congress to take credit for a tax cut with the same cost.²⁸ Carolyn Jones has argued that Congress intended to hinder the accession of women to economic power.²⁹ In any event, the new structure provided a significant tax benefit for single-earner married couples, achieving couples neutrality³⁰ at the cost of marriage neutrality and progressivity.

22. 282 U.S. 101 (1930).

23. See Bittker, *supra* note 1, at 1408.

24. *Id.* at 1411-12.

25. *Id.* at 1408-9.

26. *Id.* at 1410-11.

27. *Id.* at 1413.

28. *Id.* at 1412-13.

29. See Jones, *supra* note 14, at 295-96.

30. See Bittker, *supra* note 1, at 1413-14 n.73 (noting that separate filing rarely allowed a married couple to achieve tax savings).

C. Singles Penalty Relief and Marriage Penalization

Taxpayers began to conceive of the joint return as a tax benefit for taxpayers with family support burdens rather than a method of eliminating discrimination among property regimes.³¹ In 1951, as a response to complaints that the system was unfair to unmarried taxpayers with dependents, Congress created the head of household filing status.³² Head of household status is available to an unmarried taxpayer maintaining her home as the principal place of abode for a child or certain other dependents.³³ The head of household rate schedule has wider low-rate brackets than the rate schedule for an unmarried taxpayer. Although overlooked by many commentators, a dual-earner couple with a child could experience a marriage penalty as early as 1951 due to the loss of head of household status.³⁴

An unmarried taxpayer not eligible for head of household status could still owe as much as 41% more tax than a married person with a stay-at-home spouse.³⁵ In 1969, Congress enacted a new rate schedule with wider brackets for unmarried taxpayers to limit the perceived single person's penalty to a 20% differential.³⁶ The widening of the unmarried taxpayer brackets created the marriage penalty with which most are familiar. Although filing status now is less important because tax rates are lower, the current filing statuses and bonus-penalty structure is the same as the 1969 system. Single-earner married couples have a bonus, but on a pro rata basis, married taxpayers filing jointly are each subject to a harsher rate schedule than unmarried taxpayers. Married taxpayers filing separately are required to use a schedule that halves the bracket cutoffs for married taxpayers filing jointly,³⁷ so they cannot escape the marriage penalty by filing separately.

In sum, the tax system's patchwork of marriage bonuses and penalties is not the result of a carefully conceived plan.³⁸ The structure resulted

31. *See id.* at 1417.

32. *Id.*

33. I.R.C. § 2(b)(1) (2006).

34. *See Zelenak, supra* note 7, at 21–22. For illustrative purposes, consider the effect if high tax rates begin for unmarried taxpayers at \$100 of income, for married taxpayers filing jointly at \$200, and for heads of household at \$150. In this simplified structure, an unmarried couple one of whom files as head of household could have up to \$250 of income taxed at a low rate; whereas if the same couple married it could have no more than \$200 taxed at a low rate.

35. *See Bittker, supra* note 1, at 1429 n.110.

36. *Id.*

37. I.R.C. § 1(d) (2006).

38. Kahng, *supra* note 4, at 660 (noting that “the joint return was adopted not as a result of reasoned tax policy analysis, but rather out of political expediency”); Zelenak, *supra* note 7, at 5 (calling the joint return an “accident of history”).

from an unanticipated pair of Supreme Court decisions selectively importing income splitting under state law into federal income tax law; Congress's decision to equalize the taxation of married couples among the states through a tax cut for single-earner married couples; and two compromises to limit the unfairness of the system to unmarried taxpayers. Reducing tax rates for married couples would decrease equal-earner marriage penalties but also increase single-earner marriage bonuses and single person's penalties.³⁹ In other words, in a joint return world, "eliminate marriage penalties" means "create marriage bonuses."⁴⁰

39. This Article focuses on the single-earner marriage bonus tied to the single person's penalty and the equal-earner marriage penalty tied to the equal-earner unmarried couple's bonus. As Lily Kahng has noted, the terms "marriage penalty" and "marriage bonus" obscure much complexity:

As commonly used, the terms "marriage bonus" or "marriage penalty" describe the comparative tax burdens of two couples who are similarly situated except that one is married and filing jointly, and the other is unmarried, with each person filing an individual return. In some cases, the married couple will pay less than the unmarried couple—a marriage bonus. In other cases, the married couple will pay more than the unmarried couple—a marriage penalty.

In comparing the two couples, if the referent couple is the unmarried couple, obviously the bonus and penalty will be reversed. The penalty and bonus from this perspective are sometimes called the singles penalty and bonus. Of course, the two people who comprise the unmarried couple are not single in the sense of being uncoupled, but rather single in the sense of being unmarried. Their penalty or bonus, as compared to the married couple, can more precisely be called the unmarried couple's penalty or bonus.

A different meaning of the term "singles penalty" arises in considering the relative tax burdens of married couples and uncoupled, single individuals. When an uncoupled, single person pays more than a married couple with the same income, this is also called the singles penalty. In addition, the reverse of this is called the marriage bonus. To be more precise, and to avoid confusion with the newly named unmarried couple bonus or penalty, it can be called the single person's penalty.

See Kahng, *supra* note 4, at 656–57 (footnotes omitted).

40. The principal sources of marriage bonuses and penalties for low-income taxpayers are the standard deduction and EITC rather than the tax rate schedules. See CONG. BUDGET OFFICE, *supra* note 8, at xvii. The Bush tax cuts increased the standard deduction for married taxpayers filing jointly to double the standard deduction for an unmarried taxpayer; however, the doubling of the standard deduction is scheduled to sunset at the end of 2010. Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, §§ 101(b), 105, 118 Stat. 1166, 1167-69 (codified at I.R.C. § 63); see also Laffer, *supra* note 9. Moreover, even when the standard deduction for a joint return is double the unmarried taxpayer standard deduction, there can still be a head of household standard deduction marriage penalty.

The EITC is a federal transfer program implemented through the tax system. See Jennifer Bird-Pollan, *Who's Afraid of Redistribution? An Analysis of the Earned Income Tax Credit*, 74 MO. L. REV. 251, 284-85 (2009); Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 534 (1995). After an income plateau, the EITC phases out as income increases, but the complete phaseout amount only increases slightly in the case of a joint return. See I.R.C. § 32(b)(2)(B) (2006). Because the EITC schedule depends on how many qualifying children a taxpayer has, there can be a marriage bonus if one partner can trigger a more favorable schedule by adding children to a joint return without adding much income.

III. ASSESSMENT OF CURRENT FILING STATUSES

A. Progressivity

It is easy to take for granted the idea that joint filing is incompatible with a strong commitment to progressivity without explicitly acknowledging the difficulty of identifying the reasons for the progressive rate structure. In fact, there is no generally accepted justification for progressivity, and without a rationale for progressivity, it is impossible to know whether joint filing actually offends the principle.

In their classic article on progressivity, Blum and Kalven described the case for progressivity as “stubborn but uneasy,” concluding that it is “hard to gain much comfort from the special arguments, however intricate their formulations, constructed on notions of benefit, sacrifice, ability to pay, or economic stability.”⁴¹ Blum and Kalven argued that the strongest justification was simply redistribution of wealth.⁴² Michael Livingston has said that “[n]ow as always, the case for progressivity rises and falls with the redistributive argument”:

The alternate arguments—diminishing marginal utility of money, the benefit theory and the breakup of large concentrations of wealth—were dubious even in Blum and Kalven’s day, and intermediate developments have if anything weakened these further. Marginal utility, always indeterminate in nature, becomes still more so in a wealthier society, where the differences in consumption patterns tend to be of degree rather than kind. This problem may be sidestepped by focusing solely on extreme cases of wealth and poverty, but at that point becomes essentially a restatement of the case for redistribution, with relatively little added by the utility concept. The benefit theory founders on the lack of any obvious correlation between taxes and benefits, and if extended to its ultimate logic would produce a regime of user fees rather than a progressive income tax. Concentrations of wealth, if we are seriously concerned about them, are better dealt with by a wealth or inheritance tax. There is no escaping the redistributive or fairness issue.⁴³

Although redistributive goals more defensibly account for progressivity, redistribution of wealth holds far less popular appeal than

41. See Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 519–20 (1952).

42. See *id.*

43. Michael A. Livingston, *Blum and Kalven at 50: Progressive Taxation, “Globalization,” and the New Millennium*, 4 FLA. TAX REV. 731, 745–46 (2000).

alternative explanations.⁴⁴

Redistributive arguments are dominated by Rawlsian concerns.⁴⁵ Rawls argued that the distribution of income and wealth is due, in part, to luck, talent, and social circumstances which are morally arbitrary.⁴⁶ Rawls suggested that too much inequality could jeopardize equality of opportunity and render representative government a sham.⁴⁷ Rawls concluded that society should take steps—precisely how far is unclear—toward making the distribution of wealth more equal.

If the rationale for progressive taxation is to correct injustice in pre-tax income, then the individual should be the taxable unit. Whether a taxpayer has a spouse, partner, children, and so forth should not negate concerns that the taxpayer's income was due to luck, talent, and social circumstances. Indeed, Lily Kahng has argued that there is “credible evidence that married men receive higher pay than single men merely because they are married, and not because they are more productive.”⁴⁸

In keeping with the notion of progressivity as redistribution, the tax system generally ignores gifts in determining donors' and donees' incomes.⁴⁹ Moreover, except between spouses,⁵⁰ large gifts are subject

44. *Id.* at 738.

45. See David Elkins, *Responding to Rawls: Toward a Consistent and Supportable Theory of Distributive Justice*, 21 BYU J. PUB. L. 267, 267 (2007).

46. See JOHN RAWLS, *A THEORY OF JUSTICE* 72 (1971).

47. *Id.* at 278.

48. See Kahng, *supra* note 4, at 668–70.

49. Shari Motro tells a whimsical but powerful example illustrating the marriage bonus, which in some sense is an exception to the general rule ignoring gifts in calculating income:

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

See Shari Motro, *A New “I Do”: Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1524–25 (2006) (citations omitted) (the illustration uses 2006 tax rates and assumes the standard deduction).

50. See Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and*

to the unified estate and gift tax, which can be conceived of as increasing the progressivity of the income tax.⁵¹ In contrast, spouses with unequal incomes are effectively treated as if they made gifts deductible to the donor-spouse and includible to the donee-spouse, with the effect of income equalization.⁵²

It has been argued that joint filing is logical because married couples pool income and make spending decisions equally for the group's joint benefit.⁵³ It is unclear to what extent married couples pool income, however, and it seems likely that a primary earner will have leverage over consumption decisions.⁵⁴ Shari Motro, in contrast, has proposed allowing income splitting only where there is a binding agreement to share resources equally and regardless of whether two taxpayers are married.⁵⁵ Motro argues that a separate filing system implicitly commoditizes the contributions of the partners, which conflicts with deeply held attitudes that marriage should be a partnership of equals involving "cooperation and unity."⁵⁶ If the individual is the unit, however, embracing sharing as a basis for income splitting retreats from first principles about redistribution. The system would be allowing individual taxpayers—rather than the government—to choose, in part, the transfer recipients of a tax-and-transfer scheme.

Although any unintended increase in the commoditization of personal relationships would be an important potential trade-off, the application of this problem outside the family business context seems limited. In the context of a family business, putting a precise value on each person's contribution could be difficult and psychologically burdensome,⁵⁷ and is currently unnecessary for husbands and wives filing jointly. On the other hand, most taxpayers are employees of unrelated third parties, and

Wealth Transfer Taxation, 6 FLA. TAX REV. 757, 764-75 (2004) (describing estate and gift tax transition from no marital deduction, to 50% marital deduction, and finally the current unlimited (subject to certain restrictions) marital deduction).

51. See Michael J. Graetz, *To Praise the Estate Tax, Not To Bury It*, 93 YALE L.J. 259, 271-73 (1983).

52. See Motro, *supra* note 49, at 1516-18.

53. In contrast, some have argued that a partnership model explains marital income splitting under traditional tax principles. See *id.* at 1526-27 (critiquing the "collective efforts" justification). Under the model, the spouses agree to a 50-50 partnership because of their equal contributions to the production of marital income. It is, of course, possible for married couples to form a partnership and make contributions of equal value, but it is unrealistic to generally presume equal contributions. See *id.* at 1527 (suggesting disguised gifts or payment for personal services rather than business efforts is more likely).

54. See Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 105 (1993).

55. See Motro, *supra* note 49, at 1543-44.

56. See *id.* at 1536-40.

57. See *id.* at 1537.

would not need to make such an allocation. Although non-market exchanges between married and unmarried couples perhaps theoretically should be treated as realization events, this does not seem administrable, generally is not pursued now, and likely would not be stepped up under separate filing.⁵⁸ For these reasons, I question whether separate filing would intolerably increase the commoditization of marriages and other relationships in a way that changes social norms or imposes widespread cognitive dissonance in the return preparation process.⁵⁹

Could marriage penalties be justified based on household economies of scale?⁶⁰ In general, a married couple spends less per person on living expenses than two single people; therefore, perhaps the couple has a greater ability to pay tax than two single people.⁶¹ But the comparison between a married couple living together and two single people living alone is outdated. Similar economies of scale should apply to cohabitating couples, but the penalties will be absent in that case.⁶² Moreover, two single people could achieve roughly similar economies of scale by sharing a bedroom (with separate beds) or converting a shared living area to sleep space; indeed, anecdotes suggest that this often occurs in high cost of living areas. One might respond that married taxpayers or couples would be happier economizing in this manner than single people. Sometimes this will be true, to be sure, but happiness is ignored elsewhere for tax purposes. It also seems odd to punish sharing. If we are serious about the economies of scale justification, and are concerned about exacting more revenue from people who could economize, why not tax everyone at the same (relatively high) rate and challenge them to save?

One might defend the marriage bonus as an allowance for the fact that a married sole earner must support more than one person, whereas a single person supports only one person.⁶³ Similar to the economies of scale justification, this fails to take into account unmarried single-earner couples. Moreover, a basic support burden seems too modest to explain joint filing. It seems more appropriate to take into account

58. *Cf. id.* at 1538 (observing that disregarding transfers even between non-spouses is the “*de facto* situation” for unmarried couples who pool and that the IRS “usually turns a blind eye to these arrangements, rarely requiring the low-earning partner who assumes more responsibility for household chores to report as compensation income received from the primary wage-earner”).

59. In addition, commoditization for tax purposes may not even send a message that relationships should be commoditized for non-tax purposes.

60. *See* Bittker, *supra* note 1, at 1422-1425 (critiquing this justification).

61. Although some married couples must live apart for business reasons, it seems reasonable to assume that married couples will share living space and other assets.

62. *Id.* at 1423.

63. *See* Motro, *supra* note 49, at 1525 (rejecting this justification).

considerations such as economies of scale, pooling, and support burdens in the transfer portion of a tax-and-transfer system. If the goal is to offset a specific support burden, a dependency credit would be more defensible than joint filing.⁶⁴

B. Secondary Earner Bias

Although today almost 40% of married women are primary earners, and over 60% of married women earn at least 25% of their family's income, approximately 30% of married women are not employed.⁶⁵ Joint filing impacts a homemaker's decision to seek paid labor outside the home, because the secondary earner's income may be perceived of as "stacked" on top of the primary earner's income and subjected to relatively high marginal rates beginning with the first dollar of income.⁶⁶

Another distortion affecting secondary workers' labor decisions relates to child care costs. Subject to a modest child care credit, taxpayers must pay tax on earnings spent on child care, but childcare provided by a homemaker is not subject to tax as imputed income. Although the same unfair dichotomy could exist under separate filing, the stacking effect in a joint filing system exacerbates the disincentive to seek paid labor and pay for child care.

C. Neutrality Among State Marital Property Regimes

Perhaps we should not view the marital taxable unit as having much to do with equity among taxpayers. Congress enacted the joint return to eliminate discrimination among state marital property regimes. One might ask whether this is, rather than a traditional tax equity analysis, more of an argument for deference to the states in a matter arguably at the core of state sovereignty.⁶⁷

As it happens, federal tax law flies in the face of state sovereignty, even in matters arguably at the core of traditional state functions. The federal government's decision to ignore same-sex marriages and similar arrangements that are recognized under state law is an important example. In addition, although the power to tax has traditionally been

64. *Id.*

65. See Heather Boushey, *The New Breadwinners*, in THE SHRIVER REPORT, <http://www.awomansnation.com/economy.php> (last visited June 19, 2010).

66. See McCaffery, *supra* note 8, at 1059; Zelenak, *supra* note 2, at 365. The stacking effect operates even in a system with double-wide brackets, as long as one spouse's earnings are viewed as optional.

67. *Cf.* Motro, *supra* note 49, at 1554-55 (noting concerns about states' sovereignty over family law).

considered a fundamental state power, the federal income tax discriminates in favor of states with income taxes rather than sales taxes, by allowing taxpayers a personal deduction for state income taxes but not sales taxes.⁶⁸

Even conceding the attractiveness of a hands-off approach to state marital property law, an income splitting mandate is not the only way to achieve neutrality among the different marital property systems. Congress could also achieve uniformity for federal tax purposes by treating community property rights as income assignments, which would be ineffective for federal income tax purposes.⁶⁹

D. Preventing Tax Abuse

One might object that separate filing will lead to tax evasion as in the pre-1948 era. There are three primary difficulties: allocating earned income, allocating income from property, and allocating deductions.⁷⁰

One device taxpayers have used to shift business income is family partnerships. As an example, one spouse who contributes nothing or services of little market value could receive a partnership interest for the purpose of splitting business income. The IRS, however, has enjoyed a good deal of success in challenging abusive partnerships.⁷¹ On the other hand, if a family partnership is legitimate, and to the extent that both spouses provide valuable services, there should be no objection to income splitting. Of course, most taxpayers simply have wage income from an unrelated employer, which would be difficult to shelter in this manner.⁷²

Assuming the inviolability of the unlimited marital gift tax deduction, income from property could be split evenly by transferring ownership of income-producing property to a lower-income spouse. Tracing the income to the spouse who originally owned the property would be unrealistic.⁷³ Without tracing gifts, there are three basic choices: tax the owner with no special anti-abuse rule, tax the owner but at the higher of

68. I.R.C. § 164(a) (2006).

69. *Lucas v. Earl*, 281 U.S. 111 (1930); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 55-58 (1980) (concluding potential constitutional challenges would likely fail).

70. See Zelenak, *supra* note 2, at 382-94.

71. See *id.* at 383 ("not a major problem"); Jones, *supra* note 14, at 274-79 (discussing history of family partnership litigation).

72. *Cf. id.* at 382 ("In the vast majority of cases there is no question as to which spouse earned a particular item of income, so taxation to the earner will involve neither complexity nor opportunity for abuse.")

73. See *id.* at 387.

the spouse's rates, or something in between.⁷⁴

I would recommend using the higher rate of the two spouses, even though this would create a marriage penalty for a relatively small number of couples.⁷⁵ Of course, much income from property is long-term capital gain, which is not subject to progressive rates, so that the identity of the taxpayer generally does not affect the tax rates. The issue primarily involves short-term capital gain, interest, rent, and royalty income of wealthy couples, where one person has earned income or income from property below the low-bracket thresholds. In this limited context, a marriage penalty seems tolerable to prevent manipulation of the income tax. Effectively putting income from property into a separate basket could also reduce potential secondary earner work disincentives, because the secondary earner's income would not be stacked on top of income from property.⁷⁶

Business deductions should be allocated to the earner in a separate filing system, but it is challenging to conceive of a coherent rule for personal deductions. Personal deductions, which generally channel tax relief for consumption expenditures disproportionately to high-income taxpayers, seem inconsistent with a theory of progressivity as redistribution of unjust pre-tax income. Means-tested refundable credits seem more consistent with redistributive goals. Thus, perhaps any allocation for personal deductions will appear incoherent in combination with the progressivity rationale for separate filing.

A marriage-neutral rule would allocate deductions to the spouse who is liable for an expense, but this might result in lost deductions.⁷⁷ The marriage-neutral rule could, in some circumstances, discourage home ownership by a lower-income spouse, because the value of the mortgage interest deduction would be higher with a higher-income spouse.⁷⁸ The opposite approach would be to allow spouses to use deductions pursuant to a formula—one possibility would be to allow the most taxpayer-favorable use of the deduction.⁷⁹

Lawrence Zelenak suggests the use of a formula allocating deductions

74. *Cf. id.* at 384 (describing five options, which I collapse into three).

75. *Cf. id.* at 391 (acknowledging that this option does not put a premium on tax planning, is administrable, does not burden secondary workers, and is marriage-neutral for most couples) (“I give more importance to the first option’s strengths, but that conclusion is certainly debatable.”). *But see id.* at 390 (concluding that, in general, respecting transfers of property for purposes of income tax rates on income from property is preferable because it “achieves true marriage neutrality” even though it puts a “heavy premium on careful tax planning” and carries a “significant” secondary worker disincentive).

76. *See id.* at 388.

77. *See id.* at 391-92.

78. *See id.* at 392-93.

79. *See id.* at 392.

in proportion to income, or a taxpayer favorable formula.⁸⁰ Zelenak argues that this method would not discourage homeownership by lower-income spouses and would not put a premium on tax planning.⁸¹ Zelenak observes that it is “not the duty of the federal income tax to encourage transfers of property to non-earning spouses,” but it should at least not actively discourage such transfers.⁸² I tend to agree with these observations, but am concerned that it is unfair to taxpayers who are not married. Ownership neutrality and tax simplicity should be applied to them as well, but some line drawing would be necessary to prohibit, for example, the sale of mortgage interest deductions to any unrelated person.

IV. NONTAX PERSPECTIVES ON THE FAMILY

In my view, tax scholarship would benefit by incorporating perspectives borrowed from legal scholars and judges who focus on substantive family law issues when addressing how best to address contemporary families. If we are going to think seriously about possible public policy justifications for how we treat married taxpayers vis-à-vis unmarried taxpayers, even to the extent of undercutting the commitment to a progressive system of taxation, we should make sure we understand the contemporary debate about marriage in family law circles.

Although tax law scholarship obviously contributes greatly to our understanding of taxation, it is easy to neglect other disciplines. As Michael Livingston has noted, traditional tax scholarship tends to focus on law and economics methodology.⁸³ As Livingston explains:

The principal themes of tax scholarship—fairness, efficiency, and the search for a comprehensive tax base—are essentially economic in nature, so that even “traditional” tax scholarship has something of a law-and-economics flavor. The question of audience has been resolved largely by default: authors simply assume that there is an audience of judges, Treasury and IRS personnel, enlightened legislators, and (especially) other tax scholars that is interested in good tax policy. Tax scholarship is presumably written for them.⁸⁴

80. *Id.* at 393.

81. *Id.*

82. *Id.*

83. Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365 (1998). Livingston posits that this is because much tax scholarship is aimed at Congress, the Treasury Department, and the Internal Revenue Service, rather than at other legal academics or judges serving on nontax courts. *See id.* at 367–68, 373–74, 389–90.

84. *Id.* at 374.

Thus, for better or worse, tax scholars have sometimes eschewed engaging with scholars working in other substantive fields, even if there are obvious points of tangent (such as administrative law).⁸⁵ Often, the claim that “tax is different” leads tax scholars to reject importing concepts from other areas of law, even including such fundamental questions as whether *Chevron* deference applies to tax regulations.⁸⁶

Although tax law and scholarship is different, and historically has been directed at a more targeted audience, this does not mean that tax policy analysis cannot or will not benefit from the insights of legal scholars and courts working on a common problem. In thinking about the tax treatment of marriage, family law perspectives could be useful in ferreting out precisely why marriage retains such cultural salience in contemporary American society; if we seek a plausible rationale for treating marriage as a basis for favorable tax treatment, we should not disregard the perspectives of those scholars most immersed in thinking about marriage as a social and legal institution.

Just as judges can benefit from considering foreign law and from sustained interactions with jurists from other nations, tax scholars could benefit from more sustained engagement with scholars working in other areas of law.⁸⁷ As Ronald Krotoszynski has asked, “If a judge can find inspiration in a monograph or law review article, why should she refrain from finding such inspiration in a foreign legal text (even if imperfectly understood)?”⁸⁸ In a similar vein, tax scholars might find it useful to

85. See Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153, 1155–56 (2008) (noting that “[o]ver time, however, benign neglect and a restructuring of Internal Revenue Service (‘IRS’) personnel and priorities have yielded contemporary drafters of tax regulations with little knowledge of or regard for administrative law requirements” and observing that “[c]orrespondingly, other tax scholars have observed the tax bar’s insular nature and resulting tendency to disregard potentially relevant nontax legal doctrine”). Of course, obvious and important counterexamples exist. For example, Dorothy Brown writes about tax from a critical race perspective. See Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997). Similarly, Maureen Cavanaugh wrote about contemporary tax policy from the vantage point of a scholar in classics. See, e.g., Maureen B. Cavanaugh, *Democracy, Equality and Taxes*, 54 ALA. L. REV. 415 (2003); Maureen B. Cavanaugh, *Order in Multiplicity: Aristotle on Text, Context, and the Rule of Law*, 79 N.C. L. REV. 577 (2001).

86. See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1540 (2006) (“Where tax scholars and practitioners addressing the issue of tax deference are fairly consistent is in their insistence that when it comes to *Chevron*, tax is special and should be treated differently from other areas of administrative law.”).

87. See, e.g., JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION (Robert Badinter & Stephen Breyer, eds. 2004).

88. Ronald J. Krotoszynski, Jr., “*I’d Like to Teach the World to Sing (in Perfect Harmony)*”: *International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1357 (2006). He cautions, however, against the overuse of foreign law in interpreting domestic legal instruments: “At the same time, however,

consider the marriage debate from the perspective of family scholars to better understand the role and purpose of marriage in the contemporary United States.

A. The Benefits of Marriage

1. Private Benefits

Although the line between private and public benefits is murky, because private benefits can also incidentally benefit the public,⁸⁹ certain benefits of marriage arguably primarily benefit the couple rather than provide a social good.

Linda Waite and Maggie Gallagher have argued that marriage has a transformational effect on couples.⁹⁰ Studies consistently show that married couples are happier, healthier, and wealthier than unmarried couples or singles.⁹¹ But Anita Bernstein has reminded us that however strong the correlation, correlation does not equal causation.⁹² As discussed below, scholars such as Robin Wilson have made an intuitively persuasive case as to how marriage promotes optimal outcomes for children,⁹³ but it is unclear by what mechanism marriage transforms couples in other respects. Another potential explanation is that because marriage is a desirable status, the most successful people seek out the symbol, and are better able to maintain the relationship; in other words, single people are single because they are relatively poor, socially awkward, unhealthy, or otherwise undesirable, rather than the converse.⁹⁴

Recognizing the autonomy interests of adults is a primary value in contemporary marriage discourse.⁹⁵ Courts examining the

judges should take care not to mistake a muse for more than what it is—an ephemeral source of motivation and inspiration.” *Id.* at 1358.

89. See, e.g., Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517 (2009) (questioning an expansive reading of public use requirement under the Takings Clause).

90. See LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 18-35 (2000).

91. See Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 159 (2003); see also Kahng, *supra* note 4, at 667-72 (discussing potential wage premium for married men, and describing stigmatization of single people).

92. See Bernstein, *supra* note 91, at 159.

93. See *infra* notes 104 through 110 and accompanying text.

94. See Bernstein, *supra* note 91, at 159-60.

95. See Lynne Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 778 (2001) (“Contemporary legal literature contains surprisingly little serious scholarship discussing the social interests underlying laws regulating marriage. Perhaps this is because the overwhelming trend of developments in American family law during the past thirty years has emphasized the autonomous individual’s interest in family

constitutionality of restrictions on the right to marry have indicated that people have an interest in expressing their commitment to one another and in having the state recognize such a commitment.⁹⁶

2. Public Benefits

An exhaustive list of the public benefits of marriage is impossible, but the promotion of procreation and child rearing always appears prominently on the list. Aside from preserving the species, reproduction fuels economic growth.⁹⁷ At the same time, we generally let the costs of reproduction rest on parents, even though raising a child is expensive. Estimates of spending per child range from approximately \$7,800 per child per year for low-income families to approximately \$17,500 per child per year for families with the highest incomes.⁹⁸ As a result of the investments, both in cash and time, that parents make in their children, new adults eventually serve in the workforce; dwindling population, in contrast, will shrink the economy and increase the per capita burden of caring for the elderly.⁹⁹ The potential economic doomsday scenario involves the government issuing debt, raising taxes, inflating currency, and raising interest rates.¹⁰⁰

Indeed, because national birthrates have fallen even below the replacement level for the current population, several Western European nations, including, for example, Sweden and Italy, have adopted “baby stipends” paid directly to mothers as a financial incentive for pregnancy and childbirth.¹⁰¹ Plunging birthrates present serious and broad based

relations.”).

96. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383–86 (1978) (freedom to marry even if delinquent on child support); *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) (option to choose opposite-sex partner is irrelevant to homosexuals); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 468 (1983) (“[C]ontemporary legal writers take for granted that the ‘right to marry’ is grounded ‘in respect for freedom of choice in intimate personal relationships. . . .’”).

97. See PHILLIP LONGMAN, *EMPTY CRADLE: HOW FALLING BIRTHRATES THREATEN WORLD PROSPERITY AND WHAT TO DO ABOUT IT* 4 (2004).

98. See MARK LINO, *CTR. FOR NUTRITION POL’Y & PROMOTION, U.S. DEP’T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2007*, at ii–iv (2008).

99. See Stephanie Hoffer, *Adopting the Family Taxable Unit*, 76 U. CIN. L. REV. 55, 61 (2007).

100. *Id.*

101. Stephen Graham, *Bundles of both joy and cash; Germany begins offering new financial bonuses to raise its sagging birthrate*, HOUSTON CHRON., Jan. 4, 2007, at A11 (noting newly adopted German baby bonus program and describing existing baby bonus programs in Britain, Russia, Spain, France, the Netherlands, and Italy). Sweden pioneered this kind of program in 1948 and recently enhanced the incentives to encourage more births:

Since 1948, Sweden has made a monthly cash payment for each child under 16. The child allowance now starts at \$155. In 2001, the government increased the allowance for

social problems in societies that look to new workers and consumers to serve as an engine for economic growth and to fund retirement programs for older persons. In Germany, for example, “[a] government study forecast, that Germany’s population will drop by as much as 16 percent by 2050, from the current 82.4 million to as little as 69 million.”¹⁰² Needless to say, a population decline of this magnitude would have wide-ranging, negative effects.¹⁰³

Robin Wilson has written that optimal child rearing is a primary reason for continued state support of marriage.¹⁰⁴ Conversely, if marriage does not advance child rearing, it might be seen as an unreasonably “moralistic” position.¹⁰⁵ Wilson argues that there is empirical evidence for a causal link between marriage and optimal child rearing.¹⁰⁶ There are several intuitive explanations for this relationship. Because a married couple expects a more permanent relationship, the parties may try to avoid “sharp bargaining or tit-for-tat reciprocity, spiking each other for every perceived fault.”¹⁰⁷ Unmarried couples are more likely to demand a perfectly equal division of power in the relationship, which can lead to increased monitoring, friction, and “harden the interactions between the adults.”¹⁰⁸ Children may be harmed by exposure to these types of behavior.¹⁰⁹ Marriage may carry with it social norms of greater involvement with the children for males and better parenting for either parent.¹¹⁰

Although Wilson apparently reserves on whether state support of marriage might plausibly be justified for other reasons, Maggie Gallagher is more forthcoming. Gallagher rejects the transformational potential of marriage as a rationale for state involvement, inasmuch as it is for the private benefit of the parties.¹¹¹ Gallagher’s thesis appears to be that there must be a primary public benefit to justify state

large families—parents with three children, for instance, receive \$530 per month, and those with four get \$811. Parents also get a combined 480 days of paid leave per child.

Id.

102. *Id.*

103. *See id.* (noting that a substantial decline in Germany’s population “could hurt the economy by sapping the work force—and undermine the state pension system”).

104. *See* Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 849 (2005).

105. *Id.* at 850.

106. *Id.* at 879.

107. *Id.* at 873.

108. *Id.* at 874.

109. *Id.*

110. *Id.* at 875.

111. *See* Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 775, 779 (2002).

involvement in marriage.¹¹² In Gallagher's view, the "public legal union of a man and a woman is designed first and foremost to protect the children that their sexual union (and that type of sexual union alone) regularly produces."¹¹³ Gallagher cautions that the potential extinction of the species is "not as academic as many perhaps think."¹¹⁴

Moreover, the view that state involvement in marriage is really a proxy for promoting procreation and child rearing—and only of the optimal sort, viewed through a traditional lens—resonates outside the ivory tower. In 1996, the Defense of Marriage Act defined marriage for federal purposes as opposite-sex only, and permitted states not to recognize same-sex marriages performed in other states.¹¹⁵ The legislative history clearly shows the primacy of child rearing in Congress's decision:

Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their long-term relationship is socially important a public concern, not simply a private affair. . . . That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But because America, like nearly every known human society, is concerned about its children, our government has a special obligation to ensure that we preserve and protect the institution of marriage.¹¹⁶

Congress apparently believed that in the absence of a link between marriage and procreation, "society would have no particular interest" in recognizing marriage.¹¹⁷ This is a powerful, although not particularly cogent, endorsement of the linkage.¹¹⁸

112. *Id.* at 779, 781.

113. *Id.* at 782.

114. *Id.* at 789 ("For two generations every Western, industrialized nation has had sub-replacement birth rates. Here in America, the crisis is still many generations off, as our birthrates are closer to replacement and our social tolerance of immigration higher. But many European nations are, absent dramatic changes in reproductive patterns, on the road to dying out.")

115. 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C.

116. H.R. REP. NO. 104-664, at 14 (1996).

117. *Id.*

118. Of course, unmarried people have and raise children, and these children also represent a social value. Indeed, the state is probably powerless constitutionally to attempt to limit procreation to married couples. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 933 (1992) (plurality opinion); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); but see *Buck v. Bell*, 274 U.S. 200, 207–08 (1927). Although the Supreme Court has never formally overruled *Buck*, subsequent opinions suggest that it no longer possesses doctrinal force, see, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 100–01 (1973) (Marshall, J., dissenting) (arguing that *Roe* and *Skinner* effectively establish a right to procreate, the precedent in *Buck* notwithstanding),

The traditional view of marriage has been challenged in state courts around the country and in federal court. Regardless of whether they hold for or against same-sex marriage or other unions (e.g., “civil unions” with the benefits of marriage), courts generally have noted that procreation and child-rearing are the touchstone of state support of marriage. Courts that hold in favor of same-sex unions generally focus on the lack of evidence that same-sex couples cannot be good parents and the fact that opposite-sex marriage appears over-inclusive to the extent that it is not conditioned on procreation or ability to procreate.¹¹⁹ Courts that uphold same-sex marriage bans generally do so under the most lenient standard of review, focusing on the theoretical plausibility that opposite-sex parenting might be optimal and rational to subsidize.¹²⁰

Most Americans support same-sex civil unions with virtually all the privileges and obligations of marriage.¹²¹ Still, the nomenclature is important: most Americans do not support the extension of “marriage” rights to same-sex couples.¹²² Although national figures undoubtedly smooth out a great deal of local variation, positive attitudes toward equal benefits for same-sex unions suggest a rethinking of marital norms. One possibility is there is a contemporary norm in favor of child rearing, regardless of how the child is produced or whether the custodial parents are male and female. Another possibility is that society regrets that opposite-sex marriage is not conditioned on satisfaction of the traditional purposes of marriage; now that the gate is irreversibly open as a practical matter, perhaps people think it would be unfair to exclude same-sex couples. The most likely explanation, however is that popular

and legal scholars also have argued that *Buck* no longer constitutes good law, relying in part on lower federal and state court decisions so holding. See Russell D. Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375, 1398 (2009) (“In *Skinner v. Oklahoma*, the Court essentially repudiated *Buck v. Bell*’s embrace of eugenic criminology, ruling that Oklahoma’s Habitual Criminal Sterilization Act was unconstitutional, at least as applied to Skinner, who had been convicted of stealing chickens.”); William A. Kraus, Note & Comment, *The Incompetent Developmentally Disabled Person’s Right of Self-Determination: Right-to-Die, Sterilization and Institutionalization*, 15 AM. J.L. & MED. 333, 352 n.100 (1989) (“Since *Skinner*, involuntary sterilization statutes have been considered unconstitutional absent a showing that such a statute ‘is the only remedy available to further a compelling governmental interest.’” (quoting *In re A.W.*, 637 P.2d 366, 368–69 (Colo. 1981)).

119. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 899–902 (Iowa 2009); *Lewis v. Harris*, 908 A.2d 196, 216–17 (N.J. 2006); *Baker v. State*, 744 A.2d 864, 882 (Vt. 1999).

120. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 7, 11–12 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963, 982–83 (Wash. 2006).

121. See Frank Rich, *The Bigots’ Last Hurrah*, N.Y. TIMES, Apr. 19, 2009, at WK10; Adam Nagourney, *As Giuliani Strays From G.O.P. Base, He Sticks to 9/11*, N.Y. TIMES, May 17, 2007, at A22; Peter Steinfels, *The combat of America’s ‘culture wars’ takes place within political parties instead of between them*, N.Y. TIMES, Aug. 5, 2006, at A11.

122. See *supra* note 121.

opinion simply favors individual autonomy.¹²³ Whatever the precise explanation, Americans have collectively moved away from a rigid norm of privileging optimal (again, through the traditional lens) child rearing.

B. Criticisms of Marriage Subsidies

Who will not benefit if we persist in subsidizing only nuclear families? The nuclear family has been vanishing. There are more single adults than married adults.¹²⁴ Today, most children have lived with a single parent or with a parent and that parent's unmarried partner.¹²⁵ Moreover, the unmarried families with children are relatively poor.¹²⁶ Arguably, subsidizing married families "seems to simply heap benefit on those who are already the most advantaged."¹²⁷

Even the defenders of marriage point out the potential pitfalls of subsidies. Robin Wilson has argued that the potential for too much success is more dangerous than the potential for failure.¹²⁸ Subsidies "may well induce marginally-committed couples to marry, seeding the chances for continuing marital dissolution and weakening norms of fidelity, selflessness and commitment associated with marriage."¹²⁹ It is unclear precisely how to thread the needle between appropriate support of marriage and degrading it with subsidy. Kimberly Yuracko has suggested it would be better to focus on norms rather than marriage: "[R]ather than using marriage as the mediator by which to support positive parental norms, it might be more wise, effective, and fair to simply bolster the norms of parental commitment and responsibility directly, and for all parents, regardless of individuals' marital status."¹³⁰

In sum, most courts, legislators, and legal scholars consistently link the privileging of marriage to that institution's strong historical link to procreation and raising children. If this link reliably existed, it would provide a normatively persuasive rationale for some form of subsidy,

123. See Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 *LOY. L. REV.* 1, 4-6 (2003) (critiquing the evolution of autonomy as the modern driving force behind marriage).

124. See Sam Roberts, *It's Official: To Be Married Means To Be Outnumbered*, *N.Y. TIMES*, Oct. 15, 2006, at A22.

125. See Leah Ward Sears, *The "Marriage Gap": A Case for Strengthening Marriage in the 21st Century*, 82 *N.Y.U. L. REV.* 1243, 1246 (2007).

126. See Kimberly A. Yuracko, *Does Marriage Make People Good or Do Good People Marry?*, 42 *SAN DIEGO L. REV.* 889, 894 (2005).

127. *Id.*

128. See Wilson, *supra* note 104, at 878.

129. *Id.*

130. See Yuracko, *supra* note 126, at 893.

including a tax subsidy, for marriage as a proxy for the creation and rearing of children. The problem, however, is that our tax policies no longer reflect contemporary social realities. And, because of the constitutionally protected status of personal decisions about birth control,¹³¹ abortion,¹³² and procreation,¹³³ the government could not restrict parenting to married couples even if it wished to. Moreover, it is possible to promote traditional marriage without excluding non-traditional arrangements from its benefits.¹³⁴

C. Dependency

Martha Fineman has argued that we should rethink traditional notions of dependency, challenging the notion that caretaking, including child rearing, should be viewed just as any other choice (such as a “Porsche Preference”).¹³⁵ Fineman asserts that certain forms of dependency are virtually “inevitable” or “universal”: childhood, severe illness or disability, and old age.¹³⁶ Caretaking leads to “derivative dependency” because the caretaker will need resources and accommodations from society to survive while performing caregiving functions.¹³⁷ Fineman argues that it is a social responsibility to meet such dependency needs, because they are essential to the continuation of society.¹³⁸ Caretaking duties are generally assigned to the private sphere, however, where

131. See *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

132. See *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 933 (1992) (plurality opinion); *Roe v. Wade*, 410 U.S. 113 (1973).

133. See *Skinner v. Oklahoma*, 316 U.S. 535, 539–42 (1942); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 100–101 (1973) (Marshall, J., dissenting) (arguing that *Roe* and *Skinner* effectively establish a right to procreate without government interference with a decision to have, or not have, a child).

134. See *Alaska Civ. Liberties Union v. State*, 122 P.3d 781, 793 (Alaska 2005) (“There is no indication here that granting or denying benefits to public employees with same-sex domestic partners causes employees with opposite-sex domestic partners to alter their decisions about whether to marry. There is no indication here that any of the plaintiffs, having been denied these benefits, will now seek opposite-sex partners with an intention of marrying them. And if such changes resulted in sham or unstable marriages entered only to obtain or confer these benefits, they would not seem to advance any valid reasons for promoting marriage....[M]aking benefits available to spouses may well promote marriage; denying benefits to the same-sex domestic partners who are absolutely ineligible to become spouses has no demonstrated relationship to the interest of promoting marriage.”).

135. See, e.g., Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1403 n.2 (2001); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL’Y & L. 13, 21 n.15 (2000).

136. See Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, *supra* note 135, at 18.

137. *Id.* at 20.

138. See Fineman, *Contract and Care*, *supra* note 135, at 1410.

families generally allocate the burden to women, whose caretaking goes uncompensated.¹³⁹ In Fineman's view, caretaking creates a social debt owed by all members of society to caretakers as a group.¹⁴⁰

Fineman questions the economic narrative of choice and efficiency for ignoring the constraints of life circumstances.¹⁴¹ By using choice as the touchstone of fairness, society effectively assigns personal responsibility for circumstances beyond one's control that limit choice. In addition, efficiency arguments fail to account for informational failures:

[W]e may believe . . . that a woman chose to become a mother, but does this choice mean she has also consented to the societal conditions attendant to that role and the many ways in which that status will negatively [affect] her economic prospects? Did she even realize what those costs might be? Is it even possible that society and culture might have...[led] her astray on the issue of costs, lied to her about the returns and rewards of caretaking?¹⁴²

Moreover, does our sense of justice allow us to tolerate oppressive conditions for caretakers, even if we acknowledge an element of choice?

Fineman readily acknowledges that her thesis is contrarian. Society may well have accepted the idea of a social debt in the context of child rearing, but otherwise we normalize individualism and self-sufficiency.¹⁴³ We ignore certain advantages, such as inherited wealth, but describe state assistance to the poor as "welfare" or "subsidy."¹⁴⁴ Nevertheless, Fineman challenges us to begin a dialogue about the proper treatment of caretaking and move toward just compensation, through the tax system or otherwise.

D. Tax Policy Implications

Marriage is one of our strongest traditions, but if the primary goal of marriage is to facilitate child rearing, why not focus on this characteristic directly rather than through a marriage proxy? Parenting (whether or not undertaken by a child's biological parents) is very expensive and involves a significant loss of autonomy; it seems more likely that many potentially good parents are foregoing child rearing

139. *Id.*

140. *Id.* at 1411.

141. *Id.* at 1419.

142. *Id.* at 1420.

143. See Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, *supra* note 135, at 24.

144. See *id.* at 23.

because of its costs. Entering into a marriage, in contrast, is very inexpensive, generally triggers benefits, and (subject to minimal support obligations) can generally be tailored to the parties' desires. Tax subsidies could commoditize marriage and weaken the norms that may be responsible for its benefits.¹⁴⁵

Marriage is also easily terminated in a way that parenting generally is not. One is free to become or not become a parent, but unlike being a poor spouse or divorce, child neglect or abandonment usually involves criminal liability. When an adult becomes a parent (whether via natural pregnancy and childbirth, adoption, or surrogacy), the person is making a permanent, long-term, and effectively irrevocable commitment to take responsibility for the care of another human being. As much as we might wish that marriage were truly "for better or for worse," the fact is that this phrase describes parenting more accurately than marriage.

V. CONCLUSION

The joint return (and special rates for married taxpayers) should be abolished as an incoherent penalty and subsidy of marriage. Joint filing is indefensible as a component of a progressive tax system. Marriage has many benefits, but the benefit most deserving of support is marriage's connection with parenting. The contemporary reality is that parenting will occur outside of marriage, and parenting has high social benefits and high private costs. Although increased refundable child credits would be the most progressive method of implementing a parenting subsidy,¹⁴⁶ simply retaining head of household status seems more likely.

Separate filing would help promote marriage neutrality in the tax system, although it must include marriage penalties for a small proportion of taxpayers to prevent spouses from shifting income from property. Separate filing essentially eliminates the bias against secondary earners that the current system entails, but secondary earners could still experience an average rate bias. In other words, secondary earners would not likely be heads of household, so their rates would be higher. The effect, however, should be much weaker than stacking the secondary earner's income at the marginal rate of the primary earner. A regime with a single rate schedule would go further toward eliminating secondary earner bias.

The most compelling objection to retaining head of household status

145. *Cf.* Wilson, *supra* note 104, at 878 (noting the perils of overly successful marriage subsidies).

146. *See* Zelenak, *supra* note 1, at 388-89.

is distributional. One rationale for moving away from marriage is that subsidizing marriage is heaping benefit on those who need it least, and that we should more directly focus on behavior meriting subsidy. Similarly, rate relief provides the most relief to high-income taxpayers. But at least head of household provides an upside down subsidy for defensible reasons, whereas marriage does not.

An objection to either credits or rate relief is that it may have little relationship to spending on children.¹⁴⁷ The head of household rate structure is not calibrated toward spending on children or social benefits generated from such an investment. As Zelenak puts it, “a response might be that it is acceptable for the benefit to go to the parents—it is their reward for helping society by raising a good citizen.”¹⁴⁸ A potential response more specific to the head of household status is that wealthier families will generally invest more in their children, and higher investments in human capital should create even greater externalities. In addition, one might argue that higher income taxpayers need more of a carrot to forgo higher potential earnings to invest time and resources in parenting.¹⁴⁹

The head of household status provides no benefit beyond the first child. At first blush, this would appear suboptimal and unfair. A possible response is that the autonomy burden of having the first child is great, and the second child adds little marginal autonomy burden. The nonfinancial contributions of parents are arguably quite burdensome and deserve recognition through a subsidy scheme. A credit system might also grant greater subsidies for the first child than for additional children, in light of this consideration.

More work remains to be done on the question of how much support for parenting or other family functions is optimal. An unduly low level of support may endanger our long-term economic growth, but too much support risks false success and the wrong people fulfilling sensitive functions. We are averse to placing value on human life.¹⁵⁰ But if we think of certain traditionally private activities as involving collective responsibility and a collective benefit, it is clear we will have to engage this issue more carefully.

147. *See id.* at 389.

148. *Id.*

149. *See Hoffer, supra* note 99, at 96 n.216.

150. *See Peter Singer, Why We Must Ration Health Care*, N.Y. TIMES, July 19, 2009, at MM38.

