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Back to the Future: Marriage and Divorce Under the 2017 Tax Act

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ARTICLE

BACK TO THE FUTURE: MARRIAGE AND DIVORCE UNDER THE 2017 TAX ACT

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I. INTRODUCTION

The Tax Cuts and Jobs Act of 2017[1] (the 2017 Tax Act) significantly altered the federal tax consequences of marriage and divorce by mostly eliminating the so-called "marriage penalty"[2] from the individual income tax rates and abolishing the deduction for alimony payments.[3] These changes represent the latest congressional tinkering with issues that have persisted since the earliest days of the modern income tax, turning back the clock with regard to taxation for both married and divorced couples. For the first time, since the enactment of the Tax Reform Act of 1969,[4] the rate brackets for married taxpayers filing joint returns are twice as wide as the brackets applicable to unmarried taxpayers.[5] For the first time since 1942, alimony payments are not deductible by the payor and not includable in the recipient's gross income.[6] The significance of these changes can best be appreciated by examining their historical context, and this article will undertake that examination.

II. MARRIAGE

A. *Marriage Neutrality, Couples Equality, and Marginal Rates*

Taxing the incomes of married individuals under a progressive rate structure[7] requires a choice between marriage neutrality (under which a

1. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054. Officially known as "An Act [t]o provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018." *Id.*

2. A marriage penalty results when a married couple's tax liability is more than it would be if the spouses were unmarried individuals. The arithmetic of the phenomenon is described below in text accompanying notes 9–11, while the historical origins are explored in greater detail in text accompanying notes 54–91.

3. *See generally* Tax Cuts and Jobs Act of 2017 § 11051(a) (eliminating the deduction/inclusion mechanism for alimony payment with limited exception). A more complete description on this matter is provided at the end of Section III.A and the beginning of Section III.B of this article.

4. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487.

5. *See infra* text accompanying notes 129–30.

6. *See* discussion *infra* Section III.B.

7. A progressive rate structure is one that imposes higher percentage tax rates on higher levels of income. *See* Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 419 (1952) ("A progressive tax on income is one whose rate increases as the income of the taxpayer increases . . . ."). Progressive rates have applied since the inception of the modern federal income tax in 1913, but the degree of progressivity has varied considerably. In 1945, for example, there were twenty-four brackets, with rates ranging from 23% to 94%. *See Federal Income Tax Brackets (Tax Year 1944)*, TAX-BRACKETS.ORG, https://www.tax-brackets.org/federaltaxtable/1945 [https://perma.cc/V88Y-NUC3] (displaying twenty-four tax brackets for each filing status—Single,

person's tax liability is unaffected by his or her marital status) and couples equality (under which two married couples with equal amounts of household income pay equal amounts of tax). For purposes of illustration, assume a progressive rate structure that imposes a tax of 25% on the first $100,000 of income and 35% on the next $100,000. Assume further that two individuals, *A* and *B*, have taxable incomes of $100,000 each. Under a marriage-neutral approach, *A* and *B* would have a tax liability of $25,000 each[8] ($50,000 total) whether they are single or married to each other. Compare individuals *C* and *D*, who have taxable incomes of $200,000 and zero, respectively. Under a marriage-neutral structure, *C*'s liability would be $60,000[9] regardless of whether she is single or married to *D*. Note that although both couples, *AB* and *CD*, have total household incomes of $200,000, single-earner couple *CD* pays $10,000 more tax than two-earner couple AB under a marriage-neutral system. This means that couples equality has been sacrificed in order to preserve marriage neutrality.

Compare a system that abandons marriage neutrality in favor of couples equality. Couples equality could be accomplished by taxing the combined incomes of married couples at the same rates that apply to unmarried individuals. Under this approach, couple *CD*'s liability would be $60,000 as described above.[10] Couple *AB*, however, will also incur a liability of $60,000,[11] representing a $10,000 marriage penalty because their combined liability as single taxpayers would have been $50,000.[12] One way of achieving couples equality without imposing a marriage penalty—which happens to be the path Congress chose in 1948—would be to tax married

Married Filing Separately, Married Filing Jointly, and Head of Household—ranging from 23%–94%). In 1988, there were only two brackets, with rates of 15% and 28%. *See Federal Income Tax Brackets (Tax Year 1988)*, TAX-BRACKETS.ORG, https://www.tax-brackets.org/federaltaxtable/1988 [https://perma.cc/5QLL-94RK] (presenting only two tax brackets per filing status: 15% and 28%). Under the 2017 legislation, there are seven brackets, with rates ranging from 10% to 37%. Tax Cuts and Jobs Act of 2017 § 11001(j)(2). Nominal and inflation-adjusted individual income tax rate schedules for years 1862 through 2013 appear on the Tax Foundation website at https://taxfoundation.org/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets. Except as otherwise noted, these rate schedules were used for all calculations of tax liability described herein.

8. 25% of $100,000 equals $25,000.

9. 25% of the first $100,000 ($25,000) plus 35% of the second $100,000 ($35,000) equals $60,000.

10. 25% of the first $100,000 ($25,000) plus 35% ($35,000) of the second $100,000 equals $60,000.

11. Couple *AB* would have a total income of $200,000 and would pay 25% of the first $100,000 ($25,000) and 35% of the second $100,000 ($35,000) for a total of $60,000, the same as couple *CD*.

12. As single individuals, *A* and *B* would each owe $25,000, representing 25% of $100,000.

couples on their combined incomes while making the rate brackets applicable to those combined incomes twice as wide as the brackets applicable to single individuals.[13] Continuing with the same illustrative rate structure described above, the married couples would pay 25% on the first $200,000 of combined taxable income and 35% of the next $200,000. Since couples *AB* and *CD* both have $200,000 of taxable income, they would both incur a tax liability of $50,000.[14] This approach effectively eliminates the $10,000 "marriage penalty" incurred by couple *AB*, but it awards a $10,000 "marriage bonus" to couple *CD* because their liability is $10,000 less than it would be if they were not married.[15]

Marriage neutrality and couples equality both have their proponents among policy scholars.[16] Those favoring couples equality assert that married couples should be taxed based on their ability to pay *as a couple*, which is best measured by total household income.[17] Advocates of marriage neutrality suggest both that the bonuses and penalties which inevitably accompany couples equality are economically inefficient and, more recently, that "[j]oint filing based on formal marriage is particularly ill-suited to new patterns of marriage and child rearing."[18] One scholar has suggested that the optimal approach would be neither purely marriage neutral nor couples equal, but rather a hybrid approach with smaller deviations in each direction.[19]

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13. Discussed in detail later in the article in the text accompanying notes 51–54.

14. 25% of $200,000 equals $50,000.

15. If *C* and *D* were not married, *C*'s liability would be $60,000, which is arrived at by taxing the first $100,000 of *C*'s income at 25% ($25,000) and the second $100,000 at 35% ($35,000) under the rates applicable to unmarried taxpayers. As a married taxpayer, whose spouse has no income, all $200,000 of *C*'s income is taxed at 25% ($50,000).

16. *See generally* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975) (discussing the issues involved in taxing marriages); *see also* Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695 (2013) (suggesting the tax code needs to recognize the modern individualism).

17. As described by Boris Bittker, the underlying theory is "that taxpaying ability is determined by total family income regardless of the distribution of such income among members of the family." Bittker, *supra* note 16, at 1392.

18. Alstott, *supra* note 16, at 757.

19. *See* Yair Listokin, *Taxation and Marriage: A Reappraisal*, 67 TAX L. REV. 185, 186 (2014) ("[T]he best schedule for the taxation of marriage maintains neither perfect couples equity nor perfect marriage neutrality. Instead, the optimal marriage taxation regime violates both couples' equity and marriage neutrality, but to a smaller degree than previous and existing marriage taxation systems."). Professor Listokin suggests that "violating two principles a little is better than violating one principal a lot." *Id.*

Three observations are in order. First, a progressive rate structure can achieve either marriage neutrality or couples equality, but it cannot do both at the same time.[20] Second, a progressive rate structure that imposes an equal tax on married couples with equal incomes will inevitably result in either marriage penalties or marriage bonuses—or possibly both.[21] Third, since both marriage penalties and bonuses result from the progressive nature of the rates, variations in rates will affect the size of the penalty or bonus. To demonstrate this third point, return to the illustrative rate structure offered earlier in this section. This time assume a tax of 25% on the first $100,000 and 45% on the second $100,000 of taxable income for unmarried individuals, and 25% on the first $200,000 and 45% on the second $200,000 of income for married couples. Under this variation, the marriage bonus enjoyed by couple *CD* increases to $20,000 (because a married couple's liability on an income of $200,000 will be $50,000,[22] compared with the $70,000[23] liability imposed on an unmarried individual with $200,000 of income). In fact, the fluctuations in marginal rates over the hundred-year history of the federal income tax have been more dramatic than those used in this illustration.[24]

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20. A system can, however, deviate modestly from both marriage neutrality and couples equality. This is the approach suggested by Professor Listokin. Listokin, *supra* note 19, at 186.

21. If the rate brackets for married taxpayers filing joint returns are wider than those for unmarried taxpayers, but less than twice as wide, two earner couples will incur a marriage penalty while one earner couples will receive a marriage bonus. To varying degrees, this has been the result since the Tax Reform Act of 1969. *See infra* text accompanying notes 67–72.

22. 25% of $200,000 equals $50,000.

23. 25% of $100,000 ($25,000) plus 45% of $100,000 ($45,000) equals $70,000.

24. A progressive rate structure is one that imposes higher percentage rates of tax on higher levels of income. Blum & Kalven, *supra* note 7, at 419. Progressive rates have applied since the inception of the modern federal income tax in 1913, but the degree of progressivity has varied considerably. In 1945, for example, there were twenty-four brackets, with rates ranging from 23% to 94%. *See Federal Income Tax Brackets (Tax Year 1944)*, *supra* note 7 (displaying twenty-four tax brackets for each filing status—Single, Married Filing Separately, Married Filing Jointly, and Head of Household—ranging from 23%–94%). In 1988, there were only two brackets, with rates of 15% and 28%. *See Federal Income Tax Brackets (Tax Year 1988)*, *supra* note 8 (presenting only two tax brackets per filing status: 15% and 28%). Under the 2017 legislation, there are seven brackets, with rates ranging from 10% to 37%. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11001(j)(2), 131 Stat. 2054. Nominal and inflation-adjusted individual income tax rate schedules for years 1862 through 2013 appear on the Tax Foundation website at https://taxfoundation.org/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets. Except as otherwise noted, these rate schedules were used for all calculations of tax liability.

B. *The Origins of the Marriage Bonus*

The modern federal income tax[25] was largely—but not entirely—"marriage neutral" for the first thirty-five years of its existence. Married couples were permitted, but not required, to report their combined incomes on a single return, but the rates were the same as those applicable to unmarried individuals.[26] This meant that joint filing was disadvantageous for two-earner couples, as they could potentially double the width of the rate brackets by filing separate returns.[27] If married couples opted to file separate returns, their incomes had to be allocated appropriately between those returns.[28] In 1930, the Supreme Court held in *Poe v. Seaborn*[29] that state community property laws must be applied to determine a spouse's rights in community income. If those rights rise to the level of ownership—as the Court determined was the case under the state law involved in *Seaborn*[30]—the community income must be divided between the spouses

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25. The modern federal income tax dates to the ratification of the Sixteenth Amendment in 1913. *See US Income Tax History, Taxucation*, EFILE, https://www.efile.com/tax-history-and-the-tax-code/ [https://perma.cc/5TV5-YBP9] ("[I]n February of 1913 the Sixteenth Amendment was ratified to the Constitution, thus granting Congress the power to collect taxes on personal income."); Joseph R. Fishkin et. al., *The Sixteenth Amendment*, CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-xvi [https://perma.cc/K3DG-JL95] ("The Sixteenth Amendment, ratified in 1913, played a central role in building up the powerful American federal government of the twentieth century by making it possible to enact a modern, nationwide income tax. Before long, the income tax would become by far the federal government's largest source of revenue.").

26. Bittker, *supra* note 16, at 1400. From 1913 through 1916, the personal exemption for married couples ($4,000) was less than twice the exemption for unmarried individuals ($3,000). *See* Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, IRS, https://www.irs.gov/pub/irs-soi/02inpetr.pdf [https://perma.cc/UG2A-DTRW] (displaying personal exemption by tax year for single persons, married couples, and dependents). Because this $4,000 limit applied regardless of whether the couple filed jointly or separately, it represents the original "marriage penalty." Assume, for example, that A and B each earn $3,000. If A and B are single, they are each entitled to a $3,000 exemption and owe no tax. If A and B are married, they must share one $4,000 exemption, leaving $2,000 of taxable income. When Congress raised rates and decreased exemptions in the War Revenue Act of 1917, the legislation eliminated this penalty by setting the exemption for married couples ($2,000) at twice the amount for unmarried individuals ($1,000). *Id.* Unless otherwise noted, IRS.gov is the source for all personal exemption amounts used herein.

27. By filing separately, each spouse would be able to take advantage of the full range of rate brackets, starting at the lowest rate.

28. *See generally* Lucas v. Earl, 281 U.S. 111, 115 (1930) (holding a husbands' entire salary taxable despite the husband contracting with his wife to share the salary as joint tenants with the right of survivorship).

29. Poe v. Seaborn, 282 U.S. 101 (1930).

30. *Seaborn* involved the community property laws of the state of Washington. *Id.* at 108. Companion cases reached the same conclusion with regard to the laws of Arizona, Louisiana, and Texas. *See* Goodell v. Koch, 282 U.S. 118, 120, 126–27 (1930) ("Enough has been said to show that

for federal income tax purposes. This was a benefit to married couples living in community property states because it typically meant that their incomes would be taxed at a lower rate than would be applicable if all or most of the income were taxed to one spouse. Returning to the illustrative rates described above, assume that there is one rate structure applicable to both married and unmarried taxpayers, with a tax of 25% on the first $100,000 of taxable income and a tax of 35% on the second $100,000. Assume further, that individual *C* has an income of $200,000 and *C*'s spouse, *D*, has an income of zero. If *C* and *D* live in a community property state and all of *C*'s income is community income, *Poe v. Seaborn* holds that *C* and *D* will each report $100,000 of income, resulting in a total tax liability of $50,000.[31] If *C* and *D* live in a non-community property state, the entire $200,000 will be taxable to *C*, resulting in a total tax liability of $60,000.[32]

Because of relatively low tax rates in 1930, the immediate impact of *Poe v. Seaborn* was less significant than this illustration would suggest.[33] The highest marginal rate was 25%, and this rate applied to incomes in excess of $100,000—equivalent to more than $1.5 million in 2018 dollars.[34] Marginal rates were less than 10% on incomes up to $20,000, and married couples who combined their incomes on a joint return were allowed an exemption of $3,500—almost $53,000 in 2018 dollars.[35] The Revenue Act of 1932

our conclusion in [*Poe v. Seaborn*] holds here, and that the wife has such equal interest in community income as to entitle her to treat one-half thereof as her income, and file a separate return thereof under section 201(a) and 211(a) of the Revenue Act of 1926 . . . ."); Bender v. Pfaff, 282 U.S. 127, 130, 132 (1930) ("[I]n Louisiana . . . we hold that the spouses are entitled to file separate returns, each treating one-half of the community income as income of each 'of' them as an 'individual' as those words are used in §§ 210(a) and 211(a) of the Revenue Act of 1926 . . . ."); Hopkins v. Bacon, 282 U.S. 122, 125–27 (1930) ("[I]t remains only to say that the interest of a wife in community property in Texas is properly characterized as a present vested interest . . . . She and her husband are entitled to make separate returns, each of one-half of such income.").

31. *See* Poe v. Seaborn, 282 U.S. at 118 (affirming the District Court holding "that the husband and wife were entitled to file separate returns, each treating one-half of the community income as his or her respective incomes . . . .").

32. The first $100,000 of income will generate liability of $25,000, and the second $100,000 will generate liability of $35,000 resulting in a total liability of $60,000.

33. *See U.S. Federal Individual Income Tax Rates History, 1862–2013*, TAX FOUND. (Oct. 17, 2013), https://taxfoundation.org/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets [https://perma.cc/P7QM-TXQM] (displaying the nominal and inflation-adjusted tax brackets by year from 1862–2013).

34. *Id.*

35. *See id.* (presenting those who make 0–20,000 dollars and elect file married filing jointly were taxed between 1.5–9% in 1930); Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26 (indicating married couples were allowed a personal exemption of $3,500).

lowered the exemption for married couples to $2,500 and raised rates significantly, particularly on taxpayers with extremely high incomes.[36] Still, 97% of taxpayers reported incomes of $10,000 or less in 1932.[37] For these taxpayers, the impact of *Seaborn* remained modest or nonexistent.

At the behest of the Treasury Department, the House Ways and Means Committee introduced a proposal in 1941 to eliminate the disparity between taxpayers living in community property states and those living in non-community property states by requiring all married couples to combine their incomes on a single joint return.[38] Further, the proposal would require the combined incomes of married couples to be taxed at the same rates applicable to single individuals.[39] By effectively eliminating the community property advantage, this proposal would have forestalled the rush by states to adopt community property regimes, as described below.[40] At the same time, it would have resulted in substantial marriage penalties for two-earner couples relative to their unmarried counterparts.[41] Opposition to the 1941 proposal was vigorous, and it was eliminated from the legislation.[42]

When the United States entered World War II, Congress lowered the personal exemption for married couples to $1,200 and substantially raised rates on all taxpayers, including those in the middle and lower-income

36. Revenue Act of 1932, Pub. L. No. 72-154, § 25(c), 47 Stat. 169, 184 (1932).

37. *See* BUREAU OF INTERNAL REVENUE, U.S. TREASURY DEP'T, STATISTICS OF INCOME FOR 1932, at 66 tbl.2 (1934) (displaying individual returns for 1932 by net income classes. A total of 3,877,430 returns were filed in 1932 and over 3,772,000 (97%) originate from net income classes of less than $10,000).

38. Bittker, *supra* note 16, at 1408–11. As explained by Professor Bittker:

> The most explosive feature of the House Committee's 1941 recommendation was the imposition of the same tax on a married couple's consolidated income as on a single person with the same amount of income. This aspect of the 1941 proposal would have meant an increase in the tax burden for almost all married couples in community property states, as well as for couples in common law states if both spouses had income from personal services or investments. Conversely, two unmarried taxpayers with separate sources of income would have to pay a heavier tax if they got married than if they lived together without benefit of clergy, and many married couples would be able to reduce their tax burden by getting divorced. Quite naturally, therefore, opponents of the proposal assailed it as 'a tax on morality.'

Id. at 1409 (footnote omitted).

39. *Id.*

40. *Id.* at 1411–12.

41. *See supra* text accompanying notes 10–12.

42. *See* Bittker, *supra* note 16, at 1410 (describing the political response to the 1941 proposal as tempestuous. "Bowing to the storm, the House voted to eliminate the mandatory joint return provision from the bill that became the Revenue Act of 1941.").

range.[43] These changes enhanced the advantage enjoyed by married couples living in community property states. For purposes of illustration, assume that individual *C*, with a 1942 income of $12,000, is married to individual *D*, who has an income of zero. If *C* and *D* live in a non-community property state, their tax liability will be $2,924.[44] If *C* and *D* live in a community property state, they will each report income of $6,000 and incur a combined tax liability of $2,420.[45] Because of the income splitting effect of *Seaborn*, the couple living in a community property state will enjoy a $500 savings, which means that they will pay 17% less than their counterparts in a non-community property state.[46] The benefit enjoyed by married couples in community property states increased further in 1944, when Congress raised marginal rates again, with the highest rate rising to 94%.[47]

Even before the 1942 tax rate increases, Oklahoma responded to the *Seaborn* result by enacting an elective community property regime allowing married couples to "opt in" to community property treatment to enjoy the federal income tax benefits of income splitting.[48] Oregon followed with a similar statute in 1943,[49] and in 1944, the Supreme Court considered the effect of these "opt in" community property statutes in *Commissioner v.*

43. *See* Revenue Act of 1942, Pub. L. No. 77-753, § 131(a), 56 Stat. 798, 828 (1942) ("[I]n the case of the head of a family or a married person living with husband or wife, a personal exemption of $1,200. A husband and wife living together shall receive but one personal exemption. The amount of such personal exemption shall be $1,200."); *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33 (presenting a significant rise in tax rate between 1941 and 1942).

44. In 1942 married couple filing a joint return was allowed a personal exemption of $1,200. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. This provides couple *CD* with a taxable income of $10,800. The first $2,000 of couple *CD* income is taxed at 19% ($380), and a like amount is taxed at 22% ($440), 26% ($520), 30% ($600), and 34% ($680). *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33. The remaining $800 of their income is taxed at 38% ($304). *Id.*

45. Filling separate returns, *C* and *D* are each allowed an exemption of $500, leaving them incomes of $5,500 each. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. The first $2,000 of income is taxed at 19% ($380), the second $2,000 at 22% ($440), and the remaining $1,500 at 26% ($390), resulting in a total liability of $1,210 each. *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33.

46. *See* Poe v. Seaborn, 282 U.S. 101, 118 (1930) (affirming the District Court's holding "that the husband and wife were entitled to file separate returns, each treating one-half of the community income as his or her respective incomes . . . .").

47. *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33.

48. *See* Bittker, *supra* note 16, at 1411 ("Oklahoma—true to its sobriquet, the 'Sooner State'—had already started in 1939 by authorizing its married citizens to elect to be governed by a newly enacted community property system.").

49. *Id.*

Harmon.[50] Based on its 1930 decision in *Lucas v. Earl*,[51] which held that a married couple's contract to divide their income was not effective to split the income for tax purposes, the Court concluded that an optional community property regime was likewise ineffective.[52] In response, Oklahoma and Oregon made their community property regimes mandatory,[53] and after the Internal Revenue Service accepted both Oklahoma's and Oregon's regimes, Hawaii, Nebraska, Michigan, and Pennsylvania followed suit.[54] By 1947, a similar regime was under consideration in New York.[55]

Prompted by the wave of new community property statutes, Congress finally addressed the *Seaborn* issue in 1948 by extending the benefits of income splitting to married couples in non-community property states.[56] The solution—rate brackets for married taxpayers filing joint returns that were double the width of the brackets applicable to unmarried taxpayers—sacrificed marriage neutrality to achieve couples equality and represented a substantial post-war tax cut for married couples living in non-community

50. *See* Comm'r v. Harmon, 323 U.S. 44, 44 (1944) ("The question posed by this case is whether, upon a state's adoption of an optional community property law, a husband and wife who elect to come under that law are entitled thereafter to divide the community income equally between them for purposes of federal income tax.").

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

52. Comm'r v. Harmon, 323 U.S. at 45–46. As explained by the Court:

> Under Lucas v. Earl an assignment of income to be earned or to accrue in the future, even though authorized by state law and irrevocable in character, is ineffective to render the income immune from taxation as that of the assignor. On the other hand, in those states which, by inheritance of Spanish law, have always had a legal community property system, which vests in each spouse one half of the community income as it accrues, each is entitled to return one half of the income as the basis of federal income tax.

Id.

53. Bittker, *supra* note 16, 1412.

54. *See id.* at 1412 (stating shortly after the Internal Revenue Service accepted the new community property statutes, "Hawaii, Nebraska, Michigan, and Pennsylvania soon joined the community property parade . . . .").

55. *Id.*

56. *See* Revenue Act of 1948, Pub. L. No. 88-471, § 301, 62 Stat. 110, 114 (1948) ("In the case of a joint return of husband and wife under section 51 (b), the combined normal tax and surtax under section 11 and subsection (b) of this section shall be twice the combined normal tax and surtax that would be determined if the net income and the applicable credits against net income provided by section 25 were reduced by one-half.").

property states.[57] To illustrate the impact of the marriage bonus in its historical context, we will apply 1949 tax rates and dollars. Consider individual *C*, who has $20,000 of taxable income (equivalent to $200,000 today). Applying the 1949 tax rates for unmarried taxpayers and the appropriate personal exemption yields a tax liability of $6,290.[58] If *C* marries *D*, who has no income, *C*'s liability will decrease to $4,872.[59] Thus, couple *CD* will enjoy a marriage bonus of $1,418, representing a 23% decrease from *C*'s liability before marriage. The tax liabilities of single individuals *A* and *B*, who have incomes of $10,000 each, will not change if they marry each other.[60]

C. *The Advent and Evolution of the Marriage Penalty*

In response to complaints that married taxpayers enjoyed too great an advantage over their unmarried counterparts under the 1948 legislation, Congress added another wrinkle in 1951.[61] A new filing status—Head of

57. *See* Bittker, *supra* note 16, at 1412–13 ("Congress decided in 1948 to authorize all married couples to aggregate their income and deductions on a joint return and to pay a tax equal to twice what a single person would pay on one-half their consolidated taxable income.").

58. After a $600 exemption, individual *C* will have taxable income of $19,400. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. The first $2,000 of income will be taxed at 20% ($400), with like amounts taxed at 22% ($440), 26% ($520), 30% ($600), 34% ($680), 38% ($760), 43% ($860), 47% ($940), and 50% ($1000). *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33. The remaining $1,400 will be taxed at 53% ($743). *Id.*

59. As a married couple, *CD* will be allowed a $1,200 exemption, leaving taxable income of $18,800. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. The first $4,000 will be taxed at 20%, with like amounts taxed at 22% ($880), 26% ($1,040), and 30% ($1,200). *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33. The remaining $2,800 will be taxed at 34% ($952). *Id.*

60. After subtracting the $600 exemption, *A* and *B* will each have taxable income of $9,400 as single individuals. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. The first $2,000 of income will be taxed at 20% ($400), with like amounts taxed at 22% ($440), 26% ($520), and 30% ($600). *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33. The remaining $1,400 will be taxed at 34% ($476). *Id.* Resulting in a total tax liability of $2,436 each for *A* and *B*, which is exactly half the $4,872 they would pay as a married couple filing a joint return. *See supra* note 59 and accompanying text.

61. According to the House Ways and Means Committee report:

> It is believed that taxpayers, not having spouses but nevertheless required to maintain a household for the benefit of other individuals, are in a somewhat similar position to married couples, because they may share their income, are treated under present law substantially as if they were two single individuals each with half of the total income of the couple.

REVENUE ACT OF 1951, H.R. REP. NO. 82-586, at 1790, *reprinted in* 1951-2 C.B. 357, 364 [hereinafter H.R. REP. NO. 82-586].

Household—was created for unmarried individuals who maintained a home for a child or other dependent.[62] The rates applicable to Heads of Household resulted in tax liability midway between that of a single individual and that of a married couple with equal amounts of income.[63] Under the 1952 rates, for example, a taxpayer with $10,000 of income would owe $2,728 under the single rates[64] and $2,104 under the joint return rates.[65] Under the Head of Household rates, $10,000 of income would result in a liability of $2,304.[66] Perhaps unwittingly, Congress had introduced the possibility of a marriage penalty.[67] Consider, for example, two unmarried taxpayers who are both eligible for Head of Household status and have incomes of $10,000 each. If they marry each other, they will have $20,000 of income, which will be taxed at the joint return rates. This results in a

62. The rates applicable to Heads of Household originally appeared in § 25(b)(1) of the Internal Revenue Code of 1939. 53 Stat. 18 (1939) ("[I]n the case of the head of a family or a married person living with husband or wife, a personal exemption of $2,500.") Currently, they are codified at § 1(b) of the Internal Revenue Code of 1986. I.R.C § 1(b) (2019) ("There is hereby imposed on the taxable income of every head of a household . . . a tax . . . .").

63. The House Ways and Means Committee report explains "it was not deemed appropriate to give a head of household the full benefits of income splitting because it appears unlikely that there is as much sharing of income in these cases as between spouses." H.R. REP. NO. 82-586, *supra* note 61, at 1791.

64. Single taxpayers with an income of $10,000 and without dependents were afforded a tax exemption of $600 in 1952, leaving taxable income of $9,400. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. The first $2,000 would be taxed at 22.2% ($444), with similar amounts taxed at 24.6% ($492), 29% ($580), and 34% ($680). *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33. The last $1,400 would be taxed at 38% ($532). *Id.*

65. Assuming two exemptions, the couple's taxable income would be $8,800. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. The first $4,000 would be taxed at 22.2% ($888), the next $4,000 at 24.6% ($984), and the last $800 at 29% ($232). *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33.

66. This assumes two exemptions, leaving taxable income of $8,800. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. The first $2,000 would be taxed at 22.2% ($444), with like amounts taxed at 23.4% ($468), 27% ($540), and 29% ($580). *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33. The last $800 would be taxed at 34% ($272). *Id.*

67. Lawrence Zelenak describes Head of Household status as "The First Marriage Penalty," despite the "standard history . . . that marriage penalties were created in 1969." Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 69 (2000). In fact, the first marriage penalty dates to the original enactment of the modern income tax in 1913. For the first four years of the tax's existence, the personal exemption for married couples was only 33% ($1,000) more than the personal exemption for single taxpayers. *See* Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26 (indicating that from 1913–16, married couples only had a $4,000 limit on personal exemptions). This meant that two-earner married couples paid more tax than their single counterparts. *Id.*

liability of $5,000,[68] compared with their combined liability of $4,608 as Heads of Household.[69] Thus, they have incurred a marriage penalty of $392—8.5% of their combined pre-marriage tax liability.

For taxpayers not affected by the Head of Household anomaly, the marriage bonus and singles penalty increased during the 1960s. Bringing our dollar amounts forward to their approximate 1969 equivalents will give individual *C* an income of $30,000. As an unmarried taxpayer under the rates for 1969, *C*'s tax liability would be $10,832.[70] If *C* marries *D*, who has no income, couple *CD* would have a tax liability of $7,412[71]—a marriage bonus of $3,420, or a 31.6% reduction in *C*'s liability. Viewed from a different perspective, *C* will incur a "singles penalty" of $3,420 if she decides not to marry. By the late 1960s, unmarried taxpayers, particularly women, had begun lobbying Congress for a reduction of the singles penalty.[72] Congress granted that reduction in the Tax Reform Act of 1969,[73] with rate changes that went into effect for the calendar year 1971. The brackets for joint returns remained twice as wide as those for single taxpayers, but the rates applicable to single taxpayers were lower. Continuing with the above illustration, unmarried taxpayer *C* with an income of $30,000 would have a tax liability of $9,087 under the new rates.[74] If *C* marries *D*, who has no

68. Since each spouse was eligible for Head of Household status before marriage, we will assume a total of four exemptions at $600 each, leaving a taxable income of $17,600. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. The first $4,000 will be taxed at 22.2% ($888), with like amounts taxed at 24.6% ($984), 29% ($1,160), and 34% ($1,360). *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33. The last $1,600 will be taxed at 38% ($608). *Id.*

69. *See supra* text accompanying note 66 (explaining under the 1952 tax rates, a person with an income of $10,000 filing as Head of Household incurs a tax liability of $2,304).

70. After a personal exemption of $600, *C* would have a taxable income of $29,400, which would be taxed at rates ranging from 14% to 53%. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26; *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33.

71. After personal exemptions of $1,200, couple *CD* would have taxable income of $28,800, which would be taxed at rates ranging from 14% to 39%. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26; *U.S. Federal Individual Income Tax Rates History, 1862–2013*, *supra* note 33.

72. *See* MICHAEL J. GRAETZ, THE DECLINE AND FALL OF THE INCOME TAX 32–33 (1997) (providing a colorful description of the lobbying efforts led by Hollywood actress Gloria Swanson and Connecticut businesswoman Vivien Kellems, including mailing tea bags to members of Congress and holding a news conference on the front lawn of Ways and Means Committee chair Wilbur Mills).

73. Tax Reform Act of 1969, Pub. L. No. 91-172, § 803, 83 Stat. 487, 679.

74. After a personal exemption of $675, *C*'s taxable income would be $29,325. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. This income would be

income, couple *CD* will have a tax liability of $7,354,[75] for a marriage bonus of $1,733—a 19% reduction in *C*'s pre-marriage liability. Consider the impact on individuals *A* and *B*, who have incomes of $15,000 each. If they remain unmarried, their combined tax liability would be $6,622—or $3,311 each.[76] If they marry, their liability will *increase* to $7,354.[77] In other words, couple *AB* would incur a "marriage penalty" of $732—or 11% of their combined pre-marriage liability. Broadly speaking, the rates adopted in 1969 decreased—but did not eliminate—the marriage bonus for one-earner couples while imposing marriage penalties on two-earner couples.[78]

Recall that under an income tax with progressive rates, a choice must be made between marriage neutrality and couples equality.[79] If priority is given to couples equality, there will be marriage bonuses, marriage penalties, or both.[80] Tax policy scholarship suggests that if we accept couples equality as a given, a system that imposes both modest penalties and modest bonuses is preferable over one that awards large bonuses or imposes large penalties.[81] By that standard, the 1969 change represented an improvement over prior law.[82] This logic did not make the marriage penalty any more

taxed at rates ranging from 14% to 45%. *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

75. A second personal exemption would reduce *CD*'s taxable income to $28,650, which would be taxed at rates ranging from 14% to 39%. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26; *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

76. After a personal exemption of $675, *A* and *B* would have taxable incomes of $14,325 each. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26; *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

77. *See supra* note 68.

78. Two earner couples will enjoy a marriage bonus if one spouse has significantly more income than the other. The bonus crosses over to a penalty if the spouses' incomes are nearly equal.

79. *See* discussion Section II.A

80. *See supra* text accompanying notes 20–21.

81. *See* Listokin, *supra* note 19, at 186 ("[T]he optimal marriage taxation regime violates both couples equity and marriage neutrality, but to a smaller degree than previous and existing marriage taxation systems.").

82. The enactment of the Earned Income Credit (EIC) in 1975 added another dimension to the marriage penalty. MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., R44825, THE EARNED INCOME CREDIT (EITC): A BRIEF LEGISLATIVE HISTORY 1 (2018). The EIC is a refundable credit for low income taxpayers that is based on the amount of their income earned from wages or self-employment and is intended to provide an incentive to work. *Id.*; *Earned Income Tax Credit (EITC)*, IRS, https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit [https://perma.cc/A2BH-79QQ]; *What is the Earned Income Tax Credit?*, TAX POL'Y CTR, https://www.taxpolicycenter.org/briefing-book/what-earned-income-tax-credit [https://perma.cc/372G-59R4]. Consistent with its purpose, the amount of the credit increases as

palatable; rather, it became the object of ongoing criticism, questionable attempts at avoidance, and legislative tinkering.[83]

One couple's attempts at avoiding the marriage penalty gained particular notoriety.[84] The scheme was to obtain a Caribbean divorce[85] in December and remarry in January, thereby exploiting the provision of the Internal Revenue Code that determines marital status as of the last day of the year.[86]

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income increases until a specified threshold is reached. *See id.* ("Workers receive a credit equal to a percentage of their earnings up to a maximum credit. Both the credit rate and the maximum credit vary by family size, with larger credits available to families with more children."). After income reaches the first threshold, the credit remains fixed until income reaches a second threshold, at which point the credit begins to phase out. *Id.* As originally enacted, the phase-out levels were the same for married and single taxpayers. *See* CRANDALL-HOLLICK, *supra* note 82 ("As originally enacted, the credit was equal to 10% of the first $4,000 in earnings. Hence, the maximum credit amount was $400. The credit phased out between incomes of $4,000 and $8,000. . . . P.L. 107-16 . . . increased the income level at which the credit phased out for married tax filer in comparison to unmarried tax filers (referred to as 'marriage penalty relief . . .'")). This meant that single taxpayers faced the prospect of losing some or all of their EIC by marrying if their spouses also had income. *See* Lawrence Zelenak, *For Better and Worse: The Differing Income Tax Treatments of Marriage at Different Income Levels*, 93 N.C. L. REV. 783, 808 (2015) ("Before the 2001 legislation, the EIC phase[-]out thresholds were identical for joint returns and for individual returns, resulting in an extreme tilt toward marriage penalties in the operation of the phase[-]out.").

83. *See* Robert S. McIntyre & Michael J. McIntyre, *Fixing the "Marriage Penalty" Problem*, 43 VALPARAISO U. L. REV. 907, 908 (1999) ("But major marriage penalties were reintroduced by the 1969 Tax Act, which abandoned full income splitting in favor of marital joint filing with partial income splitting. Those penalties provoked an explosion of news reports and scholarly writing on tax issues relating to marriage."). Wendy C. Gerzog states in her 1978 article on marriage penalties:

> Essentially, the Tax Reform Act of 1969 constituted an unsatisfactory compromise. Many single persons resented the fact that they continued to be taxed more severely than one-earner married couples who reported the same amounts of income but who were able to benefit fully, and not merely partially, from the provisions of income splitting. Moreover, a new class of dissident taxpayers arose: the two-earner married couple. This group of taxpayers was unable to use the lower rate schedules provided for single individuals when each spouse filed a separate return. Thus, the marriage penalty came into being: two income-producing persons sharing the same household increased their tax burden by marrying and continuing to work.

Wendy C. Gerzog, *The Marriage Penalty: The Working Couple's Dilemma*, 47 FORDHAM L. REV. 27, 31 (1978) (footnotes omitted).

84. *See generally* GRAETZ, *supra* note 72, at 35–39 (describing the exploits of David and Angela Boyter which, according to Professor Graetz, was also reported by the *Wall Street Journal*, the *New York Times*, and the *National Enquirer*).

85. In earlier times, bilateral divorces obtained in foreign countries with short residency requirements had served as a means of escaping the strict divorce laws of some U.S. states, most notably New York. *See* David Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel and Borax*, 36 U. CHI. L. REV. 26, 44 (1966) (detailing the restrictiveness of New York divorce laws and the resulting emergence of bilateral divorces in Mexico).

86. I.R.C. § 7703(a)(1) (2017).

Assuming the divorce is valid, the taxpayers are not married on December 31 and can avoid the marriage penalty by filing as unmarried individuals. David and Angela Boyter employed this strategy in 1975 and repeated the process in 1976.[87] The Tax Court ruled against the Boyters, holding that the divorces were invalid under applicable state law.[88] The Court of Appeals was of the view that the divorces might be disregarded as sham transactions even if valid under state law and remanded the case to the Tax Court for consideration of that question.[89] It appears that the Boyters did not pursue further litigation.[90] They had divorced yet again in 1977, but this time they did not remarry.[91]

The Boyters testified before both the House Ways and Means Committee[92] and the Senate Finance Committee[93] in 1980, and their testimony presumably was a factor in Congress's decision to mitigate the marriage penalty in 1981 by creating a deduction for two-earner couples equal to 10% of the lower-earning spouse's income.[94] The General Explanation of the 1981 legislation indicates that this change would decrease the amount of the marriage penalty from $3,777 to $2,007 for a two-earner couple in which each spouse earns $50,000.[95] The Tax Reform Act of 1986 eliminated the deduction for two-earner couples.[96] According to the General Explanation, Congress determined that the deduction was no

87. Boyter v. Commissioner, 74 T.C. 989, 990 (1980).

88. *See id.* at 1001 ("Because State law is determinative on the issue of marital status and because Maryland would not recognize the foreign divorces as valid to terminate the marriage, petitioners are not entitled to file their tax returns as single persons for the years 1975 and 1976").

89. Boyter v. Commissioner, 668 F.2d 1382, 1388 (4th Cir. 1981) ("[W]e remand the case to the Tax Court to determine whether the divorces, even if valid . . . are nonetheless shams and should be disregarded for federal income tax purposes for the years in question.").

90. A Westlaw search shows no further developments after 1981.

91. *See* GRAETZ, *supra* note 72, at 38 (1997) ("So here's to the Boyters, a little toast to them for standing up to the government, for fighting for fairness and the family. They were married once, but they're not anymore. The government came between them.").

92. House Committee on Ways and Means, *Tax Treatment of Married, Head of Household, and Single Taxpayers*, 96th Cong., 2d Sess., April 2, 1980, p. 164.

93. *Marriage Penalty Tax: Hearing on§ 336, § 1247, and § 1877 Before the Subcomm. on Taxation and Debt Mgmt. Generally of the Comm. on Fin.*, 96th Cong. 187 (1980).

94. GREGG A. ESENWEIN, CONG. RESEARCH SERV., RL30800, THE FEDERAL INCOME TAX AND THE TREATMENT OF MARRIED COUPLES: BACKGROUND AND ANALYSIS 5 (2001).

95. STAFF OF THE J. COMM. ON TAXATION, 97TH CONG. REP. ON THE GENERAL EXPLANATION OF THE ECONOMIC RECOVERY ACT OF 1981, at 35 tbl.IV-6 (Comm. Print 1981).

96. *See* STAFF OF THE J. COMM. ON TAXATION, 99TH CONG. REP. ON THE GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 25 (Comm. Print 1987) [hereinafter EXPLANATION OF THE TAX REFORM ACT OF 1986] ("The prior-law deduction for two-earner married couples is repealed, effective for taxable years beginning on or after January 1, 1987.").

longer necessary under a rate structure with only two brackets—15% and 28%.[97] A table in the General Explanation indicates that a two-earner couple with each spouse earning $50,000 would incur a marriage penalty of $1,284 under the new rates, as compared with $2,609 under previous rates.[98]

The two-tiered rate structure enacted in 1986 lasted until 1990, when Congress added a 31% top marginal bracket for 1991 and later years.[99] Two additional brackets—36% and 39.6%—were added in 1993.[100] Under the 1993 rates, a single taxpayer with $60,000 of income would incur a tax liability of $13,394.[101] If two single taxpayers with incomes of $60,000 married each other, their combined tax liability would increase from $26,788 to $28,272,[102] representing a marriage penalty of $1,484—5.5% of their pre-marriage liability. Compare a single taxpayer with an income of $120,000 who marries a taxpayer with zero income. That taxpayer's liability would fall from $32,126[103] to $28,272,[104] representing a $3,854 marriage bonus—12% of her pre-marriage liability. Finally, consider the example of two unmarried individuals with taxable incomes of $60,000 each, both of whom are eligible for Head of Household status. Their liability under the 1993

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97. *Id.* at 19; *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

98. EXPLANATION OF THE TAX REFORM ACT OF 1986, *supra* note 96, at 19 tbl.I-4.

99. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11101, 104 Stat. 1388, 1388-404 (1990). The 31% rate applied to taxable incomes in excess of $49,300 for single taxpayers, $82,150 for married taxpayers filing joint returns, and $70,450 for heads of household. *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

100. Omnibus Budget Reconciliation Act of 1993, *supra* note 99, at 457–61 (1993); *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

101. After a personal exemption of $2,350, the individual's taxable income would be $57,650. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. Of this amount, $22,100 would be taxed at 15% ($3,315), $31,400 at 28% ($8,792), and $4,150 at 31% ($1,286.50). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

102. After two personal exemptions, the couple's taxable income would be $115,300. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. $36,900 of this amount would be taxed at 15% ($5,535), $52,250 at 28% ($14,630), and $26,150 at 31% ($8,106.50). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

103. After one exemption, the individual's taxable income would be $117,650. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. Under the rates set out in 1993, $22,100 would be taxed at 15% ($3,315), $31,400 at 28% ($8,792), $61,500 at 31% ($19,065), and $2,650 at 36% ($954). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

104. EXPLANATION OF THE TAX REFORM ACT OF 1986, *supra* note 96 (resulting in the elimination of the deduction). After one exemption, a married couples' taxable income would be $115,300. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. Under the rates set out in 1993, $36,900 would be taxed at 15% ($5,535), $52,250 at 28% ($14,630), and $26,250 at 31% ($8,137.50). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

rates would be $11,636 each.[105] Thus, if they were to marry each other, their joint return liability of $28,272[106] represents an increase of $5,000 in their combined liability—a marriage penalty of more than 21%.

The marriage penalty attracted renewed legislative interest in the late 1990s.[107] Bills introduced in both houses in 1997 would have given married taxpayers the option of filing as single individuals.[108] By filing as single taxpayers, a couple with equal incomes could pay less tax than a single-earner couple with the same total amount of income. Consider, for example, couple *AB*, each of whom has an income of $60,000. If *A* and *B* were allowed to file as single individuals under the rates and exemptions applicable in 1997, their liability would be $12,769[109] each, for a total of $25,538. Compare couple *CD*, who would not benefit from single filing because all $120,000 of their income is earned by *C*. Their liability under the rates applicable to joint returns would be $27,213,[110] which is $1,675 more than couple *AB*'s liability. Note that this legislation would have marked a move away from couples equality—and toward marriage neutrality—for the first time since 1948.[111] Neither house passed the 1997

105. This assumes two personal exemptions for each taxpayer, resulting in taxable income of $55,300 for each. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. Of this amount, $29,600 will be taxed at 15% ($4,440) and $25,700 at 28% ($7,196). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

106. After one exemption, a married couples' taxable income would be $115,300. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. Under the rates set out in 1993, $36,900 would be taxed at 15% ($5,535), $52,250 at 28% ($14,630), and $26,250 at 31% ($8,137.50). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

107. CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX, at xvii (1997) ("Recent growth in the number of married couples who incur marriage penalties and the increasing size of those penalties have focused attention on the effects of marriage on taxes and on alternative ways to alleviate them.").

108. The bills were officially titled: "To amend the Internal Revenue Code of 1986 to provide that married couples may file a combined return under which each spouse is taxed using the rates applicable to unmarried individuals." H.R. 2456, 105th Cong. § 2 (1997); S. 1314, 105th Cong. § 2 (1997).

109. After an exemption of $2,650, each individual's taxable income would be $57,350. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. The first $25,300 would be taxed at 15% ($3,795), and the remainder, $32,050, would be taxed at 28% ($8,974). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

110. After two exemptions, the couple would have taxable income of $114,700. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. Of this amount, $41,200 would be taxed at 15% ($6,180), $58,400 at 28% ($16,352), and the remainder, $15,100, at 31% ($4,681). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

111. Lawrence Zelenak suggests that conservatives "may not have noticed they were doing nothing for the traditional homemaking wife and breadwinning husband." Zelenak, *supra* note 67,

proposal, and legislation passed by both houses in 1999 reverted to couples equality.[112] The 1999 legislation would have awarded a tax cut to all married couples by expanding the rate brackets for joint returns to double the width of the brackets for single taxpayers.[113] This would have marked a return to the pre-1969 structure and a move toward larger marriage bonuses, particularly for single-earner couples.[114] Citing fiscal concerns, President Clinton vetoed the legislation.[115] Congress passed identical legislation in 2000,[116] which was also met with a presidential veto.[117]

The Economic Growth and Tax Relief Reconciliation Act of 2001,[118] signed into law by President Bush, provided marriage penalty relief at the lower end of the rate structure. The legislation added a 10% bracket, which was twice as wide for joint returns as for single taxpayers.[119] Beginning in 2003, the 15% bracket was also twice as wide for joint returns as for single taxpayers.[120] This change eliminated the rate-based marriage penalty for couples with incomes of $114,650 or less[121] and decreased the penalty for most other couples. Returning to our earlier example, if single individuals

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at 15 (2000). Professor Zelenak also points out that the 1997 proposal did nothing to solve the marriage penalty for taxpayers eligible for Head of Household filing status. *See id.* at 12 ("In light of the special solicitude for couples with children exhibited by the sponsors of these bills, it is strange that they would propose a complete marriage penalty fix for childless couples, but only a partial fix for those with children." (footnote omitted)).

112. Tax Refund and Relief Act of 1999, H.R. 2488, 106th Cong. §§ 111, 115. "In April 1998, they introduced new bills in both the House and the Senate, which would return to the 1948 approach by giving married taxpayers full income-splitting relative to single taxpayers, with respect to the standard deduction and bracket widths, and they stayed with that approach in 1999." Zelenak, *supra* note 67, at 14–15 (2000) (footnote omitted).

113. H.R. 2488 §§ 111, 115.

114. *See supra* text accompanying notes 57–61.

115. THE PRESIDENT'S VETO MESSAGE ON H.R. 2488, H.R. DOC. NO. 106-130 (1999).

116. Marriage Tax Penalty Relief Reconciliation Act of 2000, H.R. 4810, 106th Cong. (2000).

117. MARRIAGE TAX RELIEF RECONCILIATION ACT OF 2000—MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 106-291 (2000).

118. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001).

119. *Id.* at § 101. For single taxpayers, the 10% rate applied to the first $6,000 of taxable income; for married taxpayers filing joint returns, it applied to the first $12,000. *Id.*

120. *Id.* The 15% rate applied to taxable income between $7,000 and $28,400 for single taxpayers and taxable income between $14,000 and $56,800 for married taxpayers filing joint returns. *Id.*

121. *Id.* The upper limit of the 25% bracket for married taxpayers filing joint returns was $114,650; the upper limit for single taxpayers was $68,800. This meant that spouses whose individual incomes were $68,800 or less would incur a marriage penalty if their combined incomes exceeded $114,650, because that excess would be taxed at a higher (28%) rate.

A and *B* have incomes of $73,000 each, their liability under the 2003 rates and exemptions would be $14,332 each.[122] If *A* and *B* marry and file a joint return, their combined liability increases slightly from $28,664 to $29,353,[123] representing a marriage penalty of $689 (about 2.4% of their combined pre-marriage liability). By shrinking the marriage penalty, the rate changes also enlarged the marriage bonus. For example, if individual *C* is unmarried and has an income of $146,000, *C*'s liability will be $34,772.[124] If *C* marries *D*, whose income is zero, couple *CD*'s joint return liability will be $29,353,[125] representing a marriage bonus of $5,419 (15.6% of *C*'s pre-marriage liability). Single taxpayers eligible for Head of Household status still faced a potential marriage penalty, however, even at the lower end of the rate structure. For example, an individual with a taxable income of $38,000 would owe $4,285 under the Head of Household rates for 2003.[126] If that individual married another individual with $38,000 of taxable income who also qualified as a Head of Household, their liability under the joint return rates would be $9,570[127]—$1,000 (12%) more than their combined Head of Household liability of $8,570.[128]

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122. After an exemption of $3,050, *A* and *B* would each have taxable income of $69,650. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. Of this amount, $7,000 would be taxed at 10% ($700), $21,400 at 15% ($3,210), $40,400 at 25% ($10,100), and $1,150 at 28% ($322). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

123. As a married couple filing a joint return, *AB* would be allowed an exemption of $6,100, resulting in taxable income of $139,900. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. Under the rates applicable to married taxpayers filing joint returns, the first $14,000 would be taxed at 10% ($1,400), the next $42,800 at 15% ($6,420), the next $57,850 at 25% ($14, 462.5), and the last $25,250 at 28% ($7,070). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

124. After an exemption of $3,050, *A* would have taxable income of $142,950. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. Of this amount, $7,000 would be taxed at 10% ($700), $21,400 at 15% ($3,210), $40,400 at 25% ($10,100), and $74,150 at 28% ($20,762). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

125. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 41, 115 Stat. 38, 41–42 (2001).

126. Assuming two exemptions, the individual's taxable income would be $31,900. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. Of this amount, $10,000 would be taxed at 10% ($1,000) and the remaining $21,900 would be taxed at 15% ($3,285). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

127. With four exemptions, their combined taxable income would be $63,800. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. The first $14,000 of this income would be taxed at 10% ($1,400), the next $42,800 at 15% ($6,420), and the last $7,000 at 25% ($1,750). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

128. The 2001 legislation slightly mitigated the marriage penalty associated with the Earned Income Credit by making the phase-out level for married taxpayers somewhat higher than that for

By 2017, the starting point for the marriage penalty for taxpayers without children had increased to $153,100 as a result of inflation adjustments to the rate brackets.[129] As a result of the expiration of the 2001 tax cuts, the marriage penalty increased dramatically at the top end of the income scale.[130] In 2017, the top rate of 39.6% applied to incomes in excess of $418,400 for single taxpayers, $444,550 for Heads of Household, and $470,700 for married taxpayers filing joint returns.[131] Consider single taxpayer *E*, who has a taxable income of $400,000.[132] *E* would have no income taxed at the 39.6% rate, but if *E* marries individual *F*, who also has $400,000 of taxable income, almost $330,000 of their combined income would be taxed at the top rate.[133] Their combined tax liability would increase from $230,800 to $262,031, representing a marriage penalty of $31,231 (13.5% of their combined pre-marriage liability).[134] If we assume that both *E* and *F* had been eligible for Head of Household status before marriage, their combined liabilities would increase from $223,382 to $262,031, representing a marriage penalty of $38,649 (17% of their

single taxpayers. *See* JOINT COMM. ON TAXATION, 107TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS at 28–34 (2003) (discussing how the qualifications for receiving the Earned Income Credit under prior law hinged on the alternative minimum tax reducing the amount of refundable credit for married taxpayers).

129. Rev. Proc. 2016-55, 2016-45 I.R.B. 707 (Oct. 26, 2016). The 10% and 15% brackets for married taxpayers filing joint returns were twice the width of the corresponding brackets for single taxpayers. Kyle Pomerleau, *2017 Tax Brackets*, TAXFOUNDATION (Nov. 10, 2016), https://taxfoundation.org/2017-tax-brackets [https://perma.cc/G4DL-5ZU8]. The 25% bracket for joint returns, however, was only 1.4 times the width of the 25% bracket for single taxpayers. *Id.* The $153,100 starting point for the 28% bracket for joint returns means that two-earner married couples with combined incomes in excess of that amount will see at least some portion of their income taxed at a higher rate as a result of marriage. *Id.*

130. The 2001 tax cuts were originally scheduled to expire in 2011, but they were extended two years by the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, §§101–124 Stat. 3296, 3298–99 (2010).

131. *See* Rev. Proc. 2016-55, 2016-45 I.R.B. 707 (Oct. 26, 2016) (stating the adjusted inflation rates).

132. For simplicity, we will assume that the income amounts in this example are net of any deductions and exemptions.

133. Rev. Proc. 2016-55, *supra* note 131. If married taxpayers filing a joint return had $800,000 of taxable income in 2017, $329,300 of that income would be taxed at the top rate of 39.6% ($130,402.80). *Id.*

134. *1040 Tax Tables*, IRS (Sept. 28, 2017), https://www.irs.gov/pub/irs-prior/i1040tt—2017.pdf. These amounts were computed using the Tax Computation Worksheet in the instructions to Form 1040 for 2017.

combined pre-marriage liability).[135]

D. *Marriage Penalties and Bonuses Under the 2017 Legislation*

The 2017 legislation temporarily eliminates the deduction for personal exemptions and increases the amount of the standard deduction, with the standard deduction for joint returns being twice the amount for single taxpayers.[136] The rate brackets for joint returns are exactly twice as wide as the rate brackets for single taxpayers, except that the highest bracket (37%) applies to incomes above $500,000 for single taxpayers and $600,000 for married taxpayers filing joint returns.[137] Thus, the rate-based marriage penalty applies only to married couples with joint incomes in excess of $600,000.[138] Further, since the next highest rate bracket is 35%, the maximum possible rate-based penalty is 2% of $400,000, which would apply to a married couple if each spouse has $500,000 of taxable income.[139] This illustrative couple would incur a marriage penalty of $8,000.[140] A significant marriage penalty also remains for taxpayers who would be eligible for Head of Household status if they stayed single.[141] Consider two single taxpayers with incomes of $100,000 each. If both are eligible for Head of Household status and both claim the standard deduction, their tax liability for 2018 will be $12,588 each.[142] If they marry, their joint return liability will be $30,819,[143] which is $5,643 more than their combined liability before marriage (representing a marriage penalty of 22%).[144]

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135. *Id.*

136. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11041(a)(1)–(2), 131 Stat. 2082.

137. I.R.C. § 1(j)(2) (2017).

138. For married couples with taxable incomes of less than $600,000, each applicable tax bracket will be double the width of the corresponding bracket for single taxpayers. *Id.* This means that marriage will not subject these taxpayers to higher marginal rates.

139. If two single taxpayers have incomes of $500,000 each, none of that income will be taxed at the 37% rate. *Id.* If the two taxpayers marry each other, their combined income will be $1 million. Since the 37% rate applies to income in excess of $600,000 for married taxpayers filing a joint return, $400,000 of the couple's income will be taxed at 37% ($148,000). *Id.*

140. 2% of $400,000 equals $8,000.

141. I.R.C. § 1(j)(2).

142. After a standard deduction of $18,000, the taxpayers would have taxable incomes of $82,000 each. *Id.* § 1(j)(2)(B). Of this amount, $13,600 would be taxed at 10% ($1,360), $38,200 at 12% ($4,584), and $30,200 at 22% ($6,644). *Id.*

143. After a standard deduction of $24,000, the couple's taxable income will be $176,000. *Id.* § 1(j)(2)(A). The first $19,050 will be taxed at 10% ($1,905), the next $58,350 at 12% ($7,002), the next $87,600 at 22% ($19,272), and the last $11,000 at 24% ($2,640). *Id.*

144. This effectively penalizes single parents who marry.

While significantly reducing rate-based marriage penalties, the 2017 legislation's return to the pre-1969 approach greatly enhances marriage bonuses for single-earner couples. Consider individual *C*, who has an income of $200,000. As a single individual claiming the Standard Deduction, *C*'s income tax liability will be $41,850.[145] If *C* marries *D*, who has an income of zero, their joint liability will be $30,819,[146] representing a marriage bonus of $11,031 (26% of their combined pre-marriage liability). The marriage bonus becomes even more dramatic if we assume that individual *C* has an income of $100,000 and marries individual *D*, who has an income of zero. Before marriage, *C*'s liability will be $15,410,[147] assuming *C* claims the Standard Deduction. As a married couple filing a joint return, *C* and *D* will incur a liability of $8,739,[148] meaning that they enjoy a marriage bonus of $6,671 (a whopping 43% of *C*'s pre-marriage liability).

In addition to the penalties and bonuses inherent in the rate structure, other penalties and bonuses are sprinkled throughout the Code, often in provisions that contain ceilings or phase-outs based on dollar amounts of income.[149] Broadly speaking, if the dollar amounts applicable to joint returns are less than twice the amounts for single taxpayers, the potential is created for a marriage penalty for two-earner couples.[150] One-earner couples will enjoy a marriage bonus so long as the dollar amounts applicable to joint returns are higher than those applicable to single taxpayers.[151] The 2017 legislation altered some of these penalties and bonuses and also introduced new ones.[152] The Alternative Minimum Tax, for example,

145. After a $12,000 standard deduction, *C* will have a taxable income of $188,000, portions of which will be taxed at 10%, 12%, 22%, 24%, and 32%. *Id.* § 1(j)(2)(C). $157,500 will be allocated among the four lower brackets, and $30,500 will be taxed at 32% ($9,760). *Id.*

146. Couple *CD* will be allowed a $24,000 standard deduction, leaving taxable income of $176,000. *Id.* § 1(j)(2)(A). All of this income will be taxed at 24% or less. *Id.*

147. *C*'s taxable income will be $88,000 after a $12,000 standard deduction, and this $88,000 will be allocated among the 10%, 12%, 22%, and 24% brackets. *Id.* § 1(j)(2)(C).

148. Couple *CD* will be allowed a standard deduction of $24,000, leaving $76,000 of taxable income. *Id.* § 1(j)(2)(A). The first $19,050 will be taxed at 10% ($1,905), and the remaining $56,950 will be taxed at 12% ($6,834). *Id.*

149. *See, e.g.*, *id.* § 32(b)(2) (providing phase-out amounts for the Earned Income Credit for married taxpayers that are less than double the amounts applicable to single taxpayers).

150. Recall that a rate-based marriage penalty arises when the rates brackets applicable to joint returns are less than twice as wide as the brackets for single taxpayers (or Heads of Household). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

151. *See* I.R.C. § 1(j)(2)(A) (providing tax rate tables for married individuals filing joint returns).

152. *See id.* § 55 (listing the exemption amounts for taxpayers filing jointly and individually).

penalizes two-earner couples relative to their single counterparts because the exemption for joint returns is less than twice the exemption for unmarried taxpayers.[153] The 2017 legislation increased the amount of the exemption for years 2018 through 2025, but the exemption amount for joint returns is only 1.6 times the exemption for single taxpayers.[154] The result is a marriage penalty for two-earner couples and a marriage bonus for one-earner couples. The 2017 legislation temporarily eliminated the marriage penalty inherent in the threshold at which the Child Tax Credit begins phasing out.[155] Formerly, the threshold for joint returns was only 1.47 times the threshold for single taxpayers.[156] For 2018 through 2025, the threshold for joint returns is double the amount applicable to single taxpayers, eliminating the marriage penalty and enlarging the potential marriage bonus.[157] Absent further legislative action, however, the statute would revert to its pre-2017 format in 2026.[158] The 2017 legislation failed to address the marriage penalties associated with the Earned Income Credit.[159]

The 2017 legislation lowered the ceiling on the amount of home mortgage debt that can give rise to deductible interest, reducing the maximum debt from $1.1 million to $750,000 for taxable years 2018 through 2025.[160] As was the case before 2017,[161] the dollar limitation is the same for joint and single returns, resulting in a potential marriage penalty. Assume taxpayers *A* and *B* are married and have $1.5 million in mortgage debt on their principal residence. Because of the $750,000 limit, they can deduct only half

153. *See id.* § 55(c)(1) (stating that the exemption for joint returns is $78,750 and the exemption for single taxpayers is $50,600).

154. *Id.* § 55(d)(4)(A). The amounts are $109,400 for joint returns and $70,300 for single taxpayers. *Id.* The 2017 legislation does, however, provide that the threshold at which the exemption begins phasing out is twice as high for joint returns as for single taxpayers. *Id.*

155. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11022(a), 131 Stat. 2073–74 (adding Internal Revenue Code § 24(h)).

156. I.R.C. § 24(b)(2).

157. *Id.* § 24(h).

158. *Id.* § 1(j)(1).

159. *See supra* note 82 and accompanying text (discussing the penalty). The 2017 legislation also fails to address the marriage penalty associated with the Premium Assistance Credit under the Affordable Care Act. *See* I.R.C. § 36 (2017) (discussing the limitations of married and single individuals filing returns); Zelenak, *supra* note 82, at 802–04 (discussing the mechanics of the Premium Assistance Credit under § 36 of the Internal Revenue Code).

160. Tax Cuts and Jobs Act 2017 § 11043(a) (adding to the Internal Revenue Code § 163(h)(3)(F) for qualified residence deductions).

161. I.R.C. § 163(h)(3)(B).

their mortgage interest.[162] Compare taxpayers *C* and *D*, who are not married but live together in a house that they own as tenants in common. *C* and *D* have $1.5 million of mortgage debt, and they divide the mortgage payments equally. *C* and *D* can each deduct their respective share of the interest, meaning that all of the interest is deductible.[163] Married taxpayers *A* and *B* incur a significant penalty relative to their unmarried counterparts *C* and *D*. Similarly, the $10,000 limit on the deduction for state and local taxes added by the 2017 legislation[164] is the same for single taxpayers and joint returns.[165] Thus, unmarried individuals *C* and *D* can deduct $10,000 each, while their married counterparts *A* and *B* are limited to a total deduction of $10,000.

New Section 199A,[166] which allows taxpayers to deduct 20% of "qualified business income,"[167] contains a potential marriage bonus. The provision contains a number of thresholds and phase-outs,[168] and in each case, the dollar amounts for joint returns are double the amounts for single taxpayers.[169] This means that the deduction available to two-earner couples will not be less than the deductions of their unmarried counterparts, and some one-earner couples will enjoy a larger deduction than single taxpayers with comparable incomes.

III. DIVORCE

A. Gould v. Gould *and the Advent of the Alimony Deduction*

The Supreme Court addressed the tax treatment of alimony payments in 1917, four years after the modern income tax took effect.[170] The Court's

162. *Id.* § 163(h)(3)(F).

163. *See* Voss v. Commissioner, 796 F.3d 1051 (9th Cir. 2015) (holding that home equity indebtedness with respect to which interest was deductible was applied on per-taxpayer basis to unmarried co-owners of qualified residence); Rev. Proc., 2016-18, 16-31 I.R.B. 193 (Aug. 1, 2016) (stating in the Internal Revenue Bulletin an acquiescence by the Commissioner in the *Voss* case.).

164. Tax Cuts and Jobs Act 2017 § 11042(a) (adding Code § 164(b)(6)).

165. *Id.*

166. *Id.* § 11011(a) (adding Act § 11011(a) to the Code).

167. Generally, income from a sole proprietorship or pass-through entity such as a partnership. *Id.* § 199(A)(c).

168. A full exploration of § 199A is beyond the scope of this article.

169. *See, e.g.*, I.R.C. § 199A(d)(3) (2017) (stating the exceptions for service businesses based on taxpayer's income).

170. Revenue Act of 1913, Pub. L. No. 63-16, 38 Stat. 114 (1913) (enacting the modern income tax). The Sixteenth Amendment was ratified in February 1913, and the Revenue Act of 1913 was signed into law in October 1913. *Id.*

decision in *Gould v. Gould*[171] involved alimony payments made in 1913 under a 1909 decree.[172] The payments were substantial (almost $1 million per year in today's dollars),[173] and the tribunal that awarded the payments had no reason to contemplate their consequences under a tax regime that did not yet exist. Based on a narrow reading of the statute's definition of income, the Court concluded that the payments were not taxable to the recipient.[174] The Court bolstered this conclusion by observing that the payor would not be able to deduct the payments in determining his taxable income,[175] implying that the income represented by the payments should not be taxed to both spouses.

The amount of income involved in *Gould* was enormous, but the 1913 tax rates were relatively modest.[176] The highest marginal rate was 7%, and that rate applied to incomes in excess of $500,000 (more than $12 million in 2018 dollars).[177] A month before the Court's decision in *Gould*, however, Congress passed the War Revenue Act of 1917,[178] raising the highest marginal rate to 67% and adopting a rate schedule with twenty-one brackets. Rates for upper and middle income taxpayers increased dramatically: the marginal rate for $3,000 of taxable income (about $60,000 in 2018 dollars) increased from 2% to 4%, and the marginal rate for $70,000 of taxable income (about $1.4 million in 2018 dollars) increased from 5% to 21%.[179] The top marginal rate increased to 77% for

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171. Gould v. Gould, 245 U.S. 151 (1917).

172. *Id.* at 152.

173. The husband, Howard Gould, was to pay his wife $3,000 per month. *Id.* Howard was the son of railroad magnate Jay Gould. *Howard Gould Marries*, N.Y. TIMES, October 13, 1898, at 1. Howard's wife, Katherine Clemmons, was an actress. *Id.*

174. *Gould*, 245 U.S. at 153.

> As appears from the [Act], the net income upon which subdivision 1 directs that an annual tax shall be assessed, levied, collected and paid is defined in division B. The use of the word itself in the definition of 'income' causes some obscurity, but we are unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed.

Id.

175. *Id.* at 154, *superseded by statute*, I.R.S. G.C.M. 37,571, (June 15, 1978).

176. *See U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33 (showing those who made $500,000 or more were taxed at a 7% rate).

177. *Id.*

178. War Revenue Act of 1917, Pub. L. No. 65-50, 40 Stat. 300 (1917).

179. *Id.* § 2, 40 Stat. at 30; *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

1918,[180] declined during the 1920s,[181] and began rising again in the 1930s.[182]

With the onset of World War II, Congress raised the highest marginal rate for 1942 to 88% for incomes in excess of $200,000[183] (substantially lower than the $1 million threshold for the 77% rate in 1918, even without adjusting for inflation). The lowest marginal rate was 19%, which applied to incomes up to $2,000 after an exemption of $500 for single taxpayers and $1,200 for married couples.[184] In total, there were twenty-four brackets, all much higher than their pre-war equivalents.[185] Concerned that these dramatically higher rates would fall too heavily on individuals who were required to pay a significant portion of their income as alimony, Congress enacted a deduction for alimony payments and a corresponding inclusion in the recipient's gross income as part of the 1942 legislation.[186]

180. Revenue Act of 1918, Pub. L. No. 65-254, §§ 210–11, 40 Stat. 1057, 1062–64 (1918); *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

181. The top marginal rate fell to 58% under the Revenue Act of 1921, to 46% under the Revenue Act of 1925, and to 25% under the Revenue Act of 1926. Revenue Act of 1921, Pub. L. No. 67-96, §§ 210–11, 42 Stat. 227, 233–37 (1921); Revenue Act of 1924, Pub. L. No. 68-176, 43 Stat. 253 (1924); Revenue Act of 1926, Pub. L. No. 69-20, 44 Stat. 9, 21 (1926); *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

182. The top marginal rate rose to 63% under the Revenue Act of 1932, and to 79% under the Revenue Act of 1936. Revenue Act of 1932, 47 Stat. § 169, 174–77; Revenue Act of 1936, Pub. L. No. 74-740, §§ 11–12, 49 Stat. 1648, 1653–55 (1936); *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33.

183. Revenue Act of 1942, Pub. L. No. 77-753, § 103, 56 Stat. 802, 802–803 (1942).

184. *Id.* §§ 102, 131, 56 Stat. at 802, 827–28.

185. *Id.* §§ 102–04, 56 Stat. at 802–04.

186. *Id.* § 120, 56 Stat. at 816–17. Amending subsection (k) of § 22 and subsection (u) of § 23 of Internal Revenue Code of 1939 with:

> In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband.

Id. § 120, 56 Stat. 798, 816–17.

B. *Seventy-Five Years of Income Splitting*

The deduction/inclusion mechanism enacted in 1942[187] facilitated the splitting of income between former spouses six years before the same benefit was extended to married taxpayers by doubling the width of the rate brackets for joint returns.[188] Consider individual *C*, who has an income of \$13,000 in 1942 and is married to *D*, who has no income. Couple *CD* will incur a tax liability of \$3,304.[189] If *C* and *D* divorce and *C* pays *D* \$6,000 in alimony, their combined tax liability will decrease to \$2,700,[190] representing a savings of \$604 (18% of their liability as a married couple). After 1948, couples no longer had to divorce to enjoy the benefits of income splitting.[191] In fact, the marriage bonus resulting from the 1948 rates created a potential "divorce penalty" for newly single taxpayers.[192] This penalty could be mitigated, however, by making deductible alimony payments to a former spouse.[193] Consequently, the alimony deduction became an accepted part of the tax landscape and an important consideration in divorce settlements.

The scope of "alimony" was heavily litigated as taxpayers sought the benefit of income splitting for payments more closely resembling child support or property settlement rather than spousal support.[194] Differing

187. *Id.*

188. *See* Revenue Act of 1948, Pub. L. No. 88-471, § 301, 62 Stat. 110, 114 (1948) (addressing the splitting of income and joint returns).

189. After an exemption of \$1,200, couple *CD* will have taxable income of \$11,800. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. \$2,000 of this income will be taxed at 19% (\$380), and like amounts will be taxed at 22% (\$440), 26% (\$520), 30% (\$600), and 34% (\$680). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33. \$1,800 will be taxed at 38% (\$684). *Id.*

190. *D* will be allowed an exemption of \$500, leaving taxable income of \$5,500. Bob Wilson, *Personal Exemptions and Individual Income Tax Rates, 1913–2002*, *supra* note 26. \$2,000 will be taxed at 19% (\$380), \$2,000 at 22% (\$440), and \$1,500 at 26% (\$390). *U.S. Federal Individual Income Tax Rates History, 1862–2013, supra* note 33. The \$6,000 alimony deduction and a \$500 personal exemption will decrease *C*'s income to \$6,500. \$2,000 will be taxed at 19% (\$380), and like amounts will be taxed at 22% (\$440) and 26% (\$520). *Id.* \$500 will be taxed at 30% (\$150). *Id.*

191. Revenue Act of 1948 § 303, 62. Stat. at 115.

192. The combined tax liability of a newly divorced couple would likely be more than their previous joint return liability if one ex-spouse has substantially more income than the other.

193. *See* Revenue Act of 1942, Pub. L. No. 77-753, § 131(a), 56 Stat. 798, 816–17 (1942) (explaining the tax implications of alimony payments made by a husband to a former wife).

194. *See, e.g.*, Laurie L. Malman, *Unfinished Reform: The Tax Consequences of Divorce*, 61 N.Y.U. L. REV. 363, 381–83 (1986) (highlighting the issues stemming from the alimony provisions of the Revenue Act of 1942).

state laws regarding alimony contributed to considerable uncertainty,[195] and a 1962 Supreme Court decision effectively authorized the practice of transforming non-deductible child support payments into deductible alimony by avoiding the use of certain words in the separation agreement or divorce decree.[196] Congress finally addressed these and similar issues in 1984 by adopting uniform definitions of alimony and child support and enacting a recapture mechanism for "front-loaded" alimony payments that more closely resembled property settlements.[197] After modest adjustments to the statute in the Tax Reform Act of 1986,[198] the structure remained largely the same until 2017.

C. *The Repeal of Deductible Alimony*

The Tax Cuts and Jobs Act of 2017 eliminates the deduction/inclusion mechanism for 2019 and subsequent years, except for payments made pursuant to pre-2019 decrees or agreements.[199] Alimony will no longer be included in the recipient's gross income, and it will not be deductible by the payor.[200] For many taxpayers, the effect of the 2017 change is a tax penalty

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195. *See* STAFF OF THE J. COMM. ON TAXATION, 98TH CONG. REP. ON THE GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 714 (Comm. Print 1984) ("Differences in State laws create differences in Federal tax consequences and administrative difficulties for the IRS."); Laurie L. Malman, *Unfinished Reform: The Tax Consequences of Divorce*, 61 N.Y.U. L. REV. 363, 382 (1986) ("The support requirement caused uncertainty and created federal income tax consequences that varied dramatically depending on state law.").

196. Comm'r. v. Lester, 366 U.S. 299, 300 (1961). The divorce decree called for support payments that were to be reduced in the event any of the taxpayer's children died, married, or became emancipated. *Id.* at 301. The Court held that the payments were alimony and not child support because the decree did not "specifically designate" the "the amounts or parts thereof allocable to the support of the children." *See id.* at 303 ("The agreement must expressly specify or 'fix' a sum certain or percentage of the payment for child support before any of the payment is excluded from the wife's income.").

197. STAFF OF THE J. COMM. ON TAXATION, 98TH CONG. REP. ON THE GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984, at 713–14 (Comm. Print 1984) (chronicling the changes made to the definition of "alimony").

198. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

199. *See* Tax Cuts and Jobs Act 2017, Pub. L. No. 115-97, § 11051(a), 131 Stat. 2054, 2089 (repealing deduction for alimony payments and corresponding provisions for inclusion of alimony in gross income).

200. I.R.C. § 262(a) (2017). A deduction is precluded by Internal Revenue Code § 262, which provides that "no deduction shall be allowed for personal, living, or family expenses," except where the Code expressly provides otherwise. *Id.* With regard to the recipient's income, the Conference Report indicates that "the intent of the provision is to follow the rule of the United States Supreme Court's holding in *Gould v. Gould*, in which the Court held that such payments are not income to the recipient." H.R. Rep. No. 115-466, at 277 (2017) (Conf. Rep.).

for divorce. Assume, for example, that *C* and *D* are married and have income an of $200,000, all earned by *C*. Under the rates and standard deductions for 2019,[201] couple *CD* will incur a liability of $30,493.[202] If *C* and *D* divorce in 2019 and *C* pays $100,000 of alimony to *D*, *C*'s income will still be $200,000. As a single taxpayer, *C* will incur a liability of $41,413,[203] representing a "divorce penalty" of almost $11,000 (approximately 36% of couple *CD*'s pre-divorce liability). If the deduction/inclusion mechanism for alimony had survived the 2017 legislation, each party to the divorce described above would have an income of $100,000 and a tax liability of $15,247[204] under the 2019 rates and standard deduction.

Given the absence of hearings or committee reports explaining the rationale for the 2017 changes,[205] we are left to speculate about Congress's reasons for upending the seventy-five-year-old alimony regime. One obvious consideration is increased revenue. According to Congressional Budget Office estimates, eliminating the alimony deduction will result in an additional $6.9 billion in tax receipts over ten years.[206] The change also represents a simplification, since it eliminates the need to report alimony payments, along with the need to distinguish such payments from nondeductible child support and property settlement payments. In terms

201. The Internal Revenue Service announced the inflation adjusted amounts for 2019 in Information Release 2018-222 (Nov. 15, 2018). *IRS Provides Tax Inflation Adjustments for Tax Year 2019*, IRS (Nov. 15, 2018), https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2019 [https://perma.cc/Z28B-KURT]. The standard deduction for married taxpayers filing joint returns is $24,400, and for single taxpayers it is half that amount. *Id.*

202. Assuming a standard deduction of $24,400, couple *CD* will have a taxable income of $175,600. *Id.* $7,200 of this amount will be taxed at 24% ($1,728) and the remainder will be taxed 10%, 12%, and 22%. *Id.*

203. Assuming a standard deduction of $12,200, *C* will have taxable income of $187,800. *Id.* $27,075 of this amount will be taxed at 32% ($8,664), and $76,524 will be taxed at 24% ($18,365.76). *Id.* The balance will be taxed at 10%, 12%, and 22%. *Id.*

204. Note that a single taxpayer with $100,000 of income will incur exactly one-half the liability of a married couple with $200,000 of taxable income, assuming the standard deduction in each case. I.R.C. § 1(j).

205. *See generally* Jacob Leibenluft & Chye-Ching Huang, *GOP Process Designed to Obscure Tax Plan's Effects*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 28, 2017), https://www.cbpp.org/research/federal-tax/gop-process-designed-to-obscure-tax-plans-effects [https://perma.cc/HS6A-TREF] ("A combination of the speed of their process and intentional choices by leadership has meant that information that would be helpful in evaluating the legislation has not been available, for either the public or for legislators considering the bill.").

206. *See* JOINT COMM. ON TAXATION, JCX-67-17, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" 3 (2017) (projecting the budget effects of the Tax Cuts and Jobs Act).

of behavioral incentives, eliminating the alimony deduction creates a "divorce penalty" for those couples who enjoyed a marriage bonus prior to splitting up. The legislative history is insufficient to conclude that this divorce penalty was intentional, but it certainly squares with a socially conservative viewpoint. Whatever the rationale for the change, the results are inconsistent with the notion that a person's taxable income should reflect his or her ability to pay.[207] A taxpayer who receives alimony payments has the same ability to pay as a taxpayer who receives a comparable amount of income from salary or investments, and a taxpayer who is obligated to pay a substantial portion of his or her income as alimony to a former spouse surely does not have the same ability to pay as an otherwise similarly situated taxpayer who has no such obligation.[208]

IV. CONCLUSION

Under a progressive rate income tax that prioritizes couples equality—the notion that married couples with equal amounts of combined income should pay the same amount of tax—a choice must be made between marriage bonuses, marriage penalties, or some combination of both.[209] Congress settled on a middle course almost fifty years ago after two decades of a system tilted heavily toward marriage bonuses (and singles penalties).[210] Although this middle course might be preferable from a policy standpoint,[211] it has proven to be politically unsustainable. Congress has been chipping away at marriage penalties and increasing marriage bonuses

207. *See generally* Alice G. Abreu, *Tax 2018: Requiem for Ability to Pay*, 51 LOY. L.A. L. REV. 61, 61 (2018) (arguing that by failing to allow a deduction for a taxpayer's support obligations, the Tax Cuts and Jobs Act departs from the ideal of a tax based on ability to pay).

208. *See id.* at 66 ("Without a deduction for alimony or for personal and dependency exemptions two single individuals who take the basic standard deduction can have identical tax bases even though they differ dramatically in their ability to pay.").

209. *See* Bittker, *supra* note 16, at 1396 ("A corollary of this conclusion is that a tax system with a progressive rate schedule can be marriage-neutral if individual legal rights over income and property are controlling even after marriage and each spouse reports his or her own income, but not if the tax is based on the couple's consolidated income.").

210. *See* Zelenak, *supra* note 67, at 5–6 (2000) (Noting how the 1948 tax legislation favored married couples, which led to Congress amending legislation in 1969 to ease the tax burden on single people).

211. *See* Listokin, *supra* note 19, at 186 ("[T]he optimal marriage taxation regime violates both couples equity and marriage neutrality, but to a smaller degree than previous and existing marriage taxation systems.").

virtually since the penalties first appeared.[212]

The Tax Cuts and Jobs Act of 2017 represents the latest step in a progression away from marriage penalties and toward marriage bonuses and singles penalties, at least as far as the basic rate structure is concerned.[213] It seems Congress replaced the solicitude showed to unmarried taxpayers in 1969[214] with a desire to reward one-earner married couples. Two-earner couples without children are spared rate-based marriage penalties, but single taxpayers who would be eligible for Head of Household status face a potential tax penalty if they marry.[215] As under prior law, taxpayers eligible for the Earned Income Credit will be subject to potential marriage penalties.[216] All else being equal, it seems particularly perverse to penalize low-income single parents for marrying.[217]

After 2018, taxpayers who enjoy a marriage bonus will face a penalty if they divorce.[218] Historically, this "divorce penalty" has been mitigated by the deduction for alimony payments, which facilitated the splitting of taxable income between former spouses.[219] Given that this regime has been in place for seventy-five years[220] and has been functioning relatively smoothly since it's major overhaul more than thirty years ago,[221] its abrupt repeal is difficult to justify. The lack of legislative hearings on the issue is troubling,[222] and in the absence of such hearings, it is hard to avoid the conclusion that Congress simply resolved to generate additional revenue by

212. *See id.* ("Indeed, the Code already contains several provisions that implicitly move the Code away from a pure couples' equity system to a system that maintains neither couples equity nor marriage neutrality.").

213. *See, e.g.*, I.R.C. § 1(f) (2017) (addressing the "[p]haseout of marriage penalty in 15-percent bracket").

214. Zelenak, *supra* note 67, at 6 (2000).

215. *See generally* I.R.C. § 1(j)(2) (establishing the new tax brackets based on filing status).

216. *See* Alice G. Abreu, *supra* note 207, at 73–79 (2018) (examining the effects of the Tax Cuts and Jobs Act on individuals who would qualify for an Earned Income Credit).

217. Zelenak, *supra* note 82, at 795–98 (reviewing the effects of marriage penalties on different income levels).

218. *See generally* I.R.C. § 1(j)(2)(A)–(D) (modifying the applicable tax rates for future tax years).

219. *See* Revenue Act of 1948, Pub. L. No. 88-471, § 301, 62 Stat. 110, 114–16 (1948) (addressing the splitting of income and joint returns).

220. *See* Revenue Act of 1942, Pub. L. No. 77-753, § 131(a), 56 Stat. 798, 816–17 (1942) (introducing alimony payments as a way to offset the divorce penalty).

221. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

222. *See* Leibenluft & Huang, *supra* note 207 ("[M]ajor, complex provisions of the bill have not been explored in open hearings, either before or after the markup process began.").

punishing taxpayers whose marriages end in divorce.[223]

At the most superficial level, rewarding marriage and punishing divorce might appear to be desirable objectives, particularly if one has socially conservative leanings (although it remains curious that Heads of Household and Earned Income Credit recipients are punished for marrying).[224] Even if one agrees with the notion of the federal government encouraging marriage and discouraging divorce, however, doing so through the tax code is problematic. Empirical studies suggest that the behavioral effect of such incentives is minimal,[225] and as Professor Zelenak points out, couples who choose living arrangements that are contrary to the tax incentives suffer results that can be "grossly unfair."[226]

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223. *See infra* text accompanying note 192 (discussing the marriage bonus resulting from the 1948 rates that created a potential "divorce penalty" for newly single taxpayers).

224. *See generally* I.R.C. § 1(j)(2) (2017) (establishing the new tax brackets based on filing status).

225. *See* Zelenak, *supra* note 82, at 811 ("To be sure, both quantitative and qualitative studies suggest that lower-income couples are not much influenced by tax penalties (or bonuses) in deciding between marriage and cohabitation.").

226. *See id.* at 794–95 ("It does not matter whether [couples] chose marriage and the tax marriage penalty out of heroism or out of ignorance; either way the result is grossly unfair.").

