The Marriage Penalty: Restructuring Federal Law To Remedy Tax Burdens On Married Couples

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Abstract

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In 1975 Professor Boris Bittker wrote a comprehensive article entitled Federal Income Taxation and the Family.¹ Later that year, David and Angela Boyter obtained the first in a series of three divorces.² The Boyters undertook year-end-divorce/year-beginning-marriage ceremonies in 1975-76 and in 1976-77,³ not because of marital discord but rather to “upgrade” their income tax filing status from married to single.

The Boyters illustrate a problem addressed by Professor Bittker in the second part of his article.⁴ They, like many other dual income married couples, pay a higher income tax on their combined salaries because they are married than they would pay if they were single. What set the Boyters apart from the majority of this group is the self-help remedy they employed to reduce this tax burden. While the efficacy of

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3. Their 1977 divorce was not followed by remarriage. The couple continues to live together, however.

4. Bittker, supra note 1, at 1416-44.
that remedy has been placed in doubt by the Tax Court's recent decision upholding the government's challenge to the validity of the 1975 and 1976 divorces, the problems illustrated by the Boyters' actions must be faced by Congress shortly, whether or not a successful appeal is taken from the Tax Court decision. Several bills already await action by Congress, and some state governments have implemented alternatives to what has been called the "marriage penalty." This article

5. Boyter v. Commissioner, 74 T.C. ____ Nos. 11445-77 & 11446-77 (Aug. 6, 1980). Although the Internal Revenue Service attacked the 1975 and 1976 divorces as shams, it has not done so with respect to the 1977 divorce, in which the Boyters became permanently unmarried. Compare Rev. Rul. 76-255, 1976-2 C.B. 40, with IRS Private Letter Ruling 7835076 (1978). The Tax Court did not reach the government's contention that the Boyter divorces were shams for purposes of federal law, as it was able to decide the marital status question on state law grounds. Because the Boyters remained Maryland domiciliaries while obtaining divorces in Haiti and the Dominican Republic, Judge Wilbur determined that "Maryland would not recognize the foreign divorces as valid to terminate the marriage . . . . " 74 T.C. at ____. The opinion contains an extensive discussion of state recognition of foreign divorce decrees. This discussion was deemed necessary because there was no Maryland decision directly addressing this issue and the court was forced to choose the rule it felt the Maryland high court would have adopted. See Commissioner v. Estate of Bosch, 387 U.S. 456 (1967).

6. Both the Democratic and Republican platforms state their respective parties' opposition to the "marriage penalty." See, e.g., Democratic Party platform plank on "Women and the Economy," approved by the platform committee on June 24, 1980; Republican Party platform plank on "Strong Families," approved by the convention on July 15, 1980. Already introduced in Congress and awaiting action are over thirty bills dealing with the problem in one way or another. These bills are listed by type in Appendix I infra and are discussed later in this article at pp. 45-54 infra.

7. Because the Boyters reside in Maryland, the United States Court of Appeals for the Fourth Circuit would hear any appeal. In its recent decision in Ensminger v. Commissioner, 610 F.2d 189 (4th Cir. 1979), that court noted various cases in which the different tax rate schedules had survived challenges to their constitutionality. Id. at 192. Earlier in the opinion, the court remarked that certain inequalities in tax consequences may result from residence in one state as opposed to another, "but it illustrates the deference Congress has demonstrated for state laws in this area and its attempts to insure that, in the application of federal tax laws, taxpayers will be treated in their intimate and personal relationships as the state in which they reside treats them." Id. at 191. Only if the court of appeals disagrees with the Tax Court on the state law issue will the sham issue be raised again in Boyter.

8. See Appendix I infra.

9. Later in this article the tax systems of New York, North Carolina and Ohio will be discussed as illustrating issues raised by the various alternatives for federal
will discuss the suggested solutions and offer further proposals for legislative study.

A Brief Historical Perspective

One can best understand the conflicting viewpoints which resulted in Boyter if that case is viewed from a historical perspective. The major federal taxes that affect residents of the United States are the income tax and the various taxes imposed on gratuitous property transfers, gift, estate and generation skipping transfer taxes. To some extent, but by no means entirely, the amount of these taxes paid by any particular individual is dependent upon his or her marital status. Thus, the focal point of the material which follows is the use of marital status in legislation and judicial decisions affecting federal tax liability.

The first income tax statute, assessing a flat three percent tax on incomes in excess of eight hundred dollars, did not mention marital status; the tax was imposed on the income of "every person." Subsequent Civil War era income tax statutes did not vary in this regard, nor did the short-lived 1894 Act.

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10. Because not all of the states levy income or transfer taxes, and because those which do have not opted for uniformity in approach, discussion in this section will be limited to federal taxes. But see Appendix II for a comparison of certain characteristics of state income tax laws.


12. Because the first $800 was exempt from this tax, a slight degree of progression did exist.

13. Act of Aug. 5, 1861, ch. 45, § 49, 12 Stat. 309. So long as the tax was essentially proportional in nature, married couples who both had income paid the same amount of tax they would have paid had they been single and living together and the same amount on two separate returns as would have been due had a combined return been allowed or required.


In 1913 Congress enacted the first post-sixteenth amendment income tax statute. As the committee reports indicate, marital status was considered relevant to an individual's tax burden. While the first $3,000 of a single individual's income was deductible in computing taxable income, married couples could exempt the first $4,000. In explaining its decision to vary the exemption from the flat $4,000 deduction proposed by the House of Representatives, the Senate Finance Committee stated: "[I]t is deemed equitable as recognizing the added obligations on account of marriage and children and salutary as emphasizing the family as the unit in our social structure.

Because each individual filed a tax return based upon his or her own income, two single individuals living together could take advantage of $6,000 in exemptions if each had income of at least $3,000; if only one had any income, there would be only one $3,000 exemption. A married couple living together could exempt no more than $4,000 regardless of how much income each earned. By the same token, that couple could exempt the full $4,000 even if only one spouse earned income.

In one respect the married and the single individual received identical treatment. Each was subjected to tax only on his or her own income. This was an important consideration for married couples, because the 1913 tax rates were graduated, and in almost every instance a higher tax would be due if two incomes were combined on the same return than if each spouse filed a return reporting only one income.

In fact, the 1913 income tax provisions differentiated more be-

17. Id. § II(C).
19. The same result would obtain for two single individuals who were not living with any other person.
20. The House version provided that each spouse should be entitled to a $3,000 exemption if the couple was living separate and apart from each other. S. Rep. No. 80, supra note 18, at 24.
22. Rates ranged from 1% on the first $1,000 of taxable income to as high as 7% on taxable incomes in excess of $500,000.
23. If one spouse had a net loss which could have offset the other spouse's income, combining the two incomes would result in lower tax liability.
tween married couples deriving a substantial portion of their income from property and those receiving their income from salary, and between married couples in community property states and those residing in common law jurisdictions, than they did between married and single taxpayers. In the first instance, where income was derived from property, full advantage could be taken of income splitting if the couple divided ownership of the property rather than having only one spouse hold title. Because there were no federal transfer taxes in effect in 1913, property ownership could be arranged to allow income splitting without the imposition of an inhibiting transfer tax. As single taxpayers also could make use of property transfers to affect their tax consequences, marital status conferred neither benefit nor detriment.

When Congress enacted an estate tax in 1916, it failed to include a tax on inter vivos transfers. Thus, property transfers to equalize income remained an effective tax reduction tool in a time period when income tax rates underwent a significant increase in the degree of their progressivity.

Although the 1920s were generally a period of income tax reduction, a gift tax was enacted in 1924 to limit what might otherwise be deemed the voluntary nature of the estate tax. Two years later this tax was repealed, and property owners continued to be favored over salaried workers with respect to their opportunities for tax reduction.

The community property/common law jurisdiction distinction became important as soon as tax rates were graduated. The eight commu-

25. The maximum combined rate was increased from 7% in 1913 to 15% in 1916 and to 67% in 1917. The rapid increases in tax rates can be explained by the unprecedented funding needs occasioned by World War I. Although the income tax itself was not increased until 1916, additional excise taxes were levied in 1914 to replace customs revenue lost during what was then the European War. See S. REP. No. 813, 63d Cong., 2d Sess. 1 (1914). The 1916 increases were attributed in part to the need to fortify the country, while the 1917 increases were passed to "defray war expenses." H.R. REP. No. 922, 64th Cong., 1st Sess. 1 (1917).
26. At the time the final bill of the decade was enacted, the maximum individual income tax rate was 25%. Revenue Act of 1928, ch. 852, §§ 11-12, 45 Stat. 795-97.
nity property states treated married couples as a form of partnership, with the result that each spouse owned one-half of all property acquired by the community, including income from both property and personal services. If such ownership carried with it the right of reporting one-half of the community's income on each spouse’s return, residents of these states would pay lower taxes than residents of common law states, where income was the property of the spouse who earned it and who was, therefore, solely liable for the taxes. The different tax rules imposed upon residents of these two types of jurisdiction inspired substantial legislation and litigation in the period between 1913 and 1948.

The Revenue Act of 1921 brought about a reduction in the high tax rates in effect during World War I, resulting in a maximum combined normal and surtax rate of fifty-eight percent for 1922. The 1921 legislation also carried with it a right for married couples that was in most respects of no value: if they so wished, a husband and wife could combine their incomes on one joint return. Because no separate rate structure for such returns existed, the use of this privilege generally meant a higher tax burden in addition to joint and several liability.

The House of Representatives attempted to add to that law section 208, which was designed to eliminate the disparity of treatment between married couples residing in common law states and those residing in the community property jurisdictions. Section 208 would have included all community income in the gross income of the spouse having the management and control of the community property. The Senate deleted this provision from the 1921 Act.

Because section 208 reflected a position held by the Treasury Department for several years, its congressional defeat was not its final bow. Indeed, the government’s claims were upheld in United States v.

31. Id. § 223, 42 Stat. 250.
32. A lower tax would be possible, of course, if one spouse had losses to offset against the other spouse’s income.
Robbins, involving the California community property law in effect before 1917. Even though the wife was granted a vested interest in community property in the other seven community property states, the broad powers of management granted the husband gave rise to doubts about the continued efficacy of income splitting in those jurisdictions as well. These doubts were resolved in the 1930 decision of Poe v. Seaborn, but the statute of limitations was extended for community property returns pending the outcome of that litigation.

Seaborn and another 1930 case, Lucas v. Earl, gave the Supreme Court the opportunity to examine two income splitting arrangements—one a creature of community property law, the other a result of private contract. The Court determined that these arrangements had a different effect insofar as their federal income tax consequences were concerned. As noted earlier, the Treasury Department had attacked division of income in community property states, yet the Supreme Court allowed such division in Seaborn, averring that "The law's investiture of the husband with broad powers, by no means negatives the wife's present interest as a co-owner."

The Court was not unmindful of the fact that this decision would result in differential treatment for common law and community property residents. Earlier that same year, it had invalidated a contractual arrangement for interspousal income splitting. Although the contract involved in Earl predated the post-sixteenth amendment income tax by twelve years, the Court felt that validating such an arrangement would allow "the fruits [to be] attributed to a different tree from that on which they grew." The net result of these cases was that residents of community property states were able to benefit from lower taxes on salary income if only one of them worked than were similarly-situated

35. 269 U.S. 315 (1926).
36. An excellent discussion of this litigation appears in Bittker, supra note 1, at 1404-07 and sources cited therein.
40. 281 U.S. 111 (1930).
41. 281 U.S. at 115.
42. Id. at 117-18.
43. 281 U.S. at 115.
residents of common law states. But because no gift tax existed then, this disparity was not present with respect to income from property so long as the common law state residents were willing to share ownership.

Shifting property interests between spouses became costlier in 1932, when a permanent gift tax was enacted. As ownership of community assets was automatically split by operation of the state community property laws, the burden of this tax fell primarily on residents of the common law states. The 1932 Revenue Act signaled a change in the direction income tax rates were to take during the next several years. The maximum rate of twenty-five percent in effect since 1928 was replaced by a new schedule with a maximum rate of sixty-three percent. During the 1930s, Congress, in an attempt to balance the budget at a time when fewer people were employed and paying taxes, continually raised tax rates. Again, even if only one spouse were employed, the brunt of these rate increases fell on families in common law states because income splitting was limited to the community property states.

In 1941 Congress attempted certain reforms. The House Ways and Means Committee proposed mandatory joint returns for married couples. The committee believed this change would correct five "inequities" in the law: (1) a higher tax was paid by families where only one spouse contributed to family income than by families where both spouses contributed; (2) families living in community property states paid smaller taxes than families living in other states; (3) families whose incomes were attributable to earnings paid higher taxes than families whose incomes were attributable to investments; (4) the option of filing joint or separate returns always operated to the detriment of the government and to the advantage of the taxpayers; and (5) taxes were being reduced through the use of family partnerships, gifts and trusts. The second and third committee objections have been dis-

45. Id. §§ 11-12, 47 Stat. 174-77.
47. H.R. REP. No. 1040, 77th Cong., 1st Sess. 11-13 (1941).
The Marriage Penalty discussed earlier in this article, and the fifth is directly related to the third. The fourth objection was, of course, correct, but the first objection suffered from a basic shortcoming. The committee considered the income tax the only difference in disposable income separating a couple for whom one spouse was the sole contributor and another couple, both of whom were employed. In actuality, the second couple's work-related outlays were higher, as was its other tax burden, the "Social Security" tax. 

The Senate Finance Committee focused its reforms on the community property/common law state distinction. It would have taxed earned income to the spouse who actually earned it, taxed community investment income to the spouse having management and control thereof, and allocated deductions and credits to the spouse reporting the income to which these items related. None of these proposals became law.

When it became clear that Congress would grant residents of common law states no relief from what they considered oppressive tax burdens, several state governments created their own solution. In 1939 Oklahoma adopted an elective community property law. Oregon fol-

48. See discussion at pp. 34-36 supra. Not every community property state spouse benefits from these income allocations. Each spouse must report one-half of the community's income even though one of them, perhaps because of marital discord, actually receives a smaller amount.

49. See discussion at pp. 41 & 45 infra.

50. Act of Aug. 14, 1935, ch. 531, tit. VIII, § 801, 49 Stat. 636. This tax was initially imposed at the modest rate of 1% on the first $3,000 of wages.


52. H.R. REP. No. 1203, 77th Cong., 1st Sess. 10 (1941). The 1941 Act almost included a Senate provision that common law state residents could have used as an income splitting device had they been as imaginative as the Boyters; alimony was to be taxed to the recipient and deducted by the payor. Although deferred in conference, this provision was added to the law in 1942. Revenue Act of 1942, ch. 619, § 120, 56 Stat. 816-17. Also enacted in 1942 were rules making the estate and gift tax provisions concerning community property more similar to those affecting property in common law jurisdictions. Id. §§ 402, 453, 56 Stat. 941, 953. These changes were upheld in Fernandez v. Wiener, 326 U.S. 340 (1945).

53. The 1938 Act provided for tax rates ranging from 4% to 79%. Revenue Act of 1938, ch. 289, §§ 11-12, 52 Stat. 452-54. The 1942 legislation raised these rates so that the range was from 19% to 88%. Revenue Act of 1942, ch. 619, §§ 102-103, 56 Stat. 802-03.
owed suit in 1943.

In *Commissioner v. Harmon,* the Supreme Court analogized the voluntariness of these self-help remedies to the contract provisions in *Lucas v. Earl,* rendering them ineffective for federal income tax purposes. In the next four years, these states, along with Nebraska, Michigan, Pennsylvania, and the territory of Hawaii, adopted mandatory community property systems which the Internal Revenue Service accepted as valid. With other states threatening to make this fundamental change in their basic rules of property law, Congress acted in 1948, a year in which federal revenue demands were temporarily diminished compared to what they were during World War II.

Rejecting the 1941 proposals as being either too costly for married individuals, or unduly burdensome for couples with earned, as opposed to investment, income, Congress adopted a separate tax rate schedule for married individuals. If they chose to file a joint return, the married couple would pay a tax which was twice as large as the tax imposed upon a single person (or a married individual who filed separately) with one-half of their combined income. Thus, the degree of progression applied to married individuals' joint return rates was only one-half that applied to all other taxpayers, at least until each group reached the highest tax bracket.

Little legislative activity occurred until 1969, when Congress de-

54. 323 U.S. 44 (1944).
58. This criticism was made with respect to the House Ways and Means Committee proposal.
59. The Senate Finance Committee proposal was discarded on this basis.
60. Revenue Act of 1948, ch. 168, § 301, 62 Stat. 114. This act also added estate and gift tax marital deductions and a provision allowing married couples to split the gift tax consequences of gifts either spouse made to a third party. *Id.* §§ 361, 372, 373, 62 Stat. 117-21, 125-28. These provisions gave married couples a clear advantage over unmarried individuals insofar as property arrangements were concerned.
61. *Id.* § 101, 62 Stat. 111.
62. A separate rate schedule for heads of households was enacted in 1951, thus reducing some disparities in taxation of married couples and single individuals, at least in cases where the latter group had certain family obligations. Revenue Act of 1951, ch. 521, § 301, 65 Stat. 480. In addition, a limited deduction for job-necessitated child care expenses was added to the law in 1954. Int. Rev. Code of 1954, ch. 736, § 214,
cided that the 1948 legislation produced an unnecessarily large disparity between taxes paid by married couples and by single individuals with the same income. For example, the $6,070 tax paid by a single individual with respect to a $20,000 taxable income was thirty-eight percent greater than the $4,380 paid by a married couple with the same income. Any extra costs of supporting two individuals on the particular amount of income had to be offset by the economies of scale occasioned by their living arrangement and the additional savings if household tasks were undertaken by one spouse rather than by paid household help. The latter advantage diminished in importance if both spouses were employed, and in that situation their combined job-related costs of earning the household's income could exceed such costs borne by the single individual. In enacting a tax rate reduction for single individuals, Congress established a rate schedule designed to limit their extra burden to twenty percent above that imposed upon married individuals enjoying the same taxable income.

Using rates currently in effect for 1980, the relative tax burdens of single and married individuals is summarized in the following table:

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68A Stat. 70-71. Because of the income phase-out imposed upon married individuals, single workers were more likely to benefit from this deduction than were married couples. Id. § 214(b)(2).


65. These computations also had to take into account the fact that no tax was imposed upon the imputed income attributable to the homemaker spouse's services.


67. Several bills providing lower tax rates for 1981 have been introduced into Congress. The extent of any future tax reduction is at best speculative, particularly in view of the revenue loss occasioned by combining a general tax cut with a reduction in the marriage penalty.

68. I.R.C. § 1. The single individual's liability would be reduced to $17,642 if personal services were his only income source. Id. § 1348.
TAX PAID AT VARIOUS INCOME LEVELS

Filing Status of Taxpayer:

<table>
<thead>
<tr>
<th>Taxable Income</th>
<th>Married, Joint Return</th>
<th>Married, Separate Return</th>
<th>Single Individual's Return</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ 5,000</td>
<td>$ 224</td>
<td>$ 531</td>
<td>$ 422</td>
</tr>
<tr>
<td>10,000</td>
<td>1,062</td>
<td>1,613</td>
<td>1,387</td>
</tr>
<tr>
<td>25,000</td>
<td>4,633</td>
<td>7,389</td>
<td>5,952</td>
</tr>
<tr>
<td>50,000</td>
<td>14,778</td>
<td>20,999</td>
<td>18,067</td>
</tr>
</tbody>
</table>

Since 1948, the joint return rates have been based upon the fiction that each spouse earned one-half of the couple's combined income.\(^6^9\) Thus, the tax on a couple's joint return income of $50,000 is twice the tax on separate return income of $25,000. Married individuals benefit from this fiction whenever one spouse provides all their combined income, one spouse has a loss for the year to offset against the other's income, or one spouse's income is substantially smaller than that of the other spouse.\(^7^0\) The couple described above would thus pay tax of $14,778 using a joint return no matter how their $50,000 income was derived. Had they filed separate returns their tax burden could have been as high as $20,999.\(^7^1\) Even if both worked, separate returns would result in a combined tax exceeding $14,778 whenever one spouse contributed more than $27,100 (and the other, less than $22,900) of the $50,000.\(^7^2\)

\(^6^9\). While the fiction has some validity in community property states in view of the property rules there in effect, joint ownership is not a prerequisite to the use of these rates by either common law or community property jurisdiction residents.

\(^7^0\). The benefit ceases, depending upon income level, when the lesser-earning spouse contributes between 10% and 35%. At most income levels, the lesser earning spouse need contribute only 20% to 25% for the penalty to be felt. JOINT COMMITTEE ON TAXATION STAFF REPORT ON INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS (1980), reprinted in Daily Tax Report, Apr. 2, 1980, at J-1, J-8 [hereinafter cited as JCT STAFF REPORT]. Other provisions benefit married couples filing joint returns. See, e.g., I.R.C. §§ 165(c)(3), 179, 1244. See also I.R.C. § 116, as amended by Crude Oil Windfall Profits Tax Act of 1980, Pub. L. No. 96-223, § 404 (Apr. 2, 1980). Still other provisions require joint filing if married couples are to avail themselves of the benefits offered. See I.R.C. §§ 85, 105(d), 1348.

\(^7^1\). This tax would result if all $50,000 were attributable to one spouse.

\(^7^2\). At these income levels, each spouse has reached the 49% bracket. For every
Single individuals do not benefit from this fiction. They pay tax on their separate incomes, rather than on a pooled amount, no matter what their living arrangements. Because the rate schedule they use applies lower rates to their income than would be applied to the same amount of income produced by a married individual filing a separate return, single taxpayers living together may pay a smaller tax than that imposed upon a married couple with the same combined income. Returning to the original example involving income of $50,000, the married couple will pay $14,778 on a joint return no matter who earns the income; on separate returns they will pay that amount or more. Two single individuals would pay $5,952 each, a total of $11,904 if each earns $25,000. Indeed, even if one of them earned more than $27,100 (and the other, less than $22,900), they would still pay a total combined tax lower than that paid by the married couple in most situations. 73 This savings, or what some commentators call the "marriage penalty" is attributable to two factors: first, rates are lower for single individuals than for married individuals filing separately; and second, income tax is paid on income in excess of a "zero bracket amount." 74 Because this amount is $2,300 for a single individual, two such individuals are entitled to exempt from tax the first $4,600 of their earnings. 75 A married couple is limited to a maximum of $3,400 whether or not a joint return is filed.

It should be noted that the 1969 legislation did not raise the taxes paid by married couples; it simply did not lower them. As labor force participation by married women increased in response to such diverse factors as smaller family size, longer life expectancy, shorter marriage span, 76 better educational opportunities, 77 increased employment oppor-
tunities in nontraditional occupations, inflation, and a higher minimum wage, many couples found themselves in the situation facing David and Angela Boyter; that is, they had to pay higher income taxes because they were married.

While it appears the Boyters have failed in their particular attempt to remedy the problem of the marriage penalty for 1975 and 1976, the changes in workforce participation by married women will continue to put pressure on Congress to adopt one or more of the solutions presently before it. Many couples, particularly those with minor children, will find the Boyters' successful 1977 solution an unacceptable alternative. Even if the Boyters ultimately prevail, the majority of similarly situated taxpayers will be unwilling to undergo the expense and effort involved in successive year-end divorces and the necessary year-beginning marriages.

Evidence was introduced at a recent House Ways and Means Committee hearing that "work decisions of married women are far more sensitive to tax considerations than are those of single persons or married men." Thus, the marriage penalty may be viewed by many in Congress as vitiating the effects of federal legislation providing equal

Staff Report, supra note 70, at J-18. In view of the shorter time span between marriage and divorce, Congress amended the social security provisions allowing survivor's benefits to a divorced spouse and now requires that the marriage have lasted only 10 years as opposed to the 20-year period previously required. 42 U.S.C. § 416(d) (Supp. II 1979), as amended by Pub. L. No. 95-216, tit. III, § 337(a), 91 Stat. 1548.


80. At least one court held that remedies for the marriage penalty should be formulated by Congress. Barter v. United States, 550 F.2d 1239 (7th Cir. 1977).

81. Any rush to the state divorce courts (assuming Boyter has closed the gates to Haiti and the Dominican Republic) may mobilize those institutions to ask for Congressional relief.

82. JCT Staff Report, supra note 70, at J-10 and sources cited therein.
educational and employment opportunities for women. Finally, to the extent that relief, whether attributable to legislation or to self-help measures, gives rise to a reduction in tax revenues, Congress would be better able to predict the size of the revenue loss and adopt offsetting measures if savings are available to taxpayers without regard to their willingness to obtain divorces.

The plethora of bills pending in Congress vary in their provisions from a deduction or credit for the dual income married couple to optional single filing status. These proposals are discussed, along with counterparts already in use at the state level, in the remainder of this article.

Deductions or Credits for Job-Related Outlays

Because married couples who are both working outside the home generally incur larger expenses for such items as meals, transportation, and clothing than do couples with one worker and one homemaker, tax deductions or credits frequently have been proposed to offset these extra costs. Although such deductions might be justified under section 162 as ordinary and necessary business expenses because they are incurred to allow the second spouse to take employment, bringing such expenditures within the umbrella of the business expense deduction is unlikely. The administrative burdens flowing from such an allowance should not be underestimated. Indeed, several issues would present themselves for immediate resolution.

First, a decision would have to be made as to which spouse's expenses would be deemed the extra costs. Possible choices include the spouse with the higher(lower) expenses, the spouse with the higher(lower) earnings, and the spouse who entered the labor force most recently. Once this decision is made, Congress can then move on to the question of whether that spouse's total expenses for work-related items are to be deducted or only those outlays in excess of the amount he/she would otherwise incur. The latter choice is more satisfactory

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84. In dealing with the credit for child care outlays, Congress chose the lesser earning spouse. I.R.C. § 44A.
from a theoretical standpoint inasmuch as only such additional outlays are a necessary concomitant of earning the extra taxable income. Moreover, if the prospect of “lavish or extravagant” deductions worries Congress, automatic disallowance of the “fixed” portion of these outlays should be an acceptable solution. Incremental cost computations, although no longer used for entertainment expenses,85 have long been an accepted practice in tax computations.86 Subjective questions could be reduced if some statutory or administrative percentage were treated as the incremental portion of the employee’s actual costs. But basing the deduction on incremental cost requires increased recordkeeping and computations, which in turn magnify both the risk of taxpayer error in computing tax liability and the cost of monitoring taxpayer compliance. While allowing the full cost of certain items as deductions reduces the computations involved, this step provides taxpayers little incentive for controlling what are to a large extent “personal, living or family expenses.”87

The real problem with allowing these items as deductions under section 162 transcends mere difficulties in administration and computation. Such outlays must be viewed as business expenses under section 162, regardless of who makes them, or they should not be treated under section 162 at all. If meals, transportation, and clothing expenses are to be deductible for the second working spouse, the same treatment should be granted those outlays when made by unmarried workers or the spouse who is the family’s sole breadwinner. Since Smith v. Commissioner,88 in which the Board of Tax Appeals held that the wages of a babysitter who was hired so that parents could work was not a section 162 expense,89 a “but-for” rationale has been insufficient to justify section 162 status for outlays with a strong personal flavor. Too many years of contrary interpretation should prevent use of section 162 here; but, as the history of the child care credit90 indicates, other means of providing relief are available.

87. I.R.C. § 262.
88. 40 B.T.A. 1038 (1939), aff’d, 113 F.2d 114 (2d Cir. 1940).
89. 40 B.T.A. at 1039.
90. I.R.C. § 44A.
Congress enacted section 214 in 1954\(^1\) to provide a limited child care expense deduction for working taxpayers. Over the years this deduction has been broadened in its coverage and reformulated as a credit. There are, however, fundamental differences involved between expenditures for child care and other items of outlay, the size of which is affected by workforce participation. The cost of child care is, for the average family, a temporary phenomenon inasmuch as one's children soon reach an age where custodial care becomes unnecessary.\(^2\) The outlays for one's own meals and similar items continue throughout the term of workforce participation, a period of thirty years or longer. In addition, child care outlays frequently decrease after the child reaches first grade, when only after-school care costs become necessary.\(^3\) With the possible exception of clothing, the worker's job-related expenses do not follow this pattern.

Perhaps the most important distinction involved between these outlays is one of underlying policy. To reduce the risk that children will be left unattended or perhaps warehoused in an inadequate (and not necessarily inexpensive) setting, the tax revenue foregone by the government could be viewed as an investment, the return from which may eventually be received in the form of a reduced juvenile crime rate. In addition, persons performing child care services may now, by virtue of Internal Revenue Service reporting requirements,\(^4\) be spotlighted as receiving gross income which otherwise might go unreported. It is questionable whether allowing outlays for other items would serve such purposes. Because the items are already expenditures, only the incremental cost can be justified as work-related.\(^5\) Second, because these items are

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\(^1\) Int. Rev. Code of 1954, ch. 736, § 214, 68A Stat. 70-71. The discussion of this provision ignores the fact that some families send their children to nursery school even though one spouse never works outside the home.

\(^2\) I.R.C. § 44A allows no credit for care of a person age fifteen or older unless such person is incapable of caring for himself.


\(^4\) Internal Revenue Service Form 2441, used for claiming the child care credit, requires the name and address of the person rendering care, the amount of money paid such person, and, in certain instances, that person's social security number.

\(^5\) See discussion at pp. 45-46 supra.
purchased from established businesses, their reporting would be of little value in increasing taxpayer compliance.

While allowing a deduction or credit for these job-related costs may not have the same appeal as that generated by child care outlays, an argument can be made for tax relief to offset costs which are clearly job-induced and which do not result in benefits to the worker. The most compelling example of such a cost is the social security tax imposed upon most workers. If one spouse works and the other stays home, a participation pattern upon which the social security system is founded, the employed spouse is eligible to receive from this program death benefits, disability benefits and retirement benefits based upon a formula which takes into account the amount of his covered wages. The nonemployed spouse is eligible to receive retirement payments equal to a percentage of those received by the employed spouse both during that spouse's life and after his death. If both spouses work, each pays the social security tax and is eligible for these benefits. However, to the extent the second spouse would be entitled to some or all of these amounts even if he or she did not work and pay this tax, the tax payment does not provide any benefits and can be considered a job-related outlay for which there are no elements of personal enjoyment. Generally, the spouse with the lower wage is the one for whom the outlay is not proportionately covered by available benefits, so that spouse is the most appropriate person to be granted any tax relief that is legislated.

As explained above, unless one is willing to argue that job-related expenses are deductible as employment-related for all workers, justifying the deduction of any outlays other than for social security taxes becomes difficult. Even a deduction in situations where the second job was necessary to lift the family above a poverty level involves a rather tenuous extension of the deduction currently allowed the moonlighting

96. See discussion at pp. 46-47 supra.
98. 42 U.S.C. §§ 402(a)&(i), 423 (1976) (benefits); id. § 415 (computation of primary insurance amount).
99. 42 U.S.C. § 402(b),(c),(e),(f) (1976) (benefit generally 50% of the worker spouse’s benefit during that spouse’s life and 100% after his or her death).
worker for transportation between jobs.\textsuperscript{100} Section 43 already allows a credit for low income families, regardless of the number of workers, in situations where there is a dependent child. Moreover, in the low income situation, relief could be increased by modifying section 43 to provide a higher income phase-out for married individuals than is provided for single individuals.\textsuperscript{101} Differing income levels can be justified because the requirement of a dependent insures that a different minimum number of persons will be supported by the income, three for a married couple and two for other taxpayers. Because section 43 benefits are currently awarded whether one or both spouses work, such higher limits for couples might be further conditioned on both spouses having income, thus providing an alternative method of allowing for the extra costs generated by the second worker in a low income family.\textsuperscript{102}

While a deduction may be hard to fit within existing notions of what constitutes an ordinary and necessary business expense, it cannot be rejected summarily. If Congress decides that the marriage penalty is sufficiently severe to require relief, then a deduction still must be considered, not as theoretically justified but rather as one method of formulating such relief.

The decision between a credit and a deduction involves several considerations. The revenue lost if a credit is used is probably easier to predict than it would be if a deduction were chosen because the amount of tax foregone in the latter situation is dependent upon the tax rate otherwise applicable.\textsuperscript{103} Likewise, the use of a deduction, unless it is provided for in section 62, could easily result in job-oriented deductions alone exceeding the zero bracket amount. In that situation a large percentage of persons who presently do not itemize will be forced to keep records of medical expenses, charitable contributions, and similar items.\textsuperscript{104} Finally, a credit can be defended using an “ability to pay”

\begin{footnotes}
\item[101] See, e.g., I.R.C. § 85.
\item[102] I.R.C. § 44A, while not raising the child care credit when both spouses work, precludes its use in most situations where one does not.
\item[103] The forecasting problem is, of course, reduced if a ceiling is placed upon the amount of the deduction.
\item[104] On the other hand, if the deduction is listed in I.R.C. § 62, it can affect the amount of the medical expense and charitable contributions deductions taken by per-
rationale as a means of granting a proportionately higher benefit to lower income individuals. If, however, the credit were set at or below the lowest tax rate percentage, no taxpayer would be better off with a credit than with a deduction.\(^{105}\)

To the extent a credit percentage greater than the lowest marginal bracket is chosen, the amount by which the credit exceeds the savings attributable to the deduction can be viewed as a subsidy to lower income taxpayers. Such a subsidy falls short of full cost recovery, however, in at least three aspects. Unless the credit is set at one hundred percent of cost, it is not a full subsidy.\(^{106}\) Likewise, if the credit is not refundable, it is not a subsidy to the extent it exceeds the current year's tax liability.\(^{107}\) Finally, to the extent a taxpayer's outlays are subject to an overall dollar limitation, there is less than a full subsidy once costs exceed the limit.\(^{108}\)

The bills pending in Congress which allow a deduction\(^{109}\) or a credit\(^{110}\) for dual income couples adopt a combination of the approaches used in computing the child care and earned income credits. These bills allow a percentage of the earned income of the spouse with the smaller earnings to be deducted or credited in computing income tax liability. They do not provide full relief, however, because the specified percentage is applied against the lesser of such income or a predetermined dollar limit.\(^{111}\) Thus, the proportionate relief granted in the

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\(^{105}\) Exceptions to this rule could occur if the taxpayer would use the zero bracket amount and get no benefit from the deduction or if the credit were made refundable, as § 43 credits already are.

\(^{106}\) The earned income credit, while limited to 10% of the first $5,000 of wages, does operate in this fashion for very low income taxpayers. I.R.C. § 43. This credit was designed to offset the effect on low income workers of social security taxes, currently 6.13% of wages. The 10% credit exceeds the full subsidy at covered wage levels of $6,700 or less (as well as for the minority of workers whose jobs are not covered by the social security system).

\(^{107}\) The credit authorized by I.R.C. § 43 is refundable, however.

\(^{108}\) See, e.g., I.R.C. § 44A.

\(^{109}\) See, e.g., H.R. 6203, 96th Cong., 1st Sess. § 1(b) (1979).


\(^{111}\) H.R. 6798, 96th Cong., 2d Sess. (1980), would allow a deduction equal to
higher brackets is limited, and a marriage penalty would still remain to some extent.\textsuperscript{112}

These proposals have several virtues: first, they involve fewer computational difficulties than would be involved in allowing an offset for actual costs or in allowing married individuals to file as single individuals;\textsuperscript{113} second, they limit the revenue loss engendered by such relief.\textsuperscript{114} As between a deduction and a credit, it has been calculated that a credit “would not be as effective as a deduction, per dollar of revenue loss, in reducing marginal tax rates in the high income brackets, where high marginal rates present the most serious problems.”\textsuperscript{115}

Because these proposals are limited to a percentage of earned income, disparity of treatment still will remain between married and unmarried couples deriving income from investments. This disparity is relatively more burdensome in one regard: income from investments is not eligible for the maximum tax rate of fifty percent applied to earned income.\textsuperscript{116}

\footnotesize{\textsuperscript{112} As the JCT STAFF REPORT indicates, “a cap means that there would be no reduction in the marginal tax rate on a second earner whose earnings exceeded the cap . . . . ” JCT STAFF REPORT, supra note 70, at J-15.

\textsuperscript{113} See discussion at pp. 45-46 supra and at pp. 53-58 infra.

\textsuperscript{114} The JCT STAFF REPORT, supra note 70, at J-14 to J-16, provides the following estimates of revenue loss: a 20\% deduction with a $20,000 cap would decrease revenues $7.1 billion; a 10\% deduction with no cap would decrease revenues $3.7 billion; and a 10\% deduction with a $10,000 cap would decrease revenues $3.2 billion. A 10\% credit would result in an $11.7 billion loss even with a $10,000 earnings cap. On the other hand, the revenue loss from optional separate filing would range between $7.0 billion and $8.7 billion, depending upon how deductions and investment income were allocated. Id. at J-14. Mandatory separate filing, because of its effect on one-earner couples, would actually increase federal revenues by as much as $18.1 billion. Id. at J-13.

\textsuperscript{115} Id. at J-16.

\textsuperscript{116} I.R.C. § 1348. Once each wage earner has earned income in excess of the amount taxed at rates of 50\% or less, the flat 50\% rate comes into effect and there is no additional discrimination between married and unmarried workers. This effect occurs at a much higher level of income with respect to investment income, which can be taxed at rates as high as 70\%.
However, the discrimination does not always work against the married couple. If two individuals receive substantial amounts of income from property, as opposed to salaries, they probably will pay a lower tax if they remain single. However, if substantially all such income is received by one of them, a joint return favors the married couple. The married couple also has an advantage over the unmarried couple because the marital deduction is available to allow tax-free inter vivos transfers of property between spouses.\(^\text{117}\)

**Mandatory and Optional Separate Filing**

As an alternative means of providing relief, several bills would permit married individuals to file separate returns using the rates applied to single individuals. While most of these bills present this filing status as an option,\(^\text{118}\) a few of them would make separate filing mandatory.\(^\text{119}\) In those situations where the existing joint return/separate return rules give rise to a marriage penalty, optional or mandatory use of the single return rates would provide almost complete relief. However, in those situations where the married couple's income is earned primarily by one spouse, the present system results in lower taxes. Mandatory separate returns could thus result in increased taxes.\(^\text{120}\)

Compulsory separate returns were effectively the rule prior to

\(^{117}\) I.R.C. § 2523. Because up to $100,000 of property can be transferred free of gift tax, the income from this $100,000 can be shifted free of tax consequences. There may be a $50,000 reduction in the ultimate estate tax marital deduction, but this would usually be insignificant if income shifting were the goal, because the effect of such reduction would not be felt until a future period. *See* I.R.C. § 2056.

\(^{118}\) See, *e.g.*, H.R. 5012, 96th Cong., 1st Sess. (1979).

\(^{119}\) See, *e.g.*, H.R. 4467, 96th Cong., 1st Sess. (1979). These bills use present joint return rates. They would also ignore community property allocations and tax earned income to the spouse performing the services. *Id.* § 1(b)(1). While these bills are generally treated as requiring separate filing, their actual effects are a return to the pre-1948 rules and equality of treatment for common law and community property state residents.

\(^{120}\) Such increases would occur at every income level, but the relative percentage of returns affected adversely would be greatest at family income levels below $15,000 and above $30,000, at least in situations where investment income and deductions were allocated pro rata based upon earned income. JCT STAFF REPORT, *supra* note 70, at J-14.
Their use would once again reinstate the distinction between salary earners and persons deriving substantial amounts of income from property and the distinction between community property and common law state residents. While schemes such as those proposed in 1941\textsuperscript{122} could be appended to such a measure, mandatory separate returns are unlikely to gain taxpayer support from any group other than single individuals.\textsuperscript{123}

Optional separate filing creates a situation similar to that recognized by the House Ways and Means Committee in 1941; that is, it always will be employed to the detriment of the government. This objection loses much of its force, however, if the proposal is viewed as a taxpayer relief measure from which the government is expected to lose revenue.

Among the objections that have been raised to proposals allowing married individuals to compute their taxes as if they were single are those relating to the size of the revenue loss, complexities in record-keeping, and notions of equity toward single individuals who would not be granted that alternative. The revenue loss caused by optional separate filing using single rates could be substantially greater than the loss caused by allowing a deduction or credit.\textsuperscript{124} But in theory, the same amount could be lost if every married couple who would benefit from this proposal obtained a year-end divorce.

Alluding to this potential run to the divorce courts does not detract from the certain revenue loss that approved separate filing would bring. Indeed, Congress could prevent a self-help solution by adopting a new definition of marital status, such as being married more than one-half of the year or being married any time during the last half of the year.\textsuperscript{125} Alternatively, a rate schedule could be developed for cohabiting individuals to solve the problem raised by the Boyters' second solution.\textsuperscript{126}

\textsuperscript{121} See discussion at pp. 34-40 \textit{supra}.
\textsuperscript{122} See discussion at pp. 38-39 \textit{supra}.
\textsuperscript{123} Residents of community property states and couples deriving their entire income from investments may, however, remain neutral.
\textsuperscript{124} See note 114 \textit{supra}.
\textsuperscript{125} See, e.g., I.R.C. §§ 143(b)(1), 542(a)(2).
\textsuperscript{126} This alternative was not discussed in the JCT \textit{STAFF REPORT}, \textit{supra} note 70. It is discussed in Bittker, \textit{supra} note 1, at 1398-99, and rejected as unfeasible.
Another means of reducing the revenue loss would be to modify the gift and estate tax marital deduction provisions. A reduction of the allowable marital deduction could be implemented using a formula designed to compensate the government for income taxes lost when a couple files as single individuals. Such a modification can be justified theoretically. If the couple had remained single, they would not have been entitled to any marital deduction at all. To the extent that marital status confers detriments a couple wishes to avoid, its benefits should be treated in a consistent fashion.

Obviously, using the marital deduction to offset revenue losses has its drawbacks. First, couples who benefit from joint returns will not be affected, and they are frequently the couples deriving the greatest benefit from the marital deduction.\textsuperscript{127} Second, the proposal introduces yet another set of calculations into each couple’s decision about filing status—this new set involving at best hypothetical facts as to future gift and estate taxes. Finally, the need for the marital deduction is removed if the couple is willing to obtain a divorce each time their wealth is held in a sufficiently disparate fashion. Expeditious use of section 2516 will thus reintroduce the question of sham in a context slightly different from that in \textit{Boyter}.\textsuperscript{128}

The complexity involved in optional separate filing stems from the fact that married couples would have to do at least three separate computations of taxable income and tax: his, hers, and theirs. The computations of the separate incomes would be complicated further by the recordkeeping requirements necessary to determine which items of income and deduction are allocable to each spouse.\textsuperscript{129} While this added complexity no doubt would be an inconvenience both for the taxpayer and for the government, it is presently a fact of life for residents of several states, among them Ohio, New York and North Carolina.

\begin{itemize}
\item \textsuperscript{127} High income couples who benefit from joint returns probably do so as to both earned and investment income and can use the marital deduction to reduce taxation on transfers of property producing the latter. Their ability to do so was significantly expanded by the changes in the gift tax marital deduction enacted in 1976. See I.R.C. § 2523.
\item \textsuperscript{128} Unlike the marital deduction provided by I.R.C. § 2523, the benefits of I.R.C. § 2516 are not subject to dollar or percentage limitations.
\item \textsuperscript{129} These problems involve more than a decision between separate and joint checking accounts.
\end{itemize}
Ohio residents already are forced to do what the optional single filing status bills would require: that is, compute their taxes jointly and separately and decide which is more advantageous. In fact, the Ohio computation must be done twice, as state income taxes also must be considered. Because Ohio has only one rate schedule,\textsuperscript{130} used by all taxpayers regardless of filing status, a joint state return would result in a higher tax\textsuperscript{131} than would separate returns whenever each spouse had positive income.\textsuperscript{132} Filing a joint state return also would result in a lower state tax if one spouse had a loss to offset against the other spouse's income.

Obviously, the Ohio system favors the filing of separate state returns. Nevertheless, joint returns comprise the majority of filings,\textsuperscript{133} because Ohio law requires married individuals to use the same filing status in filing their state returns as they use in filing their federal returns.\textsuperscript{134}

As discussed earlier in this article, married individuals are rarely benefited by filing separate federal returns,\textsuperscript{135} but the earlier discussion proceeded on the assumption that only federal tax liability was relevant. As Ohio taxpayers are frequently able to benefit from separate state returns, some married couples are forced every year to make six different tax computations to ascertain the lowest possible tax liability.\textsuperscript{136} Because the maximum amount that can be saved by filing separate state returns is five hundred dollars,\textsuperscript{137} the couple's computations

\begin{itemize}
  \item \textsuperscript{130} OHIO REV. CODE ANN. § 5747.02 (Page 1980).
  \item \textsuperscript{131} Like most other states, Ohio has a graduated rate schedule so that the tax rate increases as income rises. \textit{Id}.
  \item \textsuperscript{132} There will be no marriage penalty if (1) the couple's total taxable income was $5,000 or less or (2) one spouse's income was less than the personal exemption.
  \item \textsuperscript{133} [1978] OHIO DEP'T OF TAX ANN. REP. 54-55.
  \item \textsuperscript{134} OHIO REV. CODE ANN. § 5747.08(E) (Page 1980).
  \item \textsuperscript{135} See pp. 42-43 \textit{supra}.
  \item \textsuperscript{136} Computations of each spouse's taxes and of their combined tax are required at both the state and federal levels. Additional federal computations may be required to ascertain eligibility for income averaging or the maximum tax on personal service income. \textit{See} I.R.C. §§ 1301, 1348.
  \item \textsuperscript{137} The first $40,000 of income is taxed at graduated rates, with a maximum tax of $900. All income in excess thereof is taxed at a flat 3 \%\%. If each spouse earned $40,000, the second spouse's tax before credits would be $900 on a separate return and $1,400 on a joint return.
\end{itemize}
are eased considerably if they start at the federal level and find that joint federal returns save them more than that amount.\footnote{are eased considerably if they start at the federal level and find that joint federal returns save them more than that amount.}{138}

The computation should also begin with the federal returns because the Ohio taxable income computation is based upon federal adjusted gross income. Thus, even in those cases where multiple computations are needed to determine which income combination yields the smallest tax, the computations are not as complex as those required in New York or North Carolina.

A typical family that will pay a smaller overall tax filing separately for both Ohio and federal purposes is one in which both spouses earn a salary of $10,000. The couple has no dependents, income other than salary, or deductions beyond the zero bracket amount. Their combined Ohio joint return income would be $18,700; on a separate return each would report $9,350. Their combined federal joint return income would be $18,000; on separate returns each would report $9,000. Their comparative tax liabilities are illustrated in the table below, which is based upon tax liability before credits.

TAXES PAID: FEDERAL AND OHIO

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<tr>
<th>Jurisdiction</th>
<th>Joint Return</th>
<th>Separate Returns</th>
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</thead>
<tbody>
<tr>
<td>Federal</td>
<td>$2,745.00</td>
<td>$2,745.00</td>
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<tr>
<td>Ohio</td>
<td>267.50</td>
<td>137.00</td>
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<tr>
<td>Combined</td>
<td>$3,012.50</td>
<td>$2,882.00</td>
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</table>

Ohio does provide a partial reduction in the extra tax burden imposed upon working couples who file joint returns. A credit against the income tax is allowed whenever both spouses have federal adjusted gross incomes of five hundred dollars or more from nonpassive sources.\footnote{Ohio does provide a partial reduction in the extra tax burden imposed upon working couples who file joint returns. A credit against the income tax is allowed whenever both spouses have federal adjusted gross incomes of five hundred dollars or more from nonpassive sources.}{139} The joint filing credit is a sliding percentage of the tax otherwise due.\footnote{The joint filing credit is a sliding percentage of the tax otherwise due.}{140} Like the federal credits which have been proposed, the Ohio credit does not purport to offer complete relief from the additional tax paid by those filing joint returns.\footnote{The Ohio credit does not purport to offer complete relief from the additional tax paid by those filing joint returns.}{141}

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\footnote{138}{The federal computations will frequently take into account items that are not involved in Ohio tax computations, such as the requirement of a joint return if a child care credit is claimed. I.R.C. § 44A(f)(2).}
\footnote{139}{Ohio Rev. Code Ann. § 5747.05(I) (Page 1980).}
\footnote{140}{Id.}
\footnote{141}{The maximum credit of 20% is available only if taxable income is $10,000 or more.}
The Marriage Penalty

5:1980

The complexities inherent in the New York return situation stem primarily from allocation problems: records must be kept which can be used to compute each spouse's proper share of the combined income and deductions reported on the federal return. The same problem of allocation exists in North Carolina, which has yet a third solution to the problem of how married couples are to be treated for tax purposes.

North Carolina, which like Ohio and New York has only one rate schedule, does not allow the filing of joint state returns. Because its standard deduction is relatively low, itemized deductions are common, and North Carolina residents are quite proficient at gathering the data necessary to compute two separate state returns and either separate or joint federal returns.

One means of reducing the recordkeeping problems, as well as re-

or less. Id.

142. Letter from Richard A. Levin, Research Director, Ohio Department of Taxation, to Gail Levin Richmond (July 22, 1980).


144. Id. § 602(d) (McKinney Supp. 1979). The rates run from 2% to 14%.


147. Id. § 105-147(22) (lesser of 10% of adjusted gross income or $550).

148. Even single individuals are required to keep multiple records, because North Carolina allows several deductions not permitted in federal computations. Id. § 105-147(6)&(7) (federal airline excise tax; federal telephone excise tax; employer’s share of FICA tax on household help; a percentage of dividends received from corporations having income allocable to North Carolina).
ducing the avoidance problems which could result if the bulk of deductions were taken by the spouse with the higher income, would be to adopt the method which is already in use for couples when one spouse is averaging income. While gross income and deductions authorized in computing adjusted gross income are allocated to the spouse who produced them, all other deductions are prorated between the spouses using the ratios of their respective adjusted gross incomes. The same allocation method is used in computing the maximum tax on earned income, in this context to differentiate between earned and unearned income as opposed to husband's and wife's income. In addition, to reduce the government's data checking difficulties, the optional single returns could have two columns, as is done in many states. Each spouse's income and deductions then would appear on the same form. Thus, while complexity clearly will be increased using single filing status, the extent of such increase need not be unmanageable.

The problem of providing equitable relief for single individuals takes the entire discussion full circle to the changes which were made in 1948 and 1969. In testifying before the House Ways and Means Committee, a Treasury Department official noted four goals by which tax policy has been guided: the income tax should be progressive; married couples with equal combined income should pay the same tax; a tax penalty should not be imposed on marriage; and a tax penalty should not be imposed on becoming or staying single.

As the official astutely noted, it is impossible to achieve all four goals simultaneously. Perhaps the best that can be done at this time is to chip away at the marriage tax penalty rather than to eliminate it, thus limiting the unfairness caused to single individuals. In deciding among various remedies, Congress must, of course, consider federal revenue loss. However, it should not neglect an examination of alternatives already in use at the state level and of the effect its decision will have on states such as Ohio. No matter what is done by Congress in

149. See, e.g., Treas. Reg. § 1.1304-3(c)(1966).
150. I.R.C. § 1348(b)(2).
151. E.g., North Carolina and New York.
153. Id.
the 1980s, the likelihood of eliminating all objections and self-help remedies is minute. Indeed, as Bittker stated in 1975, "the chosen solution will itself turn out, sooner or later, to be a problem." 154

154. Bittker, supra note 1, at 1463.
APPENDIX I

BILLS INTRODUCED IN THE 96TH CONGRESS

A. Deduction Allowed Based Upon Earnings of Lesser-Earning Spouse

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B. Credit Allowed Based Upon Earnings of Lesser-Earning Spouse or Other Formula

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C. Optional Separate Filing

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D. Mandatory Separate Filing

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*The Carter Administration has adopted the approach embodied in H.R. 5829.
APPENDIX II

STATE INCOME TAX PROVISIONS

A. States Imposing No Income Tax
   Florida                                South Dakota     Washington
   Nevada                                Texas             Wyoming

B. States Imposing No Income Tax on Earned Income
   Connecticut                          New Hampshire     Tennessee

C. States Imposing an Income Tax at a Flat Rate
   Illinois                              Massachusetts     Pennsylvania
   Indiana                               Michigan

D. States Imposing an Income Tax at a Flat Percentage of Federal Liability
   Nebraska                              Rhode Island     Vermont

E. States Imposing an Income Tax Using Multiple Graduated Rate Schedules
   1. States in Which Single Individuals Use the Same Rate Schedule as Married Individuals Filing Separate Returns
      Alaska*                               Idaho           Oklahoma
      Arizona                                Kansas          Oregon
      California                             Louisiana       West Virginia
      Hawaii                                 Maine
   2. States in Which Single Individuals Use a Lower Rate Schedule than Do Married Individuals Filing Separate Returns
      Georgia                                New Mexico      Utah

F. States Imposing an Income Tax Using One Graduated Rate Schedule
   1. States Requiring Joint State Returns When Joint Federal Returns Are Used
      New Jersey                             Ohio
   2. States Allowing or Requiring Separate State Returns
      Alabama                                Maryland        North Carolina
      Arkansas                               Maryland        North Dakota
      Colorado                               Mississippi     South Carolina
      Delaware                                Missouri        Virginia
      Iowa                                    Montana         Wisconsin
      Kentucky                                New York

*before the September 1980 repeal of the Alaska income tax