Washington Law Review

Volume 91 | Number 3

10-1-2016

Not Too Separate or Unequal: Marriage Penalty Relief after *Obergefell*

Mitchell L. Engler

Edward D. Stein

Recommended Citation

Mitchell L. Engler & Edward D. Stein, *Not Too Separate or Unequal: Marriage Penalty Relief after Obergefell*, 91 Wash. L. Rev. 1073 (2016).

Available at: https://digitalcommons.law.uw.edu/wlr/vol91/iss3/8

NOT TOO SEPARATE OR UNEQUAL: MARRIAGE PENALTY RELIEF AFTER *OBERGEFELL*

Mitchell L. Engler & Edward D. Stein

Abstract: Joint tax returns have generated controversy for many years. Married couples with the same joint income pay the same tax under our current system regardless of the earnings distribution between the spouses. This approach primarily rests on the idea that married couples share resources and operate as a single economic unit. Critics typically challenge this assumption and lament how marriage might significantly change a couple's taxes. Depending on their earnings breakdown, a couple's taxes could be reduced (a marital bonus for uneven-earners) or increased (a marital penalty for even-earners). These possibilities exist because the joint brackets are typically larger–but not twice as large–as the unmarried brackets.

Recent Supreme Court decisions about same-sex marriage revitalize this debate since many same-sex couples face the marriage penalty. In response, some recent commentators propose the elimination of joint returns. However, such elimination faces serious roadblocks, including political concerns and tension with marriage's collaborative character. While higher joint bracket allowances likewise would provide penalty relief, this would increase both marital bonuses and the associated revenue loss.

We propose instead a unique solution to the current standstill: an option for married couples to calculate their tax on their separate earnings. These separate amounts would be combined on a joint return. The new separate brackets would be more than half the joint allowance but less than the singles cap. This range permits maximum flexibility to balance revenue concerns with other important values. Further, our approach would provide significant penalty relief without any undesired impact on bonuses. It also would maintain our deeply ingrained joint return system. Finally, we demonstrate the superiority of our proposal over other suggested compromises.

INTRODUCTION

Though happily married, Angela and David Boyter would divorce at year end only to remarry early the next year.[1] What explains such strange behavior? Interestingly, the U.S. imperfect tax code motivated the Boyters' legal antics. Under the joint return system, certain couples pay higher taxes if married (as of December 31) than if unmarried. This results from the way the joint return system aggregates each spouse's earnings and then calculates the couple's tax based on joint marital brackets. Importantly, these joint brackets typically are larger than—but not twice as large as—the unmarried brackets.[2] Thus, a married couple's taxes generally increase upon marriage (a marital penalty) when the spouses earn roughly the same amount as each other. In the other direction, marriage can reduce a couple's taxes (a marital bonus) when one spouse earns a great deal more than the other. The Boyters hoped to obtain the non-tax benefits of marriage for most of the year while avoiding the substantial tax hit associated with the marriage penalty.[3]

1. Boyter v. Comm'r, 668 F.2d 1382 (4th Cir. 1981).

2. As discussed in greater detail in section I.B.1, the penalty also stems from our use of progressive rates. Our progressive rate system applies higher rates as income crosses over certain thresholds. The marriage penalty aspect arises where the joint thresholds are not twice as large as the single thresholds. We provide an illustrative example below in this Introduction. *See infra* notes 10–17 and accompanying text.

3. The Boyters' attempt to avoid the marriage penalty failed. The appellate court held that the two divorces followed by the two subsequent remarriages were "sham transaction[s]" since the "underlying purpose" was "for the taxpayers to remain effectively married while avoiding the marriage penalty." *Boyter*, 668 F.2d at 1387.

While the marital penalty has existed for many years, recent family law developments place it back in the spotlight. In *Obergefell v. Hodges*,[4] the United States Supreme Court held that states must allow same-sex couples to marry and give full recognition to such marriages.[5] While same-sex couples may now marry throughout the United States, the joint return system imposes a significant cost on many of them. As a result, some such couples may decide to cohabitate in lieu of marriage or to opt for a civil union, domestic partnership, or other marriage-like relationship.[6] This is because many same-sex couples are relatively even earners.[7] Partly in light of this, some commentators have renewed calls to excise joint returns.[8] Such elimination faces serious practical

4. __ U.S. __, 135 S. Ct. 2584 (2015).

5. *Id.*

6. The federal government does not treat civil unions or domestic partnerships as marriages, in general, and the Internal Revenue Service does not recognize such relationships as marriages for purposes of filing status. *See Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions*, INTERNAL REVENUE SERV., https://www.irs.gov/uac/answers-to-frequently-asked-questions-for-registered-domestic-partners-and-individuals-in-civil-unions [https://perma.cc/2B8R-T5TH] (question 1). However, couples in domestic partnerships or civil unions in community property states that treat such relationships as the legal equivalent to marriage must split their community income on their federal returns. *See* I.R.S. Chief Couns. Mem. 201021050 (May 5, 2010), http://www.irs.gov/pub/irs-wd/1021050.pdf [https://perma.cc/E4DA-LGHU]. *See also Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions*, INTERNAL REVENUE SERV., https://www.irs.gov/uac/answers-to-frequently-asked-questions-for-registered-domestic-partners-and-individuals-in-civil-unions [https://perma.cc/2B8R-T5TH] (question 9). As this article was going to press, the IRS issued regulations that clarified certain aspects of the Internal Revenue Code (IRS) as it relates to marriage. Treas. Reg. § 301.7701-18(a) (2016). Specifically, these regulations require the terms "husband" and "wife" to be interpreted in a gender-neutral way in the IRC. They also reaffirm that individuals who are parties to a civil union, a registered domestic partnership, or the like, are not married for purposes of the IRC. Treas. Reg. § 301.7701-18(c).

7. *See infra* text accompanying notes 85–88.

8. *See, e.g.*, Lily Kahng, *The Not-So-Merry Wives of* Windsor*: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 337–43 (2015) [hereinafter Kahng, *Not-So-Merry Wives*]; Lily Kahng, *Marriage Tax Hurts Lesbian Couples*, USA TODAY, April 12, 2015, at 7A, http://www.usatoday.com/story/opinion/2015/04/12/same-sex-marriage-dual-earning-couples-marriage-penalties-joint-filing-taxes-column/25474745 [https://perma.cc/NFA3-UAXB] [hereinafter Kahng, *Marriage Tax Hurts*]; Melissa Murray & Dennis Ventry, *Eliminate the Marriage Penalty*, N.Y. TIMES: ROOM FOR DEBATE (Jan. 23, 2015, 2:43 PM), http://www.nytimes.com/roomfordebate/2013/04/14/improving-on-the-tax-codes-marriage-penalty/eliminate-the-marriage-penalty [https://perma.cc/R2QS-QLP5]. Others have argued for the elimination of joint return long before *Obergefell*. *See, e.g.*, Anne Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695 (2013); Shari Motro, *The New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994); Marjorie Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); Pamela Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980).

problems, including political and transitional concerns.[9] Others have suggested higher joint brackets as a way to provide penalty relief. As illustrated below, however, this would cause an unjustified increase in marital bonuses with significant additional tax revenue loss.

This leaves a problematic status quo: significant marital penalties without an obvious fix. We propose a unique and viable solution to this current quandary: provide married couples the option to calculate their income tax based on their separate earnings. The individual tax amounts would then be aggregated on a jointly filed marital return. By maintaining our deeply ingrained joint-return system, our proposal enhances political feasibility and minimizes transitional concerns. And unlike higher joint bracket allowances, our proposal allows marriage penalty relief without a corollary increase to marital bonuses. This limits revenue loss while preserving marital bonuses at an appropriate level.

As noted above, our proposal would allow married couples the option to calculate taxes based on each spouse's separate earnings. Full penalty relief would require separate brackets equal to the single unmarried brackets. Given revenue concerns, the separate brackets need not rise to that amount, as any amount above half the joint level would provide some penalty relief. Thus, our approach provides attractive flexibility to balance penalty relief with revenue concerns.

In this regard, our proposal differs from the existing, but rarely used, *married filing separate* status. Married people currently have an option to file separate returns. This is rarely advantageous since the brackets are just half the joint return amount. Our proposal differs from the current married filing separate option in two main ways. First, our "married *calculated* separate" approach provides penalty relief by providing bracket allowances *above* half the joint return amount. Second, under our approach, married couples would still file a joint return given the collaborative value of such joint action.

The following example illustrates the above points. Assume a progressive rate structure for single taxpayers with a 20% rate on the first $150,000 of income and 30% thereafter. Further assume a joint married allowance of $200,000 for the lower 20% rate. If Tim and Dan each earn $150,000, they would face a $10,000 marital penalty. If they cohabitate without marriage, each would pay tax at the lower 20% rate on all his income: $30,000 tax each for a $60,000 total. Marriage would

9. As discussed in section II.C.1, it also raises some theoretic issues. Joint return elimination triggers transitional concerns because it gets rid of the current marital bonuses that certain couples receive. Consider, for instance, taxpayers who may have taken such bonuses into account in reaching the marital decision. *See infra* text accompanying note 92.

increase their tax to $70,000 since they would pay tax at the higher 30% rate on $100,000 of their combined income.[10] They would pay the same punitive $70,000 under the current married filing separate option since that option reduces the 20% bracket to just $100,000. In this case, Tim and Dan would owe $35,000 each for a $70,000 total.[11] Our married calculated separate (MCS) option would raise the separate income allowance above $100,000 to $140,000, for example. If so, Tim and Dan would together owe only $62,000 tax (calculated as $31,000 each),[12] a much lower penalty.

In addition, our MCS approach would not expand marital bonuses. This favorably contrasts with proposed increases to the joint bracket allowances. To see this, consider uneven-earners Mary and Ann where Mary earns all of the couple's $300,000 income. If they cohabitate, Mary would pay $75,000 tax since only half the income qualifies for the lower 20% rate.[13] But marriage would decrease their tax to $70,000, for a $5,000 bonus.[14] Importantly, our approach would not expand this bonus since Mary and Ann should still use the regular joint bracket allowances.[15] Contrast now alternative penalty relief in the form of a higher $280,000 joint allowance. This would provide the same penalty relief to Tim and Dan as provided by our approach.[16] However, this higher $280,000 joint allowance would increase Mary and Ann's marital bonus by $8,000.[17]

---

10. As a married couple, they would report $300,000 aggregate income, only $200,000 of which would qualify for the lower 20% rate. ($200,000 x 20%) + ($100,000 x 30%) = $70,000.

11. The separate $100,000 bracket equals half the joint $200,000 allowance. As such, each would owe ($100,000 x 20%) plus ($50,000 x 30%), equal to $35,000.

12. Each would have $140,000 taxed at 20% ($28,000) plus $10,000 taxed at 30% ($3,000).

13. As an unmarried individual, only $150,000 of her income qualifies for the lower 20% rate; the remaining $150,000 is taxed at the 30% rate. ($150,000 x 20%) + ($150,000 x 30%) = $75,000.

14. This is the same calculation as for married Tim and Dan with the $200,000 joint allowance. *See supra* note 10. Recall how married couples with the same aggregate earnings pay the same tax with joint returns regardless of the earnings breakdown.

15. Our new option to calculate separately would increase their tax. By calculating jointly, this couple's tax bill would stay at the $70,000 amount calculated above for them (with $200,000 taxed at the lower rate). By taking our option, though, their tax would increase, since only $140,000 total would qualify for the lower rate since all the income is earned by just one spouse.

16. Each individual would have $140,000 taxed at the lower 20% rate under our approach, equal to $280,000 in the aggregate. *See supra* note 11.

17. By calculating jointly, Mary and Ann's tax bill would drop to the same $62,000 as Tim and Dan since (i) $280,000 of the income would qualify for the lower 20% rate, with (ii) only $20,000 subject to the higher 30% rate. This would increase the bonus from $5,000 ($75,000 – $70,000) to $13,000 ($75,000 – $62,000). This results because marriage allowed an additional $130,000 of income ($280,000 – $150,000) to qualify for a 10% lower tax rate (20% rather than 30%).

Our discussion proceeds as follows. Part I reviews the origins of the joint return, demonstrating the linkage of joint returns to marriage penalties and bonuses. This Part also explains how current law resolves the tension between marital penalties and bonuses.

In Part II, we first trace the same-sex marriage developments over time, culminating with the recent *Windsor* and *Obergefell* decisions.[18] We next discuss how these recent opinions revitalize the long-standing marriage penalty issue. While some reformers propose eliminating joint returns in response to recent events,[19] we demonstrate why this lacks viability as a reform option. By excising all current bonuses, this reform approach undercuts the general policy of encouraging marriage and the propriety of a tax reduction for certain married couples. On the practical side, eliminating joint-returns presents transitional and political roadblocks.[20] We show that recent developments support instead a more targeted reform approach limited to just marriage penalties.

In Part III, we consider three prior proposals that share our vision of marital penalty relief without the elimination of all marital bonuses. One approach would double the singles tax brackets for even-earner spouses.[21] Another approach would permit married couples to file taxes as if they were single.[22] Finally, former presidential candidate Jeb Bush's intriguing approach combines (i) separate return filing for the low-earner's wages with (ii) joint return filing for the remaining marital income (including all investment income).[23] We demonstrate the serious shortcomings of these three proposals.

---

18. Obergefell v. Hodges, __ U.S. __, 135 S. Ct. 2584 (2015); United States v. Windsor, __ U.S. __, 133 S. Ct. 2675 (2013).

19. *See* Kahng, *Not-So-Merry Wives*, *supra* note 8; Kahng, *Marriage Tax Hurts*, *supra* note 8; Murray & Ventry, *supra* note 8.

20. As a recent indication of this, note that most of the 2016 presidential candidates oppose the marriage penalty, but no candidate has proposed elimination of joint returns. *See infra* note 25.

21. Margaret Ryznar, *An Easy Solution to the Marriage Penalty*, PEPP. L. REV. (forthcoming 2017), http://ssrn.com/abstract=2643832 [https://perma.cc/24CS-MF5H].

22. H.R. 2456, 105th Cong. § 2 (1997); S. 1314, 105th Cong. § 2 (1997). For discussion of this proposal, *see* Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 11–21 (2000).

23. *See* JOHN COGAN, ET AL., FUNDAMENTAL TAX REFORM: AN ESSENTIAL PILLAR OF ECONOMIC GROWTH: AN ASSESSMENT OF GOVERNOR JEB BUSH'S "REFORM AND GROWTH ACT OF 2017" (Sept. 9, 2015), http://thecge.net/wp-content/uploads/2015/09/Fundamental-Tax-Reform-An-Essential-Pillar-of-Economic-Growth1.pdf [https://perma.cc/74P5-JPBF]; LEN BURMAN, ET AL, URB. INST. & BROOKINGS INST. TAX POL'Y CENTER, AN ANALYSIS OF GOVERNOR BUSH'S TAX PLAN (Dec. 8, 2015) http://www.taxpolicycenter.org/publications/analysis-governor-bushs-tax-plan [https://perma.cc/MF5M-A6X5].

In Part IV, we demonstrate the superiority of our MCS approach over these prior attempts to combine penalty relief with bonus retention. By fully disentangling marriage penalties from marriage bonuses, our proposal allows targeted penalty relief without any undesired impact on bonuses. Further, our approach provides more flexibility to balance revenue concerns and other competing values. Finally, our approach maintains the collaborative character of joint filing by simply aggregating each spouse's separately determined tax on a joint return. Our approach uses a schedule (that is, a separate form like a "Schedule C" form used for sole proprietor business income) to determine each spouse's tax and then aggregates these separate amounts into a combined total on a jointly filed marital return. We then defend our proposal against potential critiques, and finish with some guidelines for the rate bracket percentages at different income levels.

Part V summarizes the key arguments in favor of our divergent treatment of marital penalties and bonuses. We then highlight how our approach would liberate the marital decision from the distorting tax penalty incentive to cohabitate in lieu of marriage or engage in Boyter-like legal antics.

I. THE JOINT RETURN AND THE MARRIAGE PENALTY

Politicians and analysts have criticized the marriage penalty since its arrival in 1969.[24] In fact, many of the 2016 presidential candidates proposed some form of penalty relief.[25] This dissatisfaction is not

24. *See infra* text accompanying notes 27–38.

25. In late fall 2015, we surveyed the statements of most of the then nationally recognized candidates for President of the United States on the topic. *See, e.g.*, *Tax Reform That Will Make America Great Again*, DONALD J. TRUMP, https://www.donaldjtrump.com/positions/tax-reform [https://perma.cc/62US-HP2R] (Donald Trump); BURMAN, *supra* note 23 (Jeb Bush); *The Jindal Tax Reform: Everybody Has to Have Some Skin in the Game*, BOBBY JINDAL, https://www.bobbyjindal.com/policy/tax-reform/ [https://perma.cc/VA6R-W38X] (Bobby Jindal); URB. INST. & BROOKINGS INST. TAX POL'Y CENTER, THE SANTORUM TAX PLAN (January 18, 2012), http://taxpolicycenter.org/taxtopics/Santorum-plan.cfm [https://perma.cc/P6GK-HC25] (Rick Santorum); *Ben Carson on Tax Reform*, ON THE ISSUES, http://www.ontheissues.org/2016/Ben_Carson_Tax_Reform.htm [https://perma.cc/G2XJ-GRSC] (Ben Carson); *The Simple Flat Tax Plan*, CRUZ/FIORINA 2016, https://www.tedcruz.org/tax_plan/ [https://perma.cc/8STL-TTBF] (Ted Cruz); *Carly Fiorina on the Issues*, ON THE ISSUES, http://www.ontheissues.org/Carly_Fiorina.htm [https://perma.cc/NZG6-2RD8] (Carly Fiorina); *Lindsey Graham on Tax Reform*, ON THE ISSUES, http://www.ontheissues.org/Economic/Lindsey_Graham_Tax_Reform.htm [https://perma.cc/GYL7-B4J6] (Lindsey Graham); *Mike Huckabee on Tax Reform*, ON THE ISSUES, http://www.ontheissues.org/celeb/Mike_Huckabee_Tax_Reform.htm [http://perma.cc/UT7W-RCEA] (Mike Huckabee); *John Kasich on the Issues*, ON THE ISSUES, http://www.ontheissues.org/John_Kasich.htm [https://perma.cc/8TBX-T5J8] (John Kasich); *Hillary Clinton on Tax Reform*, ON THE ISSUES, http://www.ontheissues.org/celeb/Hillary

surprising since governments typically *encourage* marriage through various benefits.[26] This Part explores how we arrived at this aberrational juncture. Section A discusses the historical origins of the penalty. Section B defines three core tax values: progressivity, couples neutrality, and marital neutrality. Section C next demonstrates the incompatibility of these values. Section D explains how current law resolves this tension among the key values.

A. Historical Origins

The original 1913 income tax did not penalize marriage.[27] At that time, spouses were simply treated as two separate taxpayers.[28] In 1918, Congress authorized husbands and wives to make "a single joint return."[29] Initially, there was little incentive to file jointly since the joint brackets were the same as the singles brackets.[30] In addition, there was an incentive for many husbands to shift income to their wives under the

_Clinton_Tax_Reform.htm [http://perma.cc/9AAN-YZUT] (Hillary Clinton); *Bernie Sanders on Tax Reform*, ON THE ISSUES, http://www.ontheissues.org/2016/Bernie_Sanders_Tax_Reform.htm [https://perma.cc/Y623-HDKH] (Bernie Sanders). The other candidates' policies were unclear as of that time. For further discussion of the proposal of candidate Trump, *see infra* text accompanying note 95. For further discussion of the proposal of former candidate Bush, *see infra* text accompanying notes 118–120 & 152–157.

26. The benefits of marriage include, for example, spousal immigration assistance, spousal testimonial privileges, social security benefits, estate tax avoidance, and veterans' benefits. There are over a thousand federal laws for which marital status is a factor (although not all the laws in which marital status is a factor actually benefit married couples). *See* U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004), http://www.gao.gov/new.items/d04353r.pdf [https://perma.cc/N9HA-26Y4] (updating GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT (1997), http://www.gao.gov/archive/1997/og97016.pdf [https://perma.cc/F4LB-29SV]). States have at least as many laws associated with being married. In New York, for example, statutes and regulations confer over 1300 legal rights and duties on married individuals. *See* EMPIRE STATE PRIDE AGENDA & NEW YORK CITY BAR ASS'N, 1324 REASONS FOR MARRIAGE EQUALITY IN NEW YORK STATE (2007), http://www.nycbar.org/pdf/report/marriage_v7d21.pdf [https://perma.cc/SSD9-RLPG].

27. This discussion is to some extent drawn from Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29, 37–40 (2012); *see also* Zelenak, *supra* note 8, at 344–48.

28. *See* Boris Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1399–414 (1975).

29. Federal Revenue Act of 1918, ch. 18, § 223, 40 Stat. 1057, 1074 (providing, in part, "If a husband and wife living together have an aggregate net income of $2,000 or over, each shall make such a return unless the income of each is included in a single joint return.").

30. *See* Smith & Stein, *supra* note 27, at 37–38. As noted therein, there was one tax rate schedule insofar as regular taxes and surtaxes are combined.

progressive rate structure. Since the husband typically had most of the income, such shifted income would get taxed at a lower rate.[31]

In 1930, the Supreme Court held that a husband's earned income could *not* be shifted to his wife in a *common law separate property jurisdiction*.[32] Shortly thereafter, however, the Court held that a wife properly reported half her husband's income in a *community property jurisdiction*.[33] These two cases created a significant interstate tax asymmetry. Couples with the same income had very different tax bills depending on whether they lived in a community or separate property jurisdiction. Some separate property jurisdictions responded by (temporarily, as it turns out) embracing some form of community property laws.[34]

Congress expanded the income splitting benefits to all married taxpayers in 1948.[35] Under the 1948 changes, the married joint brackets equaled twice the single brackets.[36] In 1969, Congress expanded the singles tax brackets to 60% of the married joint brackets.[37] In light of the 1969 changes, the marriage penalty emerged.[38]

B. Structural Origins

The marriage penalty originates from tension among three important tax values. To better understand the penalty's structural origins, this

---

31. For further details on this history, *see, e.g.*, Patricia Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 806–19 (2008).

32. Lucas v. Earl, 281 U.S. 11 (1930). In a common law separate property jurisdiction, a married person's earnings are treated as *separate*, not marital, property at least so long as the couple remains married. In a *community property* system, however, each spouse generally has a vested half-interest in their income regardless of source.

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

34. The states that temporarily adopted the community property approach were Hawaii, Michigan, Nebraska, Oklahoma, Oregon and Pennsylvania. (Massachusetts and New York seriously considered doing so as well.) *See, e.g.*, Bittker, *supra* note 28, at 1411–12. The Pennsylvania Supreme Court declared its state's community property law unconstitutional. Wilcox v. Penn. Mutual Life Ins. Co., 55 A.2d 521 (Penn. 1947). After the Revenue Act of 1948 was passed, the legislatures in the remaining five states repealed their community property laws. *See, e.g.*, Note, *Epilogue to the Community Property Scramble: Problems of Repeal*, 50 COLUM. L. REV. 332, 332–33 (1950).

35. This eliminated the unequal treatment to married taxpayers in separate property jurisdictions. Federal Revenue Act of 1948, ch. 168, § 303, 62 Stat. 110, 115 ("A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions."). This is currently provided for at I.R.C. § 6013(a) (2012).

36. Federal Revenue Act of 1948, ch. 168, § 301, 62 Stat. 110, 114 (1948).

37. Tax Reform Act of 1969, Pub. L. No. 91–172, § 803, 83 Stat. 487, 678–85 (1969).

38. *See, e.g.*, Bittker, *supra* note 28, at 1429–31; Zelenak, *supra* note 22, at 5–6.

section sets forth the three mutually exclusive values: progressivity, couples neutrality, and marital neutrality.[39]

1. Progressivity

A flat income tax rate stays constant regardless of the reported income amount. In contrast, progressive tax rates increase at higher income levels.[40] Progressivity generally rests on the diminishing marginal utility of money: the value of money decreases as the owner's wealth increases.[41] Wealthier taxpayers should thus pay a higher percentage of their earnings, and not just a higher amount based on the same flat percentage. For instance, assume that Richie has twice as much income as Lowell: $200,000 versus $100,000. Richie would pay twice as much tax as Lowell under a flat 20% rate: $40,000 versus $20,000.[42] But Richie would pay *more than* twice as much as Lowell under a progressive rate structure of 20% up to $100,000 income, and 30% thereafter: $50,000 versus $20,000.[43]

2. Couples Neutrality

Couples neutrality provides that married couples with identical joint incomes should pay the same tax regardless of the earnings breakdown between the spouses. Proponents of couples neutrality argue that married couples tend to share their resources equally regardless of source.[44] Furthermore, married couples generally have a mutual duty of support

---

39. *See, e.g.*, MICHAEL GRAETZ & DEBORAH SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICY 451–52 (7th ed. 2013); Alstott, *supra* note 8, at 705; Zelenak, *supra* note 22, at 6–7; Bittker, *supra* note 28, at 1396.

40. For historical data on progressivity from 1862 to 2013, *see* TAX FOUNDATION, *Federal Individual Income Tax Rates Adjusted for Inflation*, http://www.scribd.com/doc/190500966/Federal-Individual-Individual-Income-Tax-Rate-Adjusted-for-Inflation [https://perma.cc/YLH3-STMF].

41. *See, e.g.*, WALTER J. BLUM & HARRY KALVEN, JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION (1953). Some progressive arguments rest instead on other principles such as equality of opportunity. *See, e.g.*, Mitchell Engler, *Progressive Consumption Taxes*, 57 HASTINGS L. J. 55 (2005).

42. Richie's tax equals $200,000 x 20%, while Lowell's equals $100,000 x 20%.

43. Richie's tax increases to $50,000: ($100,000 x 20%) + ($100,000 x 30%).

44. Jessica Hardie & Amy Lucas, *Economic Factors and Relationship Quality Among Young Couples: Comparing Cohabitation and Marriage*, 72 J. MARRIAGE & FAM. 1141, 1143 (2010) ("Furthermore, married couples typically manage their resources jointly, allowing them to adjust to changing economic circumstances, whereas cohabiting partners are less likely to pool their income.").

under common law and some state family expense statutes.[45] Further note how joint returns achieve couples neutrality by aggregating each spouse's income. This links to another couples neutrality virtue: the government must police attempted income shifts by uneven-earners absent such neutrality. To see this, recall the incentives for uneven-earners to shift income to the low-earner prior to the advent of joint returns. Couples neutrality thus eliminates the manipulation of income reporting between spouses.[46]

Finally, as a practical matter, note how couples neutrality benefits unequal-earner couples. Without couples neutrality, an uneven-earner couple can pay more tax than an even-earner couple with the same aggregate income.[47] Couples neutrality, however, equalizes the tax burden of the two couples.

3. Marital Neutrality

Marital neutrality provides that marital status should not impact one's tax bill. This links to the broader tax efficiency principle that ideal taxes minimize the distortion of taxpayer preferences.[48] Section C below illustrates two types of marital neutrality violations depending on whether marriage increases (penalties) or decreases (bonuses) the couple's tax bill.[49]

Although an important tax value, marital neutrality is at odds with family law inducements to marriage.[50] In addition, "economies of scale" arguably support a tax increase when two equal-earners marry because they can live more cheaply together than apart.[51] Likewise, the

---

45. *See, e.g.*, HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 252–58 (2d. ed. 1988).

46. *See supra* section I.A.

47. Without couples neutrality, each couple's taxes would be based on the individual earnings of each spouse. As such, the high (uneven) earner could be taxed at a higher (progressive) rate.

48. This assumes that the government should generally respect taxpayer preferences. And so, while the government has power to extract tax payments from its citizens, it generally should do so in a manner that least impacts the pre-tax choices of citizens. *But see infra* note 96 and accompanying text for a special exception where the government purposefully intends to encourage desirable behaviors.

49. *See infra* text accompanying notes 102–103, where we suggest a modification to marital neutrality that separates penalties from bonuses. This is more fully developed in section IV.A.

50. *See infra* text accompanying notes 95–98.

51. *See e.g.*, Robert S. McIntyre & Michael J. McIntyre, *Fixing the "Marriage Penalty" Problem*, 33 VAL. U. L. REV. 908, 912–13 (1999) (setting forth, and then rejecting, such justification). The fact that couples can achieve some economies of scale via cohabitation somewhat undercuts this justification. Nevertheless, marriage might induce even greater economies of scale,

additional financial responsibility arguably supports a tax decrease when a high-earner marries a low-earner.[52]

Finally, as a practical matter, note how marital neutrality benefits equal-earner couples. With marital neutrality, an even-earner couple can pay less tax than an uneven-earner couple with the same aggregate income.[53] As noted above, the substitution of couples neutrality for marital neutrality would equalize the tax burden of the two couples, albeit with a loss in tax efficiency.[54]

C. The Trilemma Involving Three Core Tax Values

This section demonstrates the incompatibility of the three core values, the so-called trilemma. A progressive tax rate system cannot provide pure couples neutrality and pure marital neutrality.[55] This section further highlights the additional tension between marital bonuses and penalties.

To illustrate these tradeoffs, consider two married couples. Eva and Evan each earn $100,000 of income. Dina and Virgil also have $200,000 aggregate income, all earned by Dina. Further assume two rates for singles: a 20% rate on income up to $100,000, with a 30% rate thereafter.[56] To achieve pure couples neutrality, the system must require joint returns. This ensures that married couples with the same aggregate income pay the same tax. For example, even-earners Eva/Evan would pay less tax than divergent-earners Dina/Virgil without joint returns. High-earner Dina would pay tax at the 30% rate on half of her $200,000 income, but Eva/Evan would pay tax at the lower 20% rate on all their income. As demonstrated below, however, joint returns inevitably violate marital neutrality in the form of marital penalties, marital bonuses, or some combination thereof.

---

for example, through improved long-term planning. *See also* Hardie & Lucas, *supra* note 44 (noting that cohabiting couples are less likely to pool resources than married couples).

52. For further development of this proposition, *see infra* note 91 and accompanying text.

53. With marital neutrality, each couple's taxes would be based on the individual earnings of each spouse. And again, the high (uneven) earner could be taxed at a higher (progressive) rate.

54. Couples neutrality undermines tax efficiency, as the act of marriage would change some couples' tax bills.

55. As we discuss in section IV.D, a tax system can accommodate *partial* couples neutrality and *partial* marital neutrality as part of a more refined balancing act.

56. In actuality, our system has more than two brackets but all the key points can be more readily exposed through such a simplified example. Other elements of our system, such as the earned income tax credit (EITC) and the head of household filing status, complicate the issue further. *See, e.g.*, Zelenak, *supra* note 22, at 7–8. For ease of exposition, we abstract away from these complexities. *See also* our discussion of the EITC in section IV.E.

To see this, let's now determine the joint bracket amount. Consider first the most generous allowance of $200,000—twice the singles amount.[57] This would eliminate all penalties, as Eva/Evan would be taxed at just the lower 20% rate on their aggregate $200,000 income. This $200,000 bracket maximizes the bonuses, however, as evidenced by Dina and Virgil. By marrying instead of cohabitating, Dina and Virgil would receive a sizable tax benefit as the lower 20% rate would apply to an additional $100,000 of their joint income.[58]

At the other extreme, a $100,000 joint bracket allowance would eliminate Dina and Virgil's bonus. But this equalization of the single and joint brackets would subject Eva and Evan to the maximum marital penalty. By marrying instead of cohabitating, Eva and Evan would be hit with a sizable tax detriment: the higher 30% rate would apply to an additional $100,000 of income.[59]

A third middle-ground alternative would increase the joint brackets above the singles amount, but not all the way to $200,000. For example, a $150,000 bracket would split the difference between the potential penalties and bonuses.[60] Eva and Evan would now face the higher 30% rate on an extra $50,000 of income,[61] while Dina and Virgil would benefit from the lower 20% rate on an extra $50,000 of income.[62] A comparison of this alternative to the prior one illustrates the inherent tension between penalties and bonuses. Raising the marital bracket from $100,000 to $150,000 would cut Eva and Evan's penalty in half. But this

57. This might be justified on grounds that a married couple aggregates the income of two individuals.

58. If they cohabitate, $100,000 would be taxed at 20%, with $100,000 taxed at 30% (since one single person would report $200,000). In contrast, if they marry, all $200,000 would now qualify for the lower 20% rate.

59. If they cohabitate, each individual's earnings of $100,000 would be taxed at 20%. But if they marry, $100,000 would be taxed at 30% (since their aggregate $200,000 would exceed the 20% bracket threshold of $100,000 by $100,000).

60. As discussed in greater detail below, Lawrence Zelenak, *For Better and Worse: The Differing Income Tax Treatments of Marriage at Different Income Levels*, 93 N.C. L. REV. 784, 816 (2015), suggested just such an approach as a starting assumption (subject to override in certain situations). *See infra* text accompanying notes 172–174.

61. If they cohabitate, each individual's earnings of $100,000 would be taxed at 20%. But if they marry, $50,000 would be taxed at 30% (since their aggregate $200,000 would exceed the 20% bracket threshold of $150,000 by $50,000).

62. If they cohabitate, $100,000 would be taxed at 20% with $100,000 taxed at 30% (since one single person would report $200,000). But if they marry, $150,000 would now qualify for the lower 20% rate.

also would provide a new bonus in the same amount to Dina and Virgil.[63]

D. How Current Law Resolves the Trilemma

The current joint brackets use all three of the above possibilities. First, the lowest 10% and 15% joint brackets are twice the single brackets.[64] At the other extreme, the 33% bracket cap remains exactly the same for single and joint returns at $411,500.[65] The law moderates at other levels with joint brackets larger than, but not twice the size of, the singles amount. These moderate increases range from a low of 13% for the 35% bracket to a high of 67% for the 25% bracket.[66] Current law thus trends towards bonuses at the lower brackets,[67] and penalties at the higher brackets.

---

63. A flat tax rate plus a refundable credit (a "demogrant") could reconcile these values. Zelenack, *supra* note 22, at 75–77. The demogrant's limited impact at higher income levels would create some progressivity. The effective tax rate would move closer to the stated tax rate at higher income levels. Assume a flat 20% rate with a $10,000 demogrant and two individuals with the following income: $100,000 (Lois), and $200,000 (Hi). Lois would owe $10,000 tax for a 10% effective rate. [($100,000 x .2) – $10,000 demogrant = $10,000 tax.] Hi would owe $30,000 tax for a 15% effective rate. [($200,000 x .2) – $10,000 demogrant = $30,000 tax.] Further assume that a married couple would receive a doubled $20,000 joint demogrant and consider again our Dina/Virgil and Eva/Evan couples. Couples neutrality exists since each couple would owe $20,000 tax on their $200,000 aggregate income. [($200,000 x .2) – $20,000 demogrant = $20,000 tax.] Marital neutrality also exists since each couple would owe the same $20,000 total if they cohabited. If so, Eva and Evan would each owe the same $10,000 as Lois above. With cohabitation, Dina would owe the same $30,000 as Hi above on her $200,000 earnings while Virgil, the zero-earner, would receive a $10,000 demogrant payment from the government. This reconciliation of the trilemma values would require a government commitment to pay out demogrants to low-earners, a seeming non-starter on political grounds. In addition, this approach can impose limited progressivity since it rests solely on the demogrant. Contrast how our current system provides a variety of changing rates over the income spectrum. *See* I.R.C. § 1(a) (2012). Practically speaking, the trilemma remains intact despite this intellectually intriguing possibility.

64. As discussed above, this doubling of the singles bracket eliminates rate bracket penalties but maximizes bonuses. For tax year 2015, the $9,225 cap on 10% Tax Rate for singles increases to $18,450 for Married Filing Jointly. *See* INTERNAL REVENUE SERV., INTERNAL REVENUE BULLETIN 2014-47, § 3 (Nov. 17, 2014), https://www.irs.gov/irb/2014-47_IRB/ar14.html [https://perma.cc/VD58-9H66] (table 3, sec. 1(c) and table 1, sec. 1(a)). The $37,450 cap on 15% Tax Rate for singles increases to $74,900 for Married Filing Jointly. *See id.* Thus, in the 2015 tax year, there is no tax rate penalty for a married couple that earns $18,450 or less. *But see* our discussion of the earned income tax credit penalty in section IV.E.

65. *See* INTERNAL REVENUE BULLETIN 2014-47, *supra* note 64.

66. For tax year 2015, the $413,200 cap on 35% Tax Rate for singles increases to $464,850 for Married Filing Jointly; the $90,750 cap on 25% Tax Rate for singles increases to $151,200 for Married Filing Jointly. *Id.*

67. Note how this discussion ignores EITC issues to focus on the broader rate bracket issues. EITC issues are considered below. *See infra* text accompanying note 190 (highlighting how our married calculated separate approach can easily address EITC issues as well).

Finally, current law permits married couples to file separate returns, but this option does not allow them to avoid the penalty. This results because the married filing separate (MFS) brackets are simply half the joint allowances, rather than the full singles amounts.[68]

In sum, current law favors couples neutrality over marital neutrality. Furthermore, the current approach unfortunately links penalty relief to bonus expansion, limiting the flexibility for change.

II. IMPACT OF THE RECENT SAME-SEX MARRIAGE DEVELOPMENTS

The extension of marital rights to same-sex couples impacts the classic marital tax analysis above. Section A traces same-sex marriage developments over time. Section B discusses why these developments revitalize the long-standing marriage penalty issue. Because proponents of change often target the elimination of joint returns, section C explains why such elimination is not a viable reform option.

A. Same-Sex Marriage Developments Have Renewed the Penalty Relief Debate

This section sets the stage by tracing the same-sex marriage developments over time. In 2003, Massachusetts became the first state to

---

68. Thus, a married couple cannot file separately to escape the same 33% bracket cap ($411,500) for joint and single returns because the MFS cap is just $205,750 (i.e., half of $411,500). Currently, married couples should only use the MFS status in limited cases such as where one spouse has all the couple's unreimbursed medical expenses (allowable under I.R.C. § 213 only to the extent above 10% of the taxpayer's adjusted gross income). Even then, the extra deduction must be balanced by the potential higher rate where the spouses have uneven earnings. Assume a 20% rate bracket cap of $100,000 for singles and $150,000 for joint returns (with a 30% rate thereafter). The MFS bracket equals just $75,000 (i.e., half of $150,000). Consider Evan and Eva, each with $150,000 income. If they marry and file jointly, a $5,000 marriage penalty arises since only $150,000 would qualify for the lower 20% rate, rather than the $200,000 if they just cohabited. (This $50,000 shortfall generates an extra $5,000 tax when multiplied by a 10% higher tax rate.) The MFS option provides no relief since the 20% rate still would apply to just $150,000 in total ($75,000 each). MFS might make sense for them, though, if Evan had all of the couple's $30,000 qualified medical expenses. If Evan and Eva file a joint return, none of the unreimbursed medical expenses would qualify for the deduction since the $30,000 does not exceed the 10% threshold. Filing separately, though, might liberate some of the medical expenses, since the $30,000 could exceed the 10% threshold based solely on Evan's income. Any such deduction liberation must be balanced against potential rate increases if the spouses have uneven income. To see this, ignore the medical expenses and assume Evan generated all of the couple's $300,000 aggregate income. A separate filing would be adverse as only $75,000 would qualify for the lower 20% rate. For further discussion of the limitations of MFS, *see* David Mitchell, *An Unhappy Union: Married Taxpayers Filing Separately and the Affordable Care Act's Premium Tax Credit*, 69 TAX L. 453 (2016).

allow same-sex marriages.[69] By 2012, six states and the District of Columbia had legalized same-sex marriage and another nine states allowed same-sex civil unions or domestic partnerships.[70] Although same-sex couples in these states could file joint *state* income tax returns,[71] they could not file joint federal tax returns[72] because the federal Defense of Marriage Act (DOMA) defined marriage as between one man and one woman.[73] The Supreme Court struck down this portion of DOMA in *Windsor v. United States*,[74] thereby allowing married same-sex couples to file joint federal returns. After *Windsor*, however, some states still refused to solemnize same-sex marriages or even to recognize same-sex marriages from other states.[75]

The Supreme Court eliminated these inconsistencies in *Obergefell v. Hodges*. *Obergefell* held that the Due Process Clause of the Fourteenth Amendment required all states to allow same-sex marriages.[76] In holding that same-sex couples have a fundamental right to marry, the Court discussed "four principles and traditions . . . demonstrat[ing] that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[77] These principles are: "the right to personal choice regarding marriage is inherent in the concept of individual

---

69. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). For a history of the quest for same-sex marriage equality before *Goodridge*, *see, e.g.*, Edward Stein, *The Story of* Goodridge v. Department of Public Health: *The Bumpy Road to Marriage for Same-Sex Couples*, *in* FAMILY LAW STORIES 27 (Carol Sanger, ed., 2007).

70. Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 181 (2012).

71. Smith & Stein, *supra* note 27, at 48–52.

72. *See id.* at 41–46. As discussed therein, this created a peculiar situation whereby a married same-sex couple was required to file state taxes as a married couple but had to file federal taxes as a single person.

73. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)).

74. United States v. Windsor, __ U.S. __, 133 S.Ct. 2675, 2695 (2013). The facts of *Windsor* are as follows: Edith Windsor, whose same-sex spouse had passed away, was required to pay estate tax on her wife's estate because, due to DOMA, the federal government did not recognize same-sex marriages. Windsor would not have had to pay any estate tax had she been married to a man (or if she was a man and her spouse was a woman).

75. This created a reverse peculiarity where some married couples who filed joint federal returns had to file separately for state purposes. *See, e.g.*, Haniya H. Mir, Note, Windsor *and Its Discontents: State Income Tax Implications for Same-Sex Couples*, 64 DUKE L. J. 53, 74–77 (2014); Aaron M. Bernstein, Note, *Are We Married? State Tax Filing Problems After* Windsor, 90 N.Y.U. L. REV. 207 (2015).

76. *Obergefell*, 135 S.Ct. at 2602.

77. *Id.* at 2599.

autonomy";[78] "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals";[79] "the right to marry . . . safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education";[80] "marriage is a keystone of our social order" and "[f]or that reason, . . . society pledge[s] to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."[81]

The Court's four principles further develop the idea of marriage as a fundamental right.[82] As we argue below, *Obergefell*, in contrast to what some commentators have said, does not support the elimination of the joint return; in fact, *Obergefell* supports both penalty relief *and* the retention of the joint return. As part of our discussion, we highlight, for instance, how the tax law frequently provides beneficial tax results in furtherance of societal goals.[83]

B. Obergefell *Renews Call for Marital Penalty Relief*

This section explains why *Obergefell* and *Windsor* have led to renewed calls for marital penalty relief, often through joint return elimination.[84] First, *Obergefell* has placed the penalty back in the spotlight because more couples can now marry. Relatedly, same-sex couples seem more likely to face the marriage penalty. As discussed

---

78. *Id.*

79. *Id.*

80. *Id.* at 2600.

81. *Id.* at 2601.

82. The Supreme Court, in its landmark 1967 decision in *Loving v. Virginia*, held that "[m]arriage is one of the basic civil rights of man" (quotation omitted) and that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." 388 U.S. 1, 12 (1967). Between *Loving* and *Obergefell*, the two most important cases on the fundamental right to marry are *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Turner v. Safley*, 482 U.S. 78 (1987).

83. *See infra* note 96 and accompanying text.

84. *See, e.g.*, Margaret Ryznar, *Fixing the Marriage Penalty*, HUFFINGTON POST, (Oct. 14, 2015, 12:21 AM), http://www.huffingtonpost.com/margaret-ryznar/fixing-the-marriage-penal_b_8290820.html [https://perma.cc/QN7C-ASC4] (noting that problematic marriage penalty has impacted even more couples after *Obergefell*); Kahng, *Not-So-Merry Wives*, *supra* note 8 at 383 ("However, *Windsor*, and now *Obergefell*, will fail to deliver on the promise of tax equality unless we relinquish the fiction of marital unity"). Kahng, *Marriage Tax Hurts*, *supra* note 8; Murray & Ventry, *supra* note 7; Ed McCaffery, *The Marriage Penalty Was Never Fair, and Is Now Just Silly*, N.Y. TIMES (Apr. 14, 2013, 7:01 PM), http://www.nytimes.com/roomfordebate/2013/04/14/improving-on-the-tax-codes-marriage-penalty/the-marriage-penalty-was-never-fair-and-is-now-just-silly [https://perma.cc/T5YR-QB2Y].

above, the marriage penalty primarily impacts relatively even-earner couples.[85] Note that gender tends to correlate with income. For full-time employment, at least, men generally earn more than women.[86] Further, a greater percentage of men work as compared to women: approximately 70% versus 57%.[87] These gender disparities suggest that same-sex spouses are more likely to earn similar amounts. Two studies lend further support on grounds that same-sex relationships are more likely to have two wage earners.[88]

Separately, *Obergefell* challenges the propriety of penalizing the fundamental right to marriage. Recall, for instance, the Court's fourth principle that "marriage is a keystone of our social order" and "[f]or that reason, . . . society pledge[s] to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."[89] Significant marital tax increases directly contradict this principle.

C. Penalty Relief by Excising Joint Returns?

Given *Obergefell*'s impetus for penalty relief, how should our tax system implement such change? As noted above, some reformers propose the elimination of the joint return as the appropriate response. Joint return elimination (JRE) appeals initially, as it removes all penalties and bonuses. JRE achieves pure marital neutrality since marriage would not impact one's tax bill. Rather, all individuals would pay the same tax regardless of their marital status.

---

85. *See supra* text accompanying notes 2–3.

86. For example, according to a United States Bureau of Labor Statistics report in 2013, on average, women working full time in the United States earned 82% of what men working full time in the United States earned. *See* U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (Dec. 2014), http://www.bls.gov/opub/reports/cps/women-in-the-labor-force-a-databook-2014.pdf [https://perma.cc/JL4X-59FA].

87. *Id.*

88. *See* GARY J. GATES, THE WILLIAMS INSTITUTE, SAME-SEX AND DIFFERENT-SEX COUPLES IN THE AMERICAN COMMUNITY SURVEY: 2005–2011 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf [https://perma.cc/QHM8-VHM2]; James Alm et al., *Revisiting the Income Tax Effects of Legalizing Same-Sex Marriages*, 33 J. POL'Y ANALYSIS & MGMT. 263 (2014). Further, a study of the U.S. Census Bureau published in 2012 indicates that unmarried same-sex couples are more likely to both be earning income compared to married different-sex couples. U.S. CENSUS BUREAU, CHARACTERISTICS OF SAME SEX HOUSEHOLDS: 2012 (2012), www.census.gov/hhes/samesex/files/ssex-tables-2012.xls [https://perma.cc/C2WC-2HVH]. This same study shows that unmarried same-sex couples earn more on average than married different-sex couples. Based in part on these two studies, Lily Kahng has argued that couples consisting of two women are more likely than other couples to be subject to the marriage penalty. Kahng, *Not-So-Merry Wives*, *supra* note 8, at 337–43.

89. Obergefell v. Hodges, __ U.S. __, 135 S. Ct. 2584, 2601 (2015).

Despite this initial appeal, we believe that JRE fails as an appropriate reform for five reasons. As developed more fully below, the first four reasons stem from JRE's termination of all current bonuses: transitional concerns, political viability, the desire to encourage marriage, and the propriety of a tax reduction for certain married couples. Finally, we show why *Obergefell* and *Windsor* generally strengthen, rather than weaken, the case for marriage as a relevant tax factor.

1. Bonus Elimination Concerns

Consider first the concerns related to bonus elimination. A tax reduction for highly uneven-earner couples appeals under the income tax's "ability to pay" norm.[90] Taxes are based on income because one's ability to pay correlates with income. Recall married couple Dina and Virgil, where Dina earned all of the couple's $200,000 income. Let's compare Dina to Ingrid, an unmarried individual who also earns $200,000. All else equal, Dina has a lesser ability to pay than Ingrid since Dina's $200,000 supports two individuals.[91] JRE disregards Dina and Virgil's resource sharing—a complete rejection of couples neutrality.

Two practical concerns bolster the theoretic support above for joint return retention. First, transition issues arise because the current system has provided significant tax reductions for many years. For instance, some taxpayers may have previously married based in part on ingrained marital bonuses. JRE would strip the marital benefit from those who married with such benefit in place.[92] Somewhat related, JRE raises

---

90. Reasoning conversely, marriage penalties likewise might seem justified for equal-earning couples due to economies of scale. S*ee supra* note 51 and text accompanying notes 51–52. While there is some truth to this proposition, marriage penalties raise separate concerns. Recall for instance the discussion in section II.B about how *Obergefell* opposes a tax charge on the exercise of the fundamental marriage right.

91. Of course, marriage may provide non-pecuniary benefits to those who marry that could offset the marriage penalty. That said, the tax code, for better or worse, generally assesses taxes based on economic factors. Consider, for example, a highly compensated lawyer who leaves the practice of law for a teaching job in academia because the academic job provides greater personal satisfaction. The tax code nonetheless taxes the practicing lawyer more heavily than the law teacher.

92. As noted above, disproportionate-earner couples receive bonuses. *See supra* section II.C. While tax law changes are always part of the landscape (e.g., tax rate shifts over time), a complete elimination of bonuses without any transitional relief seems more problematic (e.g., from a tax planning perspective). For a general discussion of tax transitional policy issues, *see, e.g.*, Michael Doran, *Legislative Compromise and Tax Transition Policy*, 74 U. CHI. L. REV. 545 (2007).

political feasibility issues. It seems highly *unlikely* that Congress would excise all tax marital bonuses, a seemingly anti-marriage position.[93]

These transitional and political concerns link to an incentive-based argument for tax bonuses. *Obergefell* emphasizes marriage's long-term value for couples and their children.[94] This provides additional theoretic support for retention of marital tax bonuses: a tax incentive to undertake an activity with long-term benefits.[95] The tax code provides such inducements in a number of areas, such as retirement savings tax breaks.[96] This closely aligns with Carl Schneider's influential article on the channeling function of family law.[97] Governments provide many non-tax benefits designed to encourage marriage.[98] In this spirit, tax bonuses tend to benefit divergent-earner couples like Dina and Virgil. Such a tax bonus might offset the potential reluctance of a high-earner like Dina to commit to a marriage.

2. Obergefell *Strengthens Case for Marriage as Tax Proxy*

Obergefell and *Windsor* also support joint return retention for another reason. Under prior law, same-sex couples could not access the marital

---

93. Recall how all the 2016 presidential candidates' reform proposals maintain joint return filing. *See supra* note 20.

94. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2600 ("Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."); *id.* at 2600–01 ("Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.").

95. In this same spirit, continued joint filing might support valuable financial collaboration. *See infra* discussion in Part III.B and Part IV.C. To this extent, we have highlighted a sixth adverse factor of JRE.

96. These tax benefits are referred to as "tax expenditures" under the framework developed by Stanley Surrey and Paul McDaniel. *See generally* STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985). One might wonder why the tax system should incentivize behavior in one's self interest. State paternalism can be justified because individuals do not always act in their own long-term interests. Also, parents do not always act to further their child's interests. A focus on children's interests might suggest marital benefits just for couples with children, or more radically, a refocusing of family law on the nurturing relationship, as suggested by Martha Fineman. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995). Perhaps, though, we might want to encourage marriage for childless couples to increase their willingness to parent together.

97. Carl Scheider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV 495 (1992).

98. *See supra* note 26.

tax benefit available to heterosexual couples.[99] Such unequal access presented a fairness challenge to the use of marriage as a tax factor. But *Obergefell* and *Windsor* erased this discrimination critique. Marriage may not be a perfect proxy for joint taxation of individuals on resource-sharing grounds,[100] but it now operates as a much improved tax proxy after *Obergefell*.[101] This counters the JRE claim that marriage should no longer be a tax factor after *Obergefell*.

3. Summary

Obergefell influences the marital penalty debate in two ways. First, it solidifies the use of marriage as a relevant tax factor by eradicating a discriminatory impact on same-sex couples. Through its "marriage as a fundamental right" analysis, *Obergefell* also justifies a new split approach to the two marriage neutrality components. Current reform efforts should target marital penalties but not marital bonuses since government policy should incentivize, rather than discourage, marriage.[102] Transitional and political concerns further support this new bifurcated approach to marriage neutrality.[103]

III. PENALTY RELIEF PROPOSALS

Thus far, we have made the case for marital penalty relief without the simultaneous elimination of all marital bonuses. Section II.C highlighted one way to accomplish that goal: expand the joint brackets to twice the

---

99. *See, e.g.*, Smith & Stein, *supra* note 27 at 30.

100. In fact, some cohabiting couples might share resources at least as much as some married couples. Further, people in group "marriages" (that is, when three or more individuals are together in a marriage-like relationship) may share resources as least as much as married couples. These relationships are not legally recognized, however. For a detailed discussion of group and plural marriages, *see* RONALD C. DEN OTTER, IN DEFENSE OF PLURAL MARRIAGE 251–54 (2015). *See contra* JOHN WITTE, JR., THE WESTERN CASE FOR MONOGAMY OVER POLYGAMY (2015). *See also*, Edward Stein, *Plural Marriage, Group Marriage and Immutability in* Obergefell v. Hodges *and Beyond*, 84 UMKC L. REV. 871 (2016).

101. While not related to *Obergefell*, further note how marriage is a more readily identifiable marker for resource sharing than cohabitation. For a discussion of the discrimination critique prior to *Obergefell*, *see e.g.*, Patricia Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000).

102. Thus, we ultimately advocate a proposal that severs penalty reduction from bonus elimination. Ryznar, *supra* note 20, similarly favors penalty relief without bonus elimination. For discussion of Ryznar's proposal, *see infra* text accompanying notes 111–117.

103. This ignores for the moment, the adverse revenue implications of such a split approach. Revenue concerns will be addressed below. *See infra* section III.B.

singles amount.[104] In fact, Donald Trump has proposed this exact form of penalty relief as part of his presidential candidacy.[105] But section II.C also highlighted an undesirable side effect: the significant simultaneous increase of the current marital bonuses. This creates significant revenue concerns due to the dual loss from *both* penalty relief and bonus expansion.[106] And while Part III made the case for bonus retention, it did not necessarily support such a dramatic increase to the current bonus levels.

Is there then a way to provide penalty relief without the revenue loss associated with bonus expansion? This Part considers three proposals in this spirit.[107] Section A considers Margaret Ryznar's recent refined doubled-bracket approach that grants the doubled brackets to just even-earner couples.[108] While this proposal has some intriguing features, it suffers from an undesirable cliff effect.[109]

Section B reviews a 1997 legislative proposal. This "optional singles filing" approach would have permitted married couples who file separately to use the regular singles brackets rather than just half the joint bracket. Despite its initial appeal, its unbridled penalty relief maintains revenue and other concerns.[110]

Section C then examines former presidential candidate Jeb Bush's hybrid approach that would tax (i) the wages of the lower-earning spouse under the separate singles brackets, and (ii) the couple's remaining income under the regular joint brackets. While this approach also intrigues, we show how it provides overly generous allowances.

104. *See supra* text accompanying notes 57–58.

105. *See* Donald Trump's proposal, *supra* note 25 (narrowing the number of brackets and then providing a doubled amount for joint returns). *See also* Bobby Jindal's proposal and Rick Santorum's proposal, *supra* note 25.

106. Note the extreme focus today on revenue implications as evidenced by the inability to excise the alternative minimum tax despite widespread dissatisfaction with its application. *See, e.g.*, Aviva Aron-Dine, *Revenue Losses from Repeal of the Alternative Minimum Tax Are Staggering*, CENTER ON BUDGET AND POLICY PRIORITIES, (Feb. 1, 2007), http://www.cbpp.org/research/revenue-losses-from-repeal-of-the-alternative-minimum-tax-are-staggering [https://perma.cc/QGX2-FXPB].

107. We focus on these proposals as we are not aware of any other penalty relief proposals that also satisfy our goal of bonus retention without significant bonus expansion.

108. The goal is to limit the relief to just those who suffer the most egregious marriage penalties. *See* Ryznar, *supra* note 21.

109. As discussed below, it also maintains some undesirable entanglement of penalty relief with bonus expansion.

110. Of the three prior proposals considered in this Part, we believe this one comes closest to the mark. As discussed in section III.B and Part IV, however, we believe we can improve upon this proposal. In particular, our alternative approach better balances revenue concerns and a desire to maintain the collaborative aspect of joint filing.

A. *Refined Doubled Bracket*

Ryznar's recent proposal offers a refined version of doubled brackets in order to "alleviate[] the current marriage penalty . . . [without] creating an even bigger marriage bonus" for uneven-earner couples.[111] More specifically, Ryznar proposes doubling the brackets but only for (roughly) equal-earner couples. To qualify for the doubled brackets, the lower-earner spouse would have to earn a designated percentage of the couple's aggregate income, somewhere in the 30%–40% range.[112] This proposal has some initial appeal as it (i) eliminates the most extreme marriage penalties, (ii) maintains the current bonuses, and (iii) does not provide new bonuses for highly uneven earners. Despite such initial appeal, Ryznar's proposal suffers from a serious cliff effect, namely it ends abruptly. Specifically, as illustrated below, Ryznar's cliff effect is the abrupt loss of the higher bracket allowance when the couple's income falls just outside the qualifying range. To see this, imagine Ryznar's low-earner qualifying threshold is set at 35%.[113] Again, assume the following brackets for the lower 20% rate: $100,000 for singles, and $130,000 for married couples. Finally, consider married couple Lois and Heidi, where Lois earns $60,000 of the joint $200,000 income. Since Lois earns just 30% of their income, Lois and Heidi would be denied any relief from their $3,000 marital penalty.[114] As further demonstrated in a comparison to our alternative proposal below, the cliff effect problem is not so much the lack of any penalty relief to Lois and Heidi. Rather, small shifts in the reported income allocation between the spouses could generate disproportionately large shifts in their tax bill.[115] And while lowering the threshold to 30% would protect Lois and Heidi, the cliff effect would persist for couples just below the 30% threshold.

In addition to its undesirable cliff effect, Ryznar's approach would still provide some undesired new bonuses. For example, a lower 30% threshold would not only eliminate Lois and Heidi's penalty, but it

---

111. Ryznar, *supra* note 21, at 22.

112. *Id.* at 23.

113. This splits her 30–40% suggested range.

114. Lois and Heidi still must pay the higher 30% tax rate on $70,000 of their marital income, the excess of the joint $200,000 income over the regular joint allowance of $130,000. They would pay the higher rate on just a lower $40,000 if they cohabited instead (the excess of the high-earner's $140,000 over the $100,000 singles amount). Further note how the penalty amount would increase if the regular joint bracket amount was set at less than 130% of the singles bracket (which occurs currently at higher levels); and would decrease if the regular joint bracket amount was set at more than 130% of the singles bracket (which occurs currently at lower bracket levels).

115. *See infra* discussion at note 151 and accompanying text.

would provide them a new $4,000 bonus. This results from the lower 20% rate applying to all their income rather than just $160,000 if they cohabitated without marriage.[116] Thus, Ryznar's penalty relief remains linked to bonus expansion unless it strictly requires an even 50% split.

Given these two shortcomings, we look elsewhere in our quest for penalty relief without any bonus impact or a cliff effect.[117]

B. Optional Singles Filing

Interestingly, our search takes us back to a 1997 legislative proposal that granted married couples the option to file separately and use the unmarried single brackets.[118] On the plus side, optional singles filing (OSF) would eliminate all penalties without any impact on bonuses or a cliff effect. Its implementation also would be relatively straightforward.[119] Despite these significant virtues, several shortcomings reduce its attractiveness as a reform proposal.

Most significantly, OSF removes all marital penalties, regardless of how small. This results because any currently penalized couple simply should take the OSF option. While such indiscriminate relief appeals in theory, it raises practical revenue concerns. In favorable contrast, Ryznar rations the penalty relief to just the most highly penalized couples.[120] To illustrate, recall how Ryznar's approach would not provide any penalty relief to Lois and Heidi.[121] With OSF, Lois and Heidi could eliminate the penalty by opting to file separately.[122]

---

116. The proposal also raises some other concerns, although these might be more easily remedied through additional adjustments. For instance, the proposal would restore an advantage to residents of community property states, who would more readily qualify for the doubled brackets than residents of other states. This might be addressed by special rules that ignored community property rules on earned income, for example. This also might invite voluntary transfers of capital income to get the expanded bracket, although one might argue that incentivizing such transfers would be good to do from a marital sharing perspective. This assumes that investment income would be included in the percentage ratio (this is not clear based on our reading of Ryznar's proposal). *See infra* section IV.D for a discussion of possible solutions to the community property and capital income shifting issues in a comparable context.

117. *See infra* section IV.D for a discussion of a possible modification to Ryznar's approach that would solve the cliff problem, albeit at a significant administrative cost.

118. H.R. 2456, 105th Cong. § 2 (1st Sess. 1997); S. 1314, 105th Cong. § 2 (1st Sess. 1997).

119. Taxpayers would just choose between two existing bracket calculations.

120. Although, again, it might not achieve this very efficiently due to higher bonuses as the low-earner's qualifying percentage drops below 50%. *See infra* section IV.B.

121. *See supra* notes 114–115. Again, this assumes a 35% threshold, splitting Ryznar's range.

122. By filing separately, $160,000 would be taxed at the lower rate ($60,000 for Lois and $100,000 for Heidi), the same as if they just cohabitated.

In addition, OSF also presents another less obvious concern. Separate filing might subtly undermine the joint financial collaboration highlighted above.[123] For instance, joint returns carry joint and several liability for the married couple.[124]

In sum, the OSF and Ryznar proposals contain divergent drawbacks. OSF presents revenue concerns and a subtle undermining of the joint planning virtue. Ryznar contains a cliff effect problem plus some undesirable bonus-penalty linkage. Further note how each proposal would restore two vestigial concerns from the days prior to joint returns.[125] First, community property residents would receive tax breaks since their income generally would be shared equally.[126] Second, the tax law would encourage taxpayers in non-community property jurisdictions to attempt such shifts through contractual sharing arrangements.[127] (In fairness to these proposals, note that the elimination of joint returns also implicates these concerns.) With these issues in mind, we next consider Jeb Bush's reform proposal.

C. *Jeb Bush's Hybrid Proposal*

Jeb Bush's proposal permits the lower wage-earner to file as a single, but only for such spouse's earned income.[128] All other joint income would be taxed under the regular joint return brackets. This includes the high-earner's wages and all of the couple's investment income. While this proposal also has some intriguing aspects,[129] it provides unjustified bonuses by giving dual-earner families more than twice the single bracket amounts. This occurs because Bush's joint brackets are larger than the singles bracket. Thus, a dual-earner couple could receive the

---

123. *See supra* note 95 and accompanying text.

124. I.R.C. § 6013(d)(3) (2012). Married taxpayers who file separately do not have such joint and several liability. Under joint and several liability, both spouses are each responsible for any and all tax deficiencies attributable to either spouse. Note that there is an exception for "innocent" spouses. I.R.C. § 6015; *see also* INTERNAL REVENUE SERV., *Examining Officers Guide: Innocent Spouse*, https://www.irs.gov/irm/part4/irm_04-011-034.html [https://perma.cc/N337-Z5AK].

125. *See supra* text accompanying notes 30–33.

126. *See supra* section I.A.

127. *Id.*

128. *See* Jeb Bush's tax proposal, *supra* note 25. Note that earned income references income from labor efforts (e.g., wages), as opposed to investment income (e.g., dividends from stock investments).

129. *See infra* section IV.C.

sum of the singles bracket amount plus the higher joint bracket amount.[130]

To illustrate, assume again the following brackets for the lower 20% rate: $100,000 for singles, and $130,000 for married couples. Consider a married couple where Lowell earns $100,000 of wages while Hi earns $500,000 compensation. Under Bush's approach, $230,000 would qualify for the lower 20% rate: $100,000 on Lowell's separate return plus $130,000 on the joint return. This would provide Hi and Lowell a $3,000 windfall as only $200,000 would qualify for the lower rate if they cohabitated.

In sum, these three existing proposals contain some intriguing aspects but each suffers from serious drawbacks. We next demonstrate a way to capture their benefits without their drawbacks.

IV. MARRIED CALCULATED SEPARATE APPROACH

We believe that a modified separate approach provides the best pathway to meaningful reform. Most significantly, the separate marital brackets generally should be higher than their current levels, but lower than the singles amounts. This key adjustment gives greater flexibility to better balance all the competing values.[131]

Section A shows how our approach neatly disentangles marital penalties from marital bonuses. This separation allows an independent consideration of the desired penalty relief and the optimal bonus amounts. Section B then demonstrates why our new approach provides better penalty relief rationing than the 1997 legislative proposal and the Ryznar proposal. Section C discusses additional improvements to the 1997 proposal, such as the aggregation of the separate spousal tax amounts on a joint return, a married *calculated* separate (MCS) approach. Section C also considers possible variations on our main idea. Section D next analyzes the prior criticism of the 1997 proposal for any possible relevance to our approach. This section demonstrates how our modifications and the current legal developments negate such relevance. Finally, section E provides guidelines for setting the separate marital and the regular joint bracket amounts.

---

130. *See* Martin Feldstein, *A Tax Boon for Working Women: Jeb Bush's Tax Reform Proposal Ends the "Marriage Penalty" by Allowing Spouses to File Separately*, WALL ST. J. (Oct. 5, 2015, 7:16 PM), http://www.wsj.com/articles/a-tax-boon-for-working-women-1444087005 [https://perma.cc/G938-QZTV] (stating specifically that the couple would be able to use the joint brackets for the remaining income).

131. These values include revenue, transitional, and political feasibility concerns.

A. Disentanglement of Penalties and Bonuses

Joint return elimination would excise all bonuses in addition to penalties, raising the variety of concerns highlighted above.[132] Alternatively, higher married brackets likewise would provide penalty relief, albeit with limited flexibility due to the corollary bonus expansion. In favorable contrast, our MCS proposal neatly disentangles penalties and bonuses. This provides maximum flexibility to determine the most optimal mix of penalties and bonuses.

To set the stage, recall our earlier illustration of the inherent tension between penalties and bonuses under the current joint return approach.[133] We assumed a simple two-bracket structure for unmarried individuals with a 20% rate on the first $100,000 of income and a 30% rate thereafter.[134] Under the current approach, marriage penalties arise absent a $200,000 joint bracket cap for the 20% rate. Eva and Evan would face a marital penalty at any lesser amount since each earned $100,000 separately.[135] But such $200,000 allowance also would provide the maximum $10,000 bonus to Dina and Virgil, as Dina earned all of the couples' $200,000 income.[136] Application of the low $100,000 singles cap to joint returns would eliminate the bonus. However, this would then maximize Eva and Evan's penalty at $10,000.[137]

The other extreme of keeping the joint 20% bracket at the same $100,000 for singles further illustrates this inherent tension and entanglement of marriage penalty relief with potentially undesirable bonus expansion. This alternate end of the continuum would eliminate

---

132. *See supra* section II.C.

133. *See supra* section I.C illustration. Note that by the current joint return approach, we mean joint returns without any *meaningful* separate returns. The current approach *does* allow separate returns but without any penalty rate bracket relief since the current married filing separate brackets are half the joint brackets, not the unmarried single amount. *See supra* note 68 and accompanying text.

134. The simple two-bracket structure is assumed for ease of exposition; the conceptual points are not altered by this simplified structure. Further, we set to the side issues related to the head of household status in order to focus on the primary rate bracket issues. Head of household issues can be dealt with separately after working out the primary core structural issues. For a discussion of the head of household issue, *see* Zelenak, *supra* note 22, at 68–74.

135. This results because they could receive the lower 20% rate on a full $200,000 aggregate income if they cohabited instead of married.

136. They would receive the benefit of the lower 20% rate on an extra $100,000 of income (i.e., the full amount of the singles bracket). We have set aside the seemingly unsupported possibility that the joint return bracket should be even greater than twice the single bracket. 10% rate difference x $100,000 = $10,000.

137. They would now face the higher 30% rate on an additional $100,000 of income if they married. 10% rate difference x $100,000 = $10,000.

all bonuses but only with the corollary consequence of maximizing the penalty potential. Consider now an equal-earner couple, Larry and Laura, who each earn $100,000 of income. They would now face the higher 30% rate on an additional $100,000 of income if they married.

Contrast this with our MCS proposal. Penalty relief would be provided through expanded separate married brackets. For complete elimination, the brackets should match the unmarried single amount of $100,000. But mindful of other concerns,[138] partial relief could be achieved by setting the bracket amount below $100,000 but above $50,000.[139] Importantly, incremental bracket increases would lessen penalties without increasing bonuses. This disentanglement of penalties and bonuses has several important virtues. First, such separation enables a singular focus on the optimal amount of penalty relief unburdened by any corollary impact on bonuses. As discussed below, the penalty relief thus could vary at different income levels.[140] Somewhat related, the revenue loss from penalty reduction would be limited to the direct penalty relief, without additional lost amounts from new bonuses.

In similar fashion, any desired marriage bonuses could be maintained separately through the joint marital brackets. Again, the ideal joint bracket amounts could be set with a singular focus on just the desired bonus level without concern about undesirable penalties from lower allowances. Similar to the penalty side, the bonus amount could vary at different income levels.[141] In other words, the combined system would encourage separate calculations by potential penalty candidates and joint calculations by potential bonus candidates.

We return to our example to illustrate these points. Assume now the following caps for the lower 20% rate: $90,000 for the separate married bracket and $130,000 for the joint married bracket. The $90,000 separate bracket neatly eliminates most penalties without any bonus expansion. To see these results, consider again our two couples: Eva and Evan, and Dina and Virgil. Even-earners Eva and Evan should take our new option to calculate separately since this increases the income qualifying for the lower 20% rate from $130,000 under the joint bracket to $180,000.[142] They still would face a marriage penalty as $200,000 would qualify for

138. This includes revenue concerns. *See supra* text accompanying note 106 and text accompanying note 120.

139. $50,000 is half the $100,000 joint bracket that would be used if we wanted to eliminate all bonuses under the current approach.

140. *See infra* section IV.E.

141. *See id.*

142. Each could have $90,000 taxed at the lower rate. $90,000 x 2 = $180,000.

the lower 20% rate if they cohabited without marriage.[143] Our new separate married bracket, however, neatly reduces the penalty to just $2,000.[144] In addition, the penalty could be further limited by increasing the bracket above $90,000 if desired after balancing all relevant factors. Most importantly, our penalty relief does not contain any undesired corollary bonus consequences. With the $130,000 joint bracket cap, divergent-earners Dina and Virgil receive the same $3,000 bonus regardless of any increases to the married filing separate bracket.[145] In similar fashion, we could change the bonus possibilities by joint bracket adjustments without any impact on the penalties.

B. Better Rationing of Penalty Relief

As discussed above, the 1997 legislative proposal eliminates penalties through an option to use the singles brackets. If penalty elimination were the only important value, this would make the most sense. Other relevant values should, however, be taken into account. Most recently, we focused on the revenue loss from the complete elimination of penalties, especially if coupled with full bonus retention as under the 1997 proposal. Such revenue loss made the 1997 proposal less politically feasible given the significant tax reduction accorded to multiple-earner married couples, with this revenue loss then spread out amongst the remaining taxpayers. Reaching back to the original trilemma, the 1997 proposal also gives very little weight to couples neutrality because all couples penalized under the joint bracket would opt out and pay different amounts based on the earnings breakdown between the two spouses.

With these additional values in mind, rationing the penalty relief would improve upon the 1997 proposal's indiscriminate relief. This seems to underlie Ryznar's limited relief approach. But as discussed above, Ryznar's approach rations the relief in an uneven way due to its cliff effect. A couple just above the qualifying line would receive full

143. Each could have $100,000 taxed at the lower rate (since the unmarried singles brackets provides the lowered tax rate on $100,000 of income).

144. The $2,000 equals the extra 10% rate times a $20,000 shortfall. There is a $20,000 shortfall as only $180,000 qualifies for the lower rate instead of $200,000. Note how the penalty would rise to $7,000 under the $130,000 joint allowance without our new separate bracket of $90,000. This would result since they would face the extra 10% tax on $70,000 additional income (as just $130,000 would qualify for the lower rate instead of the $200,000 if they cohabitated).

145. Unmarried, the wage earner (Richard) would receive the 10% lower rate (30% less 20%) on just $100,000 of income. By marrying, that figure increases by $30,000 to the $130,000 joint bracket allowance. Such $30,000 multiplied by the 10% rate difference equals the $3,000 bonus.

penalty relief and possibly a bonus as well. In contrast, the penalty would apply with full force to a couple just below the qualifying line. More favorably, our proposal provides more even-handed penalty relief and avoids the entanglement of penalty relief with undesired new bonuses.

The following example compares our proposal to Ryznar's approach. As before, assume a progressive rate structure for single taxpayers where income up to $100,000 is taxed at 20% with additional income taxed at 30%. Further consider five couples with $200,000 aggregate income, dispersed as follows: (i) extremely uneven Richard and Regina, where Regina earns the full $200,000; (ii) highly uneven Thomas and Todd, where Thomas earns $160,000 and Todd earns only $40,000; (iii) moderately uneven Samantha and Sylvia, where Samantha earns $140,000 and Sylvia earns $60,000; (iv) relatively even Martha and Marvin, where Martha earns $120,000 and Marvin earns $80,000; and (v) perfectly even Larry and Laura, each of whom earn $100,000.

The following table sets forth three items: (i) the marital penalty or bonus assuming the regular joint bracket is set at $130,000 (which can be thought of as the result under current law),[146] (ii) the joint bracket amount necessary to avoid any penalty, and (iii) the bonus if the couple qualifies for the doubled joint bracket under Ryznar's approach:

146. $130,000 equals 130% of the singles bracket. As discussed in section I.D, current law varies the multiplier at different levels with a lower multiplier at the top levels.

Table # 1
Ryznar's Doubled-Bracket Approach

Couple	**Income Breakdown**	**Penalty/Bonus with $130k Joint Bracket**	**Joint Bracket to Avoid Penalty**	**Bonus Under $200,000 Joint Bracket**
Richard/ Regina	$0/ $200,000	$30,000 x 10% = $3,000 Bonus	$100,000	$100,000 x 10% = $10,000
Thomas/ Todd	$40,000/ $160,000	$10,000 x 10% = $1,000 Penalty	$140,000	$60,000 x 10% = $6,000
Samantha /Sylvia	$60,000/ $140,000	$30,000 x 10% = $3,000 Penalty	$160,000	$40,000 x 10% = $4,000
Martha/ Marvin	$80,000/ $120,000	$50,000 x 10% $5,000 Penalty	$180,000	$20,000 x 10% = $2,000
Larry/ Laura	$100,000/ $100,000	$70,000 x 10% $7,000 Penalty	$200,000	$0

This table illustrates the difficult tradeoffs under Ryznar's approach. Completely even Larry and Laura (at the bottom of the table) present the most compelling case for the doubled bracket relief. They have the highest penalty ($7,000) without relief and the doubled bracket would not provide them any bonus. But as we move up the table, the difficulties become more evident. If the relief applied solely to even-earners, relatively even Martha and Marvin would be left with a high $5,000 penalty.[147]

147. Another couple with a $99,000/$101,000 breakdown would be left with an even higher penalty of $6,900 (69,000 x 10%).

In response, Ryznar relaxes the perfectly even requirement to cover relatively even Martha and Marvin.[148] But the doubled bracket relief overshoots its mark by providing them a $2,000 bonus.[149] And once again, the line drawing problem persists as we must consider whether the relief should extend to moderately uneven Samantha and Sylvia.[150] If so, the system would further overshoot its mark by providing Samantha and Sylvia a larger $4,000 bonus. Finally, note how a very small shift in the earnings could cause a much larger $7,000 change to the tax bill. A $1,000 shift in earnings from Samantha to Sylvia would increase their tax bill by $7,000 as they would now fall below the 30% qualifying line.[151]

In sum, Ryznar's approach raises several serious concerns. First, the approach contains significant tipping points from its somewhat arbitrary line drawing. Second, the approach overshoots its mark due to its continued entanglement of bonuses and penalties. Finally, the system must police the earnings breakdown between the spouses as small shifts in the reported distribution could significantly impact the tax bill.

Now, favorably contrast our alternate married calculated separate approach. Let's assume a new separate married bracket of $90,000, set below the $100,000 singles amount but above one-half of the joint return amount (i.e., $65,000).

148. Martha earns 40% of the aggregate income (80,000 = 40% x $200,000).

149. One might say this is appropriate under couples neutrality, but Ryznar's approach does not heed couples neutrality as an absolute requirement since it does cut off other couples from the doubled bracket.

150. They are right on the lower end of Ryznar's 30%–40% possibilities as Samantha earns 30% of the aggregate income (60,000 = 30% x $200,000).

151. This would leave Samantha with just $59,000 of the income, equal to just 29.5%. While the regime could round up so that they would qualify, there still would be some (lower) line where the small earnings shift would cause the same larger tax shift. And such small earnings shift would reduce their joint bracket from the higher $200,000 to just the regular $130,000 bracket. If so, an additional $70,000 would be taxed at the 30% rate, a $7,000 difference. $70,000 x (30%–20%) = $7,000.

Table # 2
Our Proposal for Married Filing Separate Bracket

Couple	**Income Breakdown**	**Penalty /Bonus Under $130K Joint Bracket**	**Penalty with Separate Calculation**	**Resulting Bonus**
Richard/ Regina	$0/ $200,000	$30,000 x 10% = $3,000 Bonus	0	$3,000
Thomas/ Todd	$40,000/ $160,000	$10,000 x 10% = $1,000 Penalty	$10,000 x 10% = $1,000	0
Samantha/ Sylvia	$60,000/ $140,000	$30,000 x 10% = $3,000 Penalty	$10,000 x 10% = $1,000	0
Martha/ Marvin	$80,000/ $120,000	$50,000 x 10% = $5,000 Penalty	$10,000 x 10% = $1,000	0
Larry/ Laura	$100,000/ $100,000	$70,0000 x 10% = $7,000 Penalty	$20,000 x 10% = $2,000	0

We first summarize the results. Under our approach, the three intermediary couples will suffer a slight $1,000 penalty, equal to the extra 10% rate on $10,000 of income. This results because only the first $90,000 of the high-earner's income qualifies for the lower 20% rate. There is no impact on the low-earner since the entire earnings fall below the $90,000 separate married bracket. Equal-earners Larry and Laura suffer a higher $2,000 penalty equal to the extra 10% rate on $20,000 of income. This results because each has $10,000 of income which falls above the $90,000 separate married bracket but below the singles $100,000 bracket. Nonetheless, this couple receives the largest penalty relief under our proposal.[152] Further note the lack of any unfavorable cliff effect or entangled bonuses.

Linking back to Ryznar's approach, our proposal provides a better and more consistent rationing of the penalty relief. Our proposal also

152. Their penalty drops from $7,000 to $2,000, a $5,000 difference.

avoids Ryznar's "leaky bucket"[153] problem of unintended bonus increases with the corollary revenue loss. In favorable contrast again, our proposal disentangles penalty relief from bonuses by adjusting the separate married brackets rather than the joint brackets as Ryznar does. In addition, our proposal avoids the need to police the qualifying borders where small shifts can create much larger tax savings.

In sum, our proposal improves upon the 1997 legislative proposal and Ryznar's proposal by incorporating their best features and fixing their shortcomings. Our selective penalty relief addresses revenue concerns and political feasibility. In this regard, adjusting the separate married brackets is a less controversial change than either the elimination of joint returns or a new option to file as unmarried singles. Further linking to transitional issues, our bracket adjustments could be incorporated slowly over time.[154] For instance, the separate married brackets could be increased piecemeal over time with similar staggered decreases to the joint bracket allowances. These incremental joint adjustments would further address revenue concerns due to their offsetting effects. Finally, our proposal is more consistent with couples neutrality than a complete scrapping of joint returns.

C. Additional Modifications

Our proposal could incorporate further improvements. For instance, MCS could disregard community property laws. First recall how community property law motivated the original adoption of joint returns. Community property couples benefited under the prior separate filing since the earned income was split between the two spouses.[155] Similar concerns might arise under our proposal as well as other reform proposals.[156] To see this, return to the earlier example with the 20% rate

---

153. *See* ARTHUR OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 91–95 (1975) (using a leaky bucket metaphor to explain inefficient tax losses while trying achieve fair tax results).

154. While other proposals could also phase in changes over time, our proposal has the additional flexibility to independently coordinate penalty relief with any bonus impact (e.g., by adjusting the separate brackets before the joint brackets or vice versa).

155. *See supra* text accompanying notes 30–33.

156. The same issue arises under the 1997 proposal for the same reasons as under our proposal because the income shifting would induce the ability to generate benefits by filing separate. Consider in this regard the textual example in this paragraph with the only difference being that the benefits would be even greater under the 1997 proposal as it would allow each spouse to use the full singles bracket. A version of this issue also arises under Ryznar's proposal since community property couples could more readily qualify for her equal-earner status. Finally, joint return elimination would restore full force this issue as it would take us back to the time prior to joint returns.

cap set at $130,000 for the joint bracket and $90,000 for the MCS bracket. Compare now two highly uneven earner couples where one spouse in each case earns all of the couples' $200,000 income. Richard and Regina live in a separate property state while Nancy and Nathan live in a community property state. Nancy and Nathan would receive a tax break compared to Richard and Regina if community property laws were taken into account under the classic case of *Poe v. Seaborn*.[157] If so, Nancy and Nathan each would report $100,000 under the MCS option, with $180,000 total taxed at the lower 20% rate.[158]

The response to this problem is easy enough: provide that the new MCS brackets would ignore the impact of community property laws.[159] More generally, the MCS brackets likewise could ignore other attempted income shifts outside of community property principles. Consider, for instance, how a separated system provides incentives to place investment assets in the hands of the lower-earner spouse.[160] In response, the tax system could continue to tax the donor spouse on income generated from wealth transfers to the other spouse.[161]

Jeb Bush's proposal[162] incorporates this notion by permitting only the low wage-earning spouse's actual earnings to be taxed under the single brackets. As noted previously,[163] the remainder of the couple's income (compensation of the high-earner plus the couple's entire capital income) would be taxed under the regular joint return brackets. While this aspect is a virtue, as noted above, the proposal provides unjustified bonuses by allowing a dual-earner family to get more than twice the

157. 282 U.S. 101 (1930).

158. Under *Poe*, each spouse in an appropriate community property jurisdiction would report half the earnings regardless of which spouse generated the compensation. With each spouse reporting $100,000 separate income, Nancy and Nathan each could qualify $90,000 for the lower rate under the MCS brackets. $90,000 x 2 = $180,000. In contrast, Richard and Regina would file jointly without the income split, qualifying only $130,000 for the lower rate. *Id.*

159. Note that this would not limit the penalty relief since the community property split arises only on the act of marriage itself (and so the results are no worse than if the couple did not marry).

160. By shifting investment income to such lower bracket spouse, the couple would report the income more evenly (with tax savings under the progressive rate structure).

161. Since marital penalties are the impetus for the MCS brackets, the system need not open up tax reporting gaps unrelated to such motivation for the change in law. Note that Canada, which does not utilize joint return filing, takes this approach. *See* Tom McFeat, *6 Ways Income Splitting Could Cut Your Tax Bill*, CANADIAN BROADCASTING CORP. (Mar. 1, 2012, 8:40 AM), http://www.cbc.ca/news/business/taxes/6-ways-income-splitting-could-cut-your-tax-bill-1.1218592 [https://perma.cc/274U-95PP]. Further note how Jeb Bush's proposal neatly renders irrelevant such attempted shifts on investment income (since the couple's investment income remains aggregated on a joint return with the separation related solely to labor income). *See supra* note 128.

162. *See supra* section III.C.

163. *See supra* text accompanying notes 118–120.

single bracket amounts.[164] This defect could be remedied with some additional complexity by reducing the joint bracket allowances by the separately reported wage income.[165] In addition, revenue concerns could be addressed by capping the separate wages bracket at less than the singles bracket amount, just like our MCS option. Alternatively, the system could encapsulate all this within the joint brackets by increasing the joint bracket amount by the lower spouse's earnings.[166] In some ways, this last idea can be seen as a neat modification to Ryznar's proposal, curing the cliff defect with a varying increase based on the actual extent of the marital penalty.

With these modifications, we could support the modified Bush or the modified Ryznar approach as possible viable alternatives to our MCS approach. On balance, though, we still favor our proposal since it has a significant administrative advantage over our modified Bush and Ryznar ideas. The joint rate bracket adjustments would differ from taxpayer to taxpayer under the modified Bush and Ryznar ideas based on the amount of the separately reported income. This would negate the standard practice of putting common tax tables in the tax forms for all taxpayers.[167]

Finally, recall how our proposal further adjusted the 1997 legislative proposal to maintain joint return filing even under the new separate calculation option. This adjustment captures the joint collaborative

---

164. *See supra* text accompanying note 118.

165. Such reduction should stop once it hits the separate bracket amount. To illustrate, return to the familiar example with a singles cap of $100,000 for the lower 20% rate, with additional amounts taxed at 30%. Further, assume a joint bracket of $150,000 for the 20% rate (i.e., the middle ground approach—*see supra* text accompanying notes 60–62). Assume a couple has total income of $300,000: (i) the lower-earning spouse earns $100,000 of wages, (ii) the higher-earning spouse earns $150,000 of wages, and (iii) couple has $50,000 of interest income. If they cohabitate, $200,000 would be taxed at 20% with $100,000 taxed at 30% (i.e., each spouse would fill up the $100,000 bracket). If they married (without Bush's relief), they would have a penalty, as only $150,000 would qualify for the lower 20% rate with $150,000 at the higher rate. Under Bush's proposal, though, $250,000 would qualify for the lower rate ($100,000 by the low-earner filing separately; and then $150,000 on the joint return). Our suggested remedy to this defect of the Bush proposal is to reduce the joint bracket allowance by the income reported separately (but not below the singles bracket allowance). So on these facts, the $150,000 bracket allowance would be decreased down to $100,000 for this couple (thereby insuring that only $200,000 total qualifies for the lower rate). And with an eye on revenue concerns, the separate bracket could be set at $90,000 rather than $100,000.

166. But again, subject to an overall cap of twice the singles allowance (or perhaps a somewhat lower cap, like our proposal). Also, the increase should be triggered only to the extent the lower spouse's earnings exceed the excess of the regular joint bracket allowance over the singles allowance (since the regular allowance already negates the penalty to that extent).

167. In addition, note how under our modified Bush proposal, the adjustments would have to be made for each bracket applicable to the taxpayer in question.

virtue of both the Ryznar and Bush proposals,[168] which likewise maintain joint filing. Essentially, married couples would complete a schedule for each spouse's individual tax amount, providing a portion of the overall liability (similar to the current schedule for the alternative minimum tax liability).[169] Our change to the 1997 proposal reinforces the notion that the tax system still views the spouses as a collaborative couple, with the MCS option providing a penalty relief safety valve.

One other viable compromise possibility would allow taxpayers the option to pay the *average* of their tax bill (i) if they filed as two singles and (ii) if they filed jointly as a married couple. This would provide a 50/50 compromise on the marital penalty by cutting it in half for all taxpayers.[170] This idea also intrigues, as it shares many of our proposal's attractive features. In particular, it provides even-handed penalty relief without bonus expansion. It also avoids the varying tax table problem of the modified Bush and Ryznar proposals. We still prefer our original idea on balance, though, given its greater flexibility. Specifically, our original idea allows varying penalty relief at different income levels rather than an ironclad 50% relief across the board.[171]

D. Incoherence or Compromise of Competing Values?

Lawrence Zelenak critiqued the 1997 legislative proposal on grounds of "philosophical incoherence."[172] Since our approach shares lineage with the 1997 proposal, we defend our MCS idea against a similar incoherence critique. As we develop further below, our approach provides a coherent response to the marriage penalty debate. First, the *Obergefell* developments now support the seemingly inconsistent split approach of penalty relief with bonus retention. In addition, any approach will contain legal inconsistencies given the many conflicting values in play. Our improvements to the 1997 proposal, however, minimize these legal inconsistencies.

Consider first Zelenak's coherence critique of the 1997 proposed single filing election. Zelenak sees couples neutrality as the sole reason

---

168. *See supra* text accompanying notes 101–102 and notes 118–119.

169. *See* INTERNAL REVENUE SERV., OMB No. 1545–0074 Form 6251 (2015), https://www.irs.gov/pub/irs-pdf/f6251.pdf [https://perma.cc/84ZQ-7ENV].

170. We thank Carlton Smith for this intriguing suggestion.

171. *See* Part IV.E for how the optimal relief likely varies at different income levels.

172. *See* Zelenak, *supra* note 22, at 17–19; *see also Easing the Family Tax Burden: Hearing Before the S. Committee on Finance*, 107th Cong. 107-170, pp. 10–12 (Mar. 8, 2001) (testimony of Professor Zelenak), http://www.finance.senate.gov/hearings/hearing/download/?id=0fc7d303-0ccf-4387-a049-45b3d16abb6e [https://perma.cc/R58X-MDW4].

for the joint return system. As such, Zelenak argues that there are only two *coherent* options: (i) a joint return system without any enhanced separate filing;[173] or (ii) an elimination of joint returns.[174]

The current post-*Obergefell* environment, however, provides a broader perspective extending well beyond couples neutrality. In one direction, *Obergefell* challenges the continuation of large marital penalties that might discourage even-earner couples from exercising the fundamental right of marriage. But while *Obergefell* justifies penalty relief, it fails to mandate a simultaneous elimination of joint returns. If anything, *Obergefell* supports possible increases to the bonus aspect of joint returns, in order to incentivize the valuable institution of marriage.[175]

Beyond *Obergefell*, factors other than couples neutrality support joint-return retention as part of marital penalty reform. As discussed above, these factors include transitional concerns, political feasibility, and the ability-to-pay norm.[176] Finally, note how current law already suffers from Zelenak's incoherence charge. Some married couples file separately under current law to pay less taxes than other married couples with identical aggregate items.[177] Current law thus already sacrifices couples neutrality at times.

Our proposal provides a coherent balancing of conflicting goals. In this regard, consider the following excerpt from a legal theorist on coherence in the law:

> [G]iven that one function of law is to settle disputes, it can never truly be univocal in its expression of value. Since disputes frequently arise in cases of competing values, and it is likely that the law will need to strike a balance between those competing concerns, it is exceedingly difficult to imagine a legal system that articulates a perfectly consistent set of values.[178]

In this spirit, our approach provides maximum flexibility to balance all the important values. Rather than fully heeding one to the complete

173. This would maintain couples neutrality.

174. This would reject couples neutrality.

175. *See supra* text accompanying notes 99–102.

176. As discussed above, the ability to pay norm includes the notion that a married couple living off the one breadwinner's salary has lesser ability to pay than a single person with the same salary. *See supra* note 90–91 and accompanying text.

177. *See supra* note 68 and accompanying text.

178. Kenneth Ehrenberg, *Pattern Languages and Institutional Facts: Functions and Coherences in the Law*, in COHERENCE: INSIGHTS FROM PHILOSOPHY, JURISPRUDENCE AND ARTIFICIAL INTELLIGENCE 155, 164 (Michal Araszkiewicz & Jaromír Šavelka eds., 2013).

exclusion of another, our approach presents the opportunity to reach the optimal level for each value after taking into account the inevitable tradeoffs. For instance, our approach relaxes the 1997 proposal's rigid adherence to the full single brackets. By permitting lower MCS brackets, this provides more weight to couples neutrality, albeit with the tradeoff of some continued marital penalties. This highlights the inevitable tension between these two factors.[179] Likewise, joint return elimination embraces fully marital neutrality to the complete exclusion of couples neutrality.[180] We believe, however, that the best reform plan appropriately balances all these important values, without completely tossing some aside.

E. Setting the Bracket Amounts

In analyzing the optimal joint bracket allowances, Zelenak recommends an even-split presumption between bonuses and penalties.[181] Under this approach, joint brackets generally would equal one-and-a-half times the singles amount. For instance, the 20% rate joint bracket would equal $150,000 in our earlier example with a $100,000 singles cap.[182] Zelenak would override this even-split presumption only upon compelling evidence.[183] For instance, Zelenak would apply a higher increase at the lower income levels due to higher rates of cohabitation with children at such income levels.[184] The improved tax treatment arguably would counteract the possible failure of these parents to weigh fully their children's benefit from their own marriage.

Interestingly, this low-income focus uncovers further revenue flexibility in our approach. As discussed above, current law eliminates tax rate penalties for low-income taxpayers through doubled joint allowances at the lower tax rates.[185] But this costs additional revenue since these doubled joint brackets benefit all taxpayers who pass through these lower levels, including all higher income taxpayers.[186] Our

179. Lowered allowances also heed the revenue raising function.

180. It also ignores the desire to incentivize marriage and the ability-to-pay norm application to married couples. And absent special rules of implementation, it also raises transitional concerns.

181. *See* Zelenak, *supra* note 60, at 816.

182. The singles allowance was $100,000. $100,000 x 1.5 = $150,000.

183. *See* Zelenak, *supra* note 60, at 816–17.

184. *Id.*

185. *See supra* section I.D. By doubled joint allowances, we mean joint brackets equal to twice the singles amount.

186. To see this, recall our standard two-bracket structure with singles taxed at 20% on income up to $100,000. If the 20% joint bracket is higher than $100,000, say $150,000, even a millionaire

approach could provide MCS brackets equal to the singles amount with a corresponding decrease to the joint brackets at those levels. This would maintain the penalty avoidance for low-income taxpayers while boosting revenue collections from high-income taxpayers.[187]

As an aside, another potential low-income taxpayer adjustment concerns the earned income tax credit (EITC).[188] The current EITC contains various marital penalties stemming from its limited application to just low-income taxpayers. Similar to the broader rate-bracket penalty issue, the penalty arises from the current failure to double the disqualifying (higher) income levels for married taxpayers.[189] Our MCS approach could provide a ready fix here as well: simply extend the separate calculation option to include the EITC.[190]

In this section, we provide initial guidelines, rather than absolute parameters. We take this approach mindful of our proposal's attractive flexibility. We hope to engage others in a fuller discussion of how to best utilize our improved balancing mechanism.

CONCLUSION

This Article significantly contributes to the long-running marital penalty literature. We highlight how the same-sex marriage developments both revitalize the tax analysis and alter the traditional tax landscape. In light of such developments, we provide an intriguing new mechanism for determining married couples' taxes, the new married calculated separate (MCS) option. We also show how our approach improves upon the current law and other penalty-relief proposals.

---

earner currently benefits from this higher amount because the first $150,000 of the millionaire's income would qualify for the lower rate.

187. If the lower brackets are doubled, a married couple with one very high earner (and a very low or non-earner) would benefit from such bracket expansion by having more of their high-level income taxed at the lower rate. We could alternatively remove the low-bracket benefits for high-income taxpayers by imposing even higher rates once income exceeds a high threshold. That alternative approach (low rates on first dollars with even higher rates on later dollars) is more distortive since the last (marginal) dollars face a higher rate. From an efficiency standpoint, it is generally preferable to have more balanced rates. This is because the distortion expands exponentially as the tax rate increases. *See, e.g.*, Emmanuel Saez, *Optimal Progressive Capital Income Taxes in the Infinite Horizon Model*, 97 J. PUB. ECON. 61 (2013).

188. I.R.C. § 32 (2012).

189. *See* I.R.C § 32(b)(2)(A), (B)(i).

190. The system might want to provide more limited EITC relief, however. For instance, the system might want to block a billionaire's low-earner spouse from obtaining this benefit. *See* Zelenak, *supra* note 22, at 52–53.

Finally, we provide guidelines for the specific applications of our approach.

In setting the stage, we explore how recent same-sex marriage developments transform the traditional goal of marital neutrality. Full appreciation of marriage as a fundamental right supports the reduction of marriage penalties but not of marriage bonuses. Recognition of the many state marital incentives corroborates this split approach to the penalty and bonus aspects of marital neutrality. In fact, *Obergefell's* view of marriage may even support possible increases to marriage bonuses. On the other hand, tax revenue concerns[191] caution against a combination of lower penalties and higher bonuses, as proposed by some 2016 presidential candidates.[192]

Mindful of these changing parameters, we see great appeal in severing penalty relief from bonus expansion. Our MCS proposal provides the most viable pathway. Under current law, married individuals who file separately receive tax brackets equal to just half the joint bracket allowance (thereby negating any penalty relief). By increasing these separate brackets above the current levels, our proposal would provide penalty relief without any simultaneous increase in marriage bonuses. In fact, such penalty relief might support decreases to certain joint bracket allowances.[193] These decreases would create offsetting revenue benefits to help defray the cost of the penalty relief from the higher separate brackets. In addition, our proposal fosters joint collaboration by simply aggregating each spouse's separate tax amounts on a joint return.

Other recent proposals likewise combine penalty reduction with bonus retention, lending support to our split approach. We show the superiority of our approach over these other intriguing ideas. On the one hand, our proposal avoids the cliff effect and bonus entanglement problems of the interesting idea to grant only even-earner couples a higher joint bracket allowance. In the other direction, our MCS approach is more flexible and revenue friendly than a married filing *single* approach.[194] We then utilize these principles to improve upon Jeb Bush's

---

191. The reluctance to remove the alternative minimum tax despite widespread dissatisfaction evidences the extreme current focus on revenue implications. *See supra* note 106.

192. As discussed above, these proposals would increase the joint marital brackets to twice the singles allowances. *See supra* text accompanying notes 104–05.

193. That is, to the extent that the joint bracket allowance is attributable to penalty relief. *See supra* the discussion in Part IV.E.

194. A married filing *single* approach would allow married individuals to use the singles brackets. Our enhanced married filing *separate* approach would expand the current married filing separate brackets, but not necessarily all the way to the singles allowance.

intriguing hybrid approach.[195] With our modifications, this approach provides a plausible alternative pathway to reform, albeit at a greater administrative cost. Finally, we resisted the temptation to provide absolute parameters for each tax bracket level. Rather, we sketched guidelines to maintain maximum flexibility. We also hope that others will share the baton in making useful refinements now that we have highlighted the general framework and pathway for meaningful reform.

Our MCS proposal would remove the tax incentives for couples to cohabitate in lieu of marriage or engage in legal antics like the Boyters. All couples could rightfully base the important marital decision on personal factors such as love, shared values, compatibility and the more appropriate legal implications of marriage. *Obergefell* requires no less.

195. Bush's hybrid approach consists of a separate wage return with a joint investment income filing. Without our adjustment, Bush's proposal goes too far, as it allows the low-earner spouse to use the singles bracket for wages *and* full use of the (higher) joint bracket allowance for the couples' remaining income.