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## BEYOND THE MARRIAGE TAX TRILEMMA

*Daniel Hemel\**

*For decades, the well-known “marriage tax trilemma” has played a central role in discussions of the tax treatment of the family unit. The “trilemma” refers to the mathematical impossibility of constructing a tax system that imposes the same tax liability across all married couples with the same income (couples neutrality), neither encourages nor penalizes marriage (marriage neutrality), and taxes higher income individuals at higher rates (progressivity). Numerous articles have proposed responses to the trilemma that choose two of the legs over a third or that seek to split the difference among the competing neutrality norms that the trilemma casts as desirable. Most casebooks, meanwhile, use the trilemma to introduce students to the policy debate over the taxation of marriage and the household.*

*The overwhelming emphasis on the trilemma is surprising once one recognizes that there is in fact no trilemma at all: we need not choose among couples neutrality, marriage neutrality, and progressivity because we can have all three. The solution—which several scholars have noted, but the tax policy debate has largely ignored—lies in a flat tax rate combined with a refundable per-person tax credit (or “demogrant”), which could be constructed so as to yield a highly progressive average rate structure while maintaining couples neutrality and marriage neutrality. Whatever the merits of the flat tax plus demogrant as a policy matter, it plays a useful role as a thought experiment: If we achieved progressivity through a flat tax and a demogrant, such that we could have couples neutrality and marriage neutrality simultaneously, would we want to deviate from these neutrality norms anyway? If so—if we would want to violate the couples neutrality and marriage neutrality norms even if*

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*they were compatible with a progressive tax structure—then the trilemma is not the central challenge in the taxation of singles and couples.*

*This Essay examines the arguments for couples neutrality and marriage neutrality, concluding that neither norm is an appropriate objective for tax policy. Couples neutrality sacrifices the potential efficiency gains from taxing secondary earners at reduced rates. Marriage neutrality relinquishes the distributive benefits of targeted transfers to single parents. To be sure, deviations from couples neutrality may lead to inefficient reallocations of labor within the household, and a single parent bonus necessarily entails a marriage penalty. These tradeoffs—unlike the soluble marriage tax trilemma—are the deep quandaries in the taxation of marriage that scholars and policymakers must confront.*

*The Essay concludes with implications for research, policy, and pedagogy. The analysis underscores the importance of studying the welfare effects of “marginal marriages”—the unions that modest tax penalties might deter—rather than basing policy analysis on data drawn from marriages that are distant from the margin. It also casts a somewhat more favorable light on the marriage penalties embedded in the earned income tax credit and the head of household filing status under the current tax code. Finally, it suggests that teachers of tax law should reorient class materials and discussions away from a trilemma that we know how to (but should not want to) solve and toward the genuine dilemmas in the tax treatment of marriage.*

## I. INTRODUCTION

A fundamental issue in the formulation of an income tax system is the treatment of marital status. For the past several decades, debates about the taxation of marriage in the United States have revolved around the so-called “marriage tax trilemma.”<sup>1</sup> The three legs of the trilemma are (1) couples neutrality, (2) marriage neutrality, and (3) progressivity.<sup>2</sup> It is mathematically impossible to devise a system that imposes the same tax liability across all married couples with the same income (couples neutrality<sup>3</sup>), neither

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1. Yair Listokin, *Taxation and Marriage: A Reappraisal*, 67 TAX L. REV. 185, 185 (2014).

2. *Id.*

3. The terms “couples neutrality” and “couples equity” are used interchangeably in the tax law literature. See, e.g., *id.* at 192; Victoria J. Haneman, *The Collision of Student Loan Debt and Joint Marital Taxation*, 35 VA. TAX REV. 223, 239 (2016). The former term, though perhaps less descriptive,

encourages nor penalizes marriage (marriage neutrality), and taxes higher income individuals at higher rates (progressivity).<sup>4</sup> An income tax system can incorporate any two of these three features, but it cannot have all three.<sup>5</sup>

Much of the legal scholarship on the tax treatment of marriage since the early 1970s has focused on—and grappled with—this trilemma. Boris Bittker, who was among the first tax law scholars to identify the problem, concluded that “there can be no peace in this area, only an uneasy truce.”<sup>6</sup> Several authors have argued that the trilemma should be solved by prioritizing marriage neutrality and progressivity over couples neutrality.<sup>7</sup> Lawrence Zelenak recently suggested a system of couples neutrality and progressive rates that would roughly equalize the maximum marriage penalty and marriage bonus at each income level.<sup>8</sup> Yair Listokin has proposed a progressive rate structure that tries to strike a balance between couples neutrality and marriage neutrality by deviating slightly from each, based on the assumption that “violating two principles a little is better than violating one principle a lot.”<sup>9</sup> All of these authors respond to the marriage tax trilemma either by choosing two of the three principles to vindicate or by trying to find a workable compromise among all three.

Not only does the trilemma idea shape scholarship on the tax treatment of marriage, but it also suffuses the materials that we as tax law professors use to teach our students. As Anne Alstott observes, “most casebooks and law teachers use [the trilemma] to

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is much more common (as of this writing, forty usages in the Westlaw “Law Reviews & Journals” database versus six for “couples equity”). This follows the crowd.

4. Listokin, *supra* note 1, at 192.

5. *Id.* at 195.

6. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1443 (1975). The trilemma was previously mentioned by Edwin Cohen, the Assistant Secretary of the Treasury for Tax Policy under President Nixon, in testimony before the House Ways and Means Committee three years earlier. See *The Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working: Hearing Before the H. Comm. on Ways and Means*, 92nd Cong. 78 (1972) [hereinafter Cohen Testimony] (statement of Edwin S. Cohen).

7. See, e.g., Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 3 (1980); Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 610 (2010); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 65 (1993); Jeannette Anderson Winn & Marshall Winn, *Till Death Do We Split: Married Couples and Single Persons Under the Individual Income Tax*, 34 S.C. L. REV. 829, 869 (1983).

8. See Lawrence Zelenak, *For Better or Worse: The Differing Income Tax Treatments of Marriage at Different Income Levels*, 93 N.C. L. REV. 783, 816 (2015).

9. Listokin, *supra* note 1, at 186.

structure classes on the taxation of the family.”<sup>10</sup> The most recent edition of Alstott’s own coauthored casebook begins its section on the taxation of the family with an extended discussion of the trilemma.<sup>11</sup> The late Paul McDaniel and his coauthors introduce couples neutrality, marriage neutrality, and progressivity as “competing and conflicting policy objectives” in the taxation of marriage.<sup>12</sup> Richard Schmalbeck and Lawrence Zelenak use the trilemma to orient their casebook’s discussion of the tax treatment of families, noting that marriage non-neutrality is an “unfortunate” byproduct of “the basic policy decisions to have (1) a progressive rate structure and (2) joint returns for married taxpayers.”<sup>13</sup> Virtually every other introductory income tax casebook places the trilemma front and center in its discussion of tax policy toward marriage.<sup>14</sup> Perhaps most vividly, hornbook authors Daniel Posin and Donald Tobin—after laying out the trilemma and demonstrating its insolubility—conclude: “Dispirited as we are by this conundrum, we are relegated to just sitting in a corner and eating our Christmas pie.”<sup>15</sup>

The overwhelming scholarly and pedagogical focus on the marriage tax trilemma is puzzling once one recognizes that, in fact, there is no trilemma at all: we do not need to choose among couples neutrality, marriage neutrality, and progressivity because we can have all three. The straightforward solution lies in a flat tax rate with a refundable per capita credit (or “demogrant,”) which would achieve progressivity while also imposing equal taxes on all equal-

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10. Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 698 (2013). Alstott suggests that “[o]nce we recognize that marriage is no longer the organizing institution for work and family life” we face the “new trilemma” in constructing a tax code with progressive marginal rates that “assesses equal taxes on *households* with equal earnings” and does not distort decisions regarding household formation. *Id.* at 729 (emphasis added).

11. MICHAEL J. GRAETZ, DEBORAH H. SCHENK & ANNE L. ALSTOTT, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 496–501 (8th ed. 2018).

12. PAUL R. MCDANIEL ET AL., FEDERAL INCOME TAXATION: CASES AND MATERIALS 1310 (6th ed. 2008).

13. RICHARD SCHMALBECK & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 778–79 (2d ed. 2007).

14. *See, e.g.*, JOSEPH M. DODGE ET AL., FEDERAL INCOME TAX: DOCTRINE, STRUCTURE, AND POLICY—TEXT, CASES, PROBLEMS 96 (4th ed. 2012); ALAN GUNN & LARRY D. WARD, CASES, TEXT AND PROBLEMS ON FEDERAL INCOME TAXATION 473 (6th ed. 2006) (listing progressivity, marriage neutrality, and couples neutrality as the “[c]onflicting policy goals” in the taxation of marriage); PAUL R. MCDANIEL ET AL., FEDERAL INCOME TAXATION: CASES AND MATERIALS 1310 (6th ed. 2008) (progressivity, marriage neutrality, and couples neutrality are the “[c]ompeting and conflicting policy objectives” in the taxation of marriage). An important exception is JOSEPH BANKMAN ET AL., FEDERAL INCOME TAXATION 395–96 (17th ed. 2017), which notes the possibility of using flat rates with a demogrant. *See also* SCHMALBECK & ZELENAK, *supra* note 13, at 779 (noting the possibility of a flat tax plus demogrant but dismissing it as politically infeasible).

15. DANIEL Q. POSIN & DONALD B. TOBIN, PRINCIPLES OF FEDERAL INCOME TAXATION 455 (6th ed. 2003).

income couples and neither subsidizing nor penalizing marriage. The solution, moreover, has existed in plain view for some time: Jane Fraser, a scholar of industrial engineering and operations research, demonstrated the point formally in a 1986 article in the journal *Management Science*.<sup>16</sup> A handful of tax law scholars have made the same observation in the decades since—sometimes crediting Fraser,<sup>17</sup> sometimes not.<sup>18</sup>

The primary objective of this Essay is *not* to demonstrate that a flat tax plus a demogrant resolves the marriage tax trilemma. That point—as noted—is one Fraser made with admirable clarity more than three decades ago.<sup>19</sup> Nor is my argument that we *ought* to adopt a flat tax plus demogrant; others—including Joseph Bankman and Thomas Griffith—have explored the virtues of this arrangement with nuance and in depth.<sup>20</sup> But whether or not it is a wise policy, a flat tax plus a demogrant provides a useful thought experiment that allows us to reevaluate the scholarly and pedagogical emphasis on the marriage tax trilemma. If we were to achieve progressivity through a flat tax plus a demogrant such that it would be possible to maintain couples neutrality and marriage neutrality, would we want to deviate from those principles? If yes—if we would want to depart from couples neutrality and marriage neutrality even if both were compatible with progressivity (as they are)—then the trilemma cannot be the central challenge in the taxation of the family unit.

This Essay argues that neither couples neutrality nor marriage neutrality ought to be a desideratum of tax policy. Put more starkly: even if we can resolve the marriage tax trilemma (and we can), we should not. We can make the tax system more efficient and more equitable by imposing different tax burdens on couples with the same combined income (thus violating couples neutrality), and we can achieve meaningful distributional benefits by introducing modest subsidies for single parents (thus violating marriage neutrality). The central challenge in the taxation of marriage is *not* how to mediate among the conflicting goals of couples neutrality, marriage neutrality, and progressivity, not only because the third goal need not conflict with the first two but also because the first two should not be goals at all.

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16. Jane M. Fraser, *The Marriage Tax*, 32 MGMT. SCI. 831, 839–40 (1986).

17. See Marcus Berliant & Paul Rothstein, *Possibility, Impossibility, and History in the Origins of the Marriage Tax*, 56 NAT'L TAX J. 303, 303–04 (2003).

18. See Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 75–76 (2000); see also Mitchell L. Engler & Edward D. Stein, *Not Too Separate or Unequal: Marriage Penalty Relief After Obergefell*, 91 WASH. L. REV. 1073, 1086 n.63 (2016) (citing Zelenak, *supra*).

19. Fraser, *supra* note 16, at 832.

20. Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1955–67 (1987).

Start with couples neutrality. A stylized fact of labor economics is that secondary earners in dual income couples are more sensitive to income tax rates than primary earners are.<sup>21</sup> As a result, policymakers can reduce the excess burden (i.e., “deadweight loss”) of income taxation by applying lower tax rates to secondary earners than to primary earners.<sup>22</sup> Couples neutrality necessarily sacrifices the potential efficiency gains from taxing secondary earners at lower rates.<sup>23</sup> Importantly, the efficiency gains from reducing the tax rate on secondary earners must be balanced against the efficiency losses that arise from tax-motivated reallocations of household labor responsibilities when different members of a couple face different rates.<sup>24</sup> Several other authors have noted this tradeoff;<sup>25</sup> this Essay explains how the tradeoff can be resolved using a straightforward mathematical formula based on the elasticity of taxable income for primary and secondary earners.<sup>26</sup> While there is still the formidable empirical challenge of estimating those elasticities, the appropriate conceptual framework is readily accessible.

Couples neutrality also appears unattractive from an equity perspective. Equity considerations counsel in favor of allocating tax burdens on the basis of ability to pay.<sup>27</sup> Couples neutrality requires that a couple in which one spouse earns \$100,000 from full-time employment and the other spouse earns zero must pay the same in total tax as a couple in which both spouses work full time and earn \$50,000 each. All else equal, the first couple has a higher ability to pay than the second because the non-earning spouse in the first couple can provide services such as child care for which the second couple likely must pay out of pocket. The principle of horizontal equity instructs us to tax likes alike,<sup>28</sup> but couples neutrality necessarily leads us to tax unalikes alike and to tax likes unalike.

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21. See, e.g., Nada Eissa & Hilary Hoynes, *Taxes and the Labor Market Participation of Married Couples: The Earned Income Tax Credit*, 88 J. PUB. ECON. 1931, 1932–36 (2004); Robert K. Triest, *The Effect of Income Taxation on Labor Supply in the United States*, 25 J. HUM. RESOURCES 491, 513 (1990).

22. Martin Feldstein & Daniel R. Feenberg, *The Taxation of Two-Earner Families*, in THE EMPIRICAL FOUNDATIONS OF HOUSEHOLD TAXATION 39, 40–41 (Martin Feldstein & James Poterba eds., 1996).

23. See John Piggott & John Whalley, *The Tax Unit and Household Production*, 104 J. POL. ECON. 398, 415 (1996).

24. *Id.* at 399.

25. See, e.g., Patricia Apps & Ray Rees, *Optimal Family Taxation and Income Inequality*, 25 INT’L TAX & PUB. FIN. 1093, 1095 (2018); Michael J. Boskin & Eytan Sheshinski, *Optimal Tax Treatment of the Family: Married Couples*, 20 J. PUB. ECON. 281, 282 (1983); Piggott & Whalley, *supra* note 23, at 415; Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S. CAL. L. REV. 15, 198–99 (1998).

26. See Piggott & Whalley, *supra* note 23, at 399.

27. See, e.g., Triest, *supra* note 21, at 512–13.

28. Jonathan Barry Forman, *What Can Be Done About Marriage Penalties?*, 30 FAM. L.Q. 1, 1 n.3 (1996).

Tax policy generally requires difficult tradeoffs between efficiency and equity, but couples neutrality accomplishes neither.

The case against marriage neutrality, meanwhile, arises from the observation that single status—and especially single *parent* status—serves as a powerful indicator of ability to pay. Again, if we seek to allocate tax burdens on the basis of ability to pay, this observation would seem to suggest that single parents deserve a targeted tax break. Interestingly, the argument for a single parent tax break exposes deep tensions between utilitarian and egalitarian justifications for progressive taxation. And inevitably, the implementation of a single parent tax break introduces a marriage tax penalty. Critics of the marriage penalties generated by the earned income tax credit and head of household filing status under current law overlook the fact that these penalties are a logical corollary of our choice to subsidize struggling single parents.<sup>29</sup>

In sum, the solubility of the classic trilemma does not answer the question of how the tax system should treat marriage. Tax policy with respect to marriage still involves difficult tradeoffs, though they are different than the tradeoffs upon which the trilemma framework focuses. In some cases, the fundamental difficulties are essentially empirical; in other cases, the challenges are normative. While this Essay offers a number of tentative policy recommendations regarding the tax treatment of marriage, the more central claim is that we—as scholars and as teachers—should redirect our attention from a largely false trilemma and toward the deeper policy problems that the taxation of marriage entails.

The Essay proceeds as follows: Part II introduces the marriage tax trilemma and explains how federal tax law currently chooses to resolve it. Part III shows how a flat tax with a demogrant would—at least superficially—put the trilemma to rest. Part IV then asks whether one leg of the trilemma, couples neutrality, is in fact a goal

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29. See, e.g., Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y. L. SCH. J. HUM. RTS. 287, 302 (1999); Zelenak, *supra* note 8, at 791, 816; Edward J. McCaffery, *The Marriage Penalty Was Never Fair, and Is Now Just Silly*, N.Y. TIMES (Apr. 14, 2013), <https://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>. Alstott, whose deep and nuanced analysis of the tax treatment of marriage has done more than anyone else's to influence my own thinking, acknowledges that marriage disincentives in the income tax and the earned income tax credit are “[n]ot easily eradicated,” but Alstott still maintains that “[t]he marriage penalty is undesirable”—a conclusion that I question in Part V. Anne L. Alstott, *Alleviating Marriage Penalties in the Income Tax and the Earned Income Tax Credit*, 66 TAX NOTES 1343, 1343 (1995). For a further (and rich) analysis of marriage disincentives embedded in the EITC, see Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 559–64 (1995) (noting that “[t]he EITC, like other income-tested transfer programs, creates unavoidable and difficult policy tradeoffs between potential marriage disincentives and accurate targeting of benefits”).



worth pursuing. Part V asks a similar question about the second leg of the trilemma, marriage neutrality. The final Part concludes with implications for research, policy, and pedagogy.

## II. THE MARRIAGE TAX TRILEMMA IN THEORY AND PRACTICE

### A. *The Trilemma in Theory*

The marriage tax trilemma is ultimately a matter of math. Start with four individuals: Addison, Blake, Casey, and Dana. Imagine that Addison and Blake each earn \$100,000, that Casey earns \$200,000, and that Dana earns \$0. Consider a two-bracket income tax schedule, with a 20% rate on the first \$100,000 of income and a 40% rate on income over \$100,000. This is a simple example of a progressive marginal rate structure (i.e., a structure that imposes higher marginal rates on higher-earning taxpayers). Table 1 illustrates the resulting distribution of income and tax burdens:

TABLE 1. DISTRIBUTION OF INCOME AND TAX BURDENS FOR HYPOTHETICAL UNMARRIED INDIVIDUALS—PROGRESSIVE

	<b>Addison</b>	<b>Blake</b>	<b>Casey</b>	<b>Dana</b>
Income	\$100,000	\$100,000	\$200,000	\$0
Tax	\$20,000	\$20,000	\$60,000	\$0

Now imagine that Addison and Blake marry and that Casey and Dana marry. Marriage neutrality requires that the tax paid by Addison and Blake as a couple equal the total amount that each paid previously. Otherwise, Addison and Blake would receive either a marriage bonus or a marriage penalty. Likewise, marriage neutrality requires that the tax paid by Casey and Dana as a couple equal the total amount that each paid before. Table 2 illustrates the distribution of income and tax burdens when the two-bracket progressive income tax schedule described above is implemented in a marriage-neutral manner:

TABLE 2. DISTRIBUTION OF INCOME AND TAX BURDENS FOR HYPOTHETICAL UNMARRIED AND MARRIED INDIVIDUALS—PROGRESSIVE, MARRIAGE NEUTRAL

	<b>Addison</b>	<b>Blake</b>	<b>Addison &amp; Blake</b>	<b>Casey</b>	<b>Dana</b>	<b>Casey &amp; Dana</b>
Income	\$100,000	\$100,000	\$200,000	\$200,000	\$0	\$200,000
Tax	\$20,000	\$20,000	\$40,000	\$60,000	\$0	\$60,000

While achieving marriage neutrality, the result in Table 2 violates couples neutrality, which requires that married couples with

equal incomes pay equal amounts in taxes. The combined income of Addison and Blake (\$200,000) is equal to the combined income of Casey and Dana (\$200,000), but marriage neutrality means that Addison and Blake pay less in taxes (\$40,000) than Casey and Dana do (\$60,000).

Couples neutrality can be restored by setting the tax on the now-married Addison and Blake equal to the tax on the now-married Casey and Dana. For example, we could raise the tax on Addison and Blake to equal the tax on Casey and Dana, as illustrated in Table 3:

TABLE 3. DISTRIBUTION OF INCOME AND TAX BURDENS FOR  
HYPOTHETICAL UNMARRIED AND MARRIED INDIVIDUALS—  
PROGRESSIVE, MARRIAGE PENALTY FOR EQUAL-EARNING COUPLE

	<b>Addison</b>	<b>Blake</b>	<b>Addison &amp; Blake</b>	<b>Casey</b>	<b>Dana</b>	<b>Casey &amp; Dana</b>
Income	\$100,000	\$100,000	\$200,000	\$200,000	\$0	\$200,000
Tax	\$20,000	\$20,000	\$60,000	\$60,000	\$0	\$60,000

Now, the married Addison and Blake pay the same in taxes as the married Casey and Dana (\$60,000), but Addison and Blake pay more in combined taxes when they are married (\$60,000) than they did when they were single (\$40,000). Thus, Addison and Blake face a marriage penalty.

Alternatively, we could restore couples neutrality by lowering the tax on the now-married Casey and Dana to equal the tax on the now-married Addison and Blake, as illustrated in Table 4:

TABLE 4. DISTRIBUTION OF INCOME AND TAX BURDENS FOR  
HYPOTHETICAL UNMARRIED AND MARRIED INDIVIDUALS—  
PROGRESSIVE, MARRIAGE BONUS FOR UNEQUAL-EARNING COUPLE

	<b>Addison</b>	<b>Blake</b>	<b>Addison &amp; Blake</b>	<b>Casey</b>	<b>Dana</b>	<b>Casey &amp; Dana</b>
Income	\$100,000	\$100,000	\$200,000	\$200,000	\$0	\$200,000
Tax	\$20,000	\$20,000	\$40,000	\$60,000	\$0	\$40,000

Now, the married Casey and Dana pay the same in taxes as the married Addison and Blake (\$40,000), but the combined tax paid by Casey and Dana is less when they are married (\$40,000) than when they were single (\$60,000). Thus, Casey and Dana reap a marriage bonus.

Our problem arises because we began with the premise of progressivity: if Casey's income is twice Addison's, then Casey must pay more than twice what Addison does in taxes. If we abandon progressivity as a premise, then couples neutrality and marriage

neutrality can both be achieved. Imagine that we set a flat tax rate equal to 25% of income, as illustrated in Table 5:

TABLE 5. DISTRIBUTION OF INCOME AND TAX BURDENS FOR  
HYPOTHETICAL UNMARRIED AND MARRIED INDIVIDUALS—FLAT RATE  
(25%)

	Addison	Blake	Addison & Blake	Casey	Dana	Casey & Dana
Income	\$100,000	\$100,000	\$200,000	\$200,000	\$0	\$200,000
Tax	\$25,000	\$25,000	\$50,000	\$50,000	\$0	\$50,000

We have achieved the goals of couples neutrality and marriage neutrality, but at the price of progressivity. Thus, as these Tables illustrate, it would seem that as long as we cling to the principle of progressivity, couples neutrality and marriage neutrality are not simultaneously maintainable.

Consistent with this logic, President Nixon’s Assistant Secretary of the Treasury for Tax Policy, Edwin Cohen, told the House Ways and Means Committee in 1972 that “[n]o algebraic equation, no matter how sophisticated,” can reconcile couples neutrality and marriage neutrality with progressive taxation.<sup>30</sup> “All that we can hope for,” the Assistant Secretary said, “is a reasonable compromise.”<sup>31</sup> Similarly, the staff of the Joint Committee on Taxation stated in a 1980 report that “[a]ny system of taxing married couples requires making a choice among three different ideas of tax equity”: that “the tax system should be ‘marriage neutral’”; that “couples with the same income should pay the same amount of tax”; and finally, that “as income rises, the tax burden should rise as a percentage of income.”<sup>32</sup> “Unhappily,” the staff report concluded, “these three concepts of equity are mutually inconsistent.”<sup>33</sup> Judge Henry Friendly of the U.S. Court of Appeals for the Second Circuit—in rejecting a claim that marriage penalties in the federal income tax code violated the Constitution’s equal protection guarantee—likewise said that “it is simply impossible to design a progressive tax regime in which all married couples of equal aggregate income are taxed equally and in which an individual’s tax liability is unaffected by changes in marital status.”<sup>34</sup> Quoting Cohen, Judge Friendly noted that “[b]oth ends of a seesaw cannot be up at the same time.”<sup>35</sup>

30. Cohen Testimony, *supra* note 6, at 79.

31. *Id.*

32. STAFF OF THE JOINT COMM. ON TAXATION, THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS 26 (1980).

33. *Id.*

34. *Druker v. Comm’r*, 697 F.2d 46, 50 (2d Cir. 1982).

35. *Id.* at 50 (quoting Cohen Testimony, *supra* note 6).

*B. The Trilemma Across Time*

The ends of the seesaw have swung up at different times throughout U.S. history. From the passage of the first modern income tax in 1913 until 1930, Congress prioritized marriage neutrality over couples neutrality.<sup>36</sup> Then in 1930, the Supreme Court held in *Poe v. Seaborn*<sup>37</sup> that each spouse in a community property state should be taxed on 50 percent of the couple's community income.<sup>38</sup> As a result, couples in community property states (at the time, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington) generally reaped a marriage bonus, while marriage neutrality prevailed in the rest of the country.<sup>39</sup> The Revenue Act of 1948 extended the benefit of income splitting to couples in all states; thus, couples neutrality with a marriage bonus became the nationwide norm.<sup>40</sup> Since then, couples neutrality has remained close to a constant (with a notable exception in the 1980s discussed below), but marriage neutrality has not. Couples with a primary earner who makes substantially more than a secondary earner have generally reaped a marriage bonus, while couples in which each member makes approximately the same amount have faced sometimes-substantial marriage penalties.<sup>41</sup>

During the 2016 presidential campaign, candidate Donald Trump vowed to “eliminate the marriage penalty” once and for all.<sup>42</sup> The tax bill that he signed into law in December 2017<sup>43</sup> fell well short of that promise. While some news reports in the initial aftermath of the bill's passage suggested that Congress and President Trump had eliminated marriage penalties for all except the highest income earners,<sup>44</sup> the new law leaves in place—and in some cases

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36. See Edward G. Fox, *Do Taxes Affect Marriage? Lessons from History* 19–23 (N.Y. Univ. Law Sch., N.Y. Univ. Ctr. for Law, Econ. & Org., Law & Econ. Research Paper Series, Working Paper No. 17-15, 2017).

37. 282 U.S. 101 (1930).

38. *Id.* at 118.

39. See Fox, *supra* note 36, at 18–19.

40. Revenue Act of 1948, Pub. L. No. 80-471, § 301, 62 Stat. 110, 114 (1948); see also Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1103–16 (1948).

41. See John Brozovsky & A.J. Cataldo, II, *A Historical Analysis of the “Marriage Tax Penalty”*, 21 ACCT. HISTORIANS J. 163, 166 (1994).

42. Donald J. Trump for President, *Trump: Tax Reform That Will Make America Great Again*, <https://assets.donaldjtrump.com/trump-tax-reform.pdf> (last visited July 30, 2019).

43. See Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of 26 U.S.C.).

44. See Michael Durkheimer, *Under the GOP Tax Bill, Not Being Married Could Cost You*, FORBES (Dec. 17, 2017, 3:08 PM), <https://www.forbes.com/sites/michaeldurkheimer/2017/12/17/under-the-gop-tax-bill-not-being-married-could-cost-you> (“The potential for a ‘marriage penalty’ . . . would be preserved, in small part, for a few potential couples earning very high incomes (over \$300,000 each) . . .”); Louis Jacobs, *Marriage Penalty Mostly Eliminated, But Not Entirely*, POLITIFACT (Dec. 21, 2017, 3:16 PM),

exacerbates—substantial marriage penalties for dual income couples that earn much less than the highest earners.<sup>45</sup>

Table 6 is a representation of the marriage bonuses (positive) and penalties (negative) that couples at different income levels face under the new law. The left side shows the effect of marriage on federal income tax liability for a couple with no children; the right side shows the effect of marriage on federal income tax liability for a couple with two children (one each). For two individuals earning the same amount (the 50/50 Split), the marriage penalty can be quite substantial—especially when each member of the couple has a child. For couples in which one member is the sole income earner (the 100/0 Split), marriage results in a generous tax bonus at most points along the income distribution.

TABLE 6. MARRIAGE BONUSSES AND PENALTIES FOR TAX YEAR 2018\*

Combined Income	No Children		2 Children (1 Each)	
	Bonus (Penalty) 50/50 Split	Bonus (Penalty) 100/0 Split	Bonus (Penalty) 50/50 Split	Bonus (Penalty) 100/0 Split
\$20,000	-\$735	+\$800	-\$709	+\$3583
\$50,000	+\$1	+\$1631	-\$1339	-\$39
\$100,000	+\$1	+\$6671	-\$1603	+\$5849
\$200,000	+\$1	+\$11,031	-\$5643	+\$9719
\$500,000**	-\$4849	+\$31,761	-\$7631	+\$30,369
*Author's calculations, factoring in statutory tax rates, standard deduction, earned income tax credit, child tax credit for child under 17, and additional Medicare tax. Assumes that a single individual with one child will file as a head of household and that married couples will file jointly.				
**For couple with combined income of \$500,000, assumes itemized deductions; 5% state income tax rate; \$20,000 per person in mortgage interest and charitable contributions.				

It is worth pausing to emphasize that these marriage bonuses and penalties are *annual*. If you are reading this and you are a member of a dual-earner married couple with a combined income of \$200,000 per year and with, say, a 2 year-old and a newborn, consider that the expected net present value of the tax savings from getting divorced and cohabitating with your spouse from now until when your

<https://www.politifact.com/truth-o-meter/promises/trumpometer/promise/1427/eliminate-marriage-penalty> (“Under the new tax brackets, the marriage penalty only phases in with the second-highest tax bracket . . . which is for earners between \$200,000 and \$500,000 (individual) and \$400,000 and \$600,000 (married couples).”).

45. See *infra* Table 6.

2 year-old goes off to college is on the order of \$70,000.<sup>46</sup> Of course, the rate tables may (and likely will) change between now and then, but they could change in either direction (i.e., the marriage penalty could be lower, but it also may be higher). This is not a brief for divorce and cohabitation; it is merely to point out that marriage penalties remain real and substantial.

Four features of the tax code account for most of the marriage penalties observed. The first is the earned income tax credit (“EITC”). In tax year 2018, the credit begins to phase out at \$18,660 for single parents and at \$24,350 for married parents.<sup>47</sup> Thus, low-income single parents whose earned income falls below the phaseout amount may vault into the phaseout range when they wed (and, in some cases, may lose the credit entirely as a result of marriage).<sup>48</sup> The December 2017 tax law left the EITC untouched, so the preexisting EITC marriage penalty persists.<sup>49</sup>

Second, the December 2017 tax law retains the head of household filing status.<sup>50</sup> Single parents who live with children under age 19 will generally qualify as heads of household.<sup>51</sup> The new standard deduction for heads of household is \$18,000, while the standard deduction for joint filers is \$24,000.<sup>52</sup> Thus, if two heads of household who claim the standard deduction decide to marry, their combined taxable income rises by \$12,000 (i.e., the sum of their standard deductions falls from \$36,000 to \$24,000). Moreover, the structure of the bottom three income tax brackets is particularly favorable to heads of household relative to single filers and married couples.<sup>53</sup> Single parents who marry sacrifice the benefit of the preferential head of household rate structure.

Third, the December 2017 tax law imposes a \$10,000 cap on state and local tax (“SALT”) deductions for individual taxpayers.<sup>54</sup> The same \$10,000 cap applies to single filers, heads of household, and married couples filing jointly.<sup>55</sup> Thus, two unmarried individuals who

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46. The net present value of a fifteen-year term annuity with an annual payment of \$5,643 per year and a three percent interest rate is \$69,386.74.

47. Rev. Proc. 2018-18, 2018-10 I.R.B.

48. Rev. Rul. 2018-06, 2018-10 I.R.B. Moreover, the maximum credit for a parent with one child (\$3,461) is less than half the maximum credit for parents with two children (\$5,716), so if two credit-eligible single parents, each with one child, decide to marry, their combined credit will fall. *See* Rev. Proc. 2018-18.

49. *See* Allen J. Rubenfield & Ganesh M. Pandit, *The Status of the “Marriage Penalty”: An Update from the Tax Cuts and Jobs Act*, CPA J. (Feb. 2019), <https://www.cpajournal.com/2019/02/04/the-status-of-the-marriage-penalty-an-update-from-the-tax-cuts-and-jobs-act/>.

50. *See* I.R.C. § 2(b) (2018).

51. *See id.* §152.

52. *See id.* § 63(c)(7).

53. *See id.* § 1(j)(2)(B).

54. *See id.* § 164(b)(6)(B).

55. The cap is \$5000 for a married individual filing a separate return. *See id.*

itemize their deductions and whose SALT payments exceed the cap will see their taxable income rise by \$10,000 if they wed. The structure of the SALT cap alone imposes a marriage penalty of up to \$3700 on higher income individuals—with the brunt of the burden borne by individuals in blue states that tend to have higher state and local taxes.<sup>56</sup>

Finally, several of the taxes imposed by the Affordable Care Act (“ACA”) have marriage penalties baked into them. The additional hospital insurance tax of 0.9% applies to wages above \$200,000 for single filers and heads of household but sets in at \$250,000 for joint filers.<sup>57</sup> That provision alone adds a marriage penalty of up to \$1350 for high-income couples. The ACA’s 3.8% net investment income tax takes effect at the same thresholds, yielding a marriage penalty of up to \$5700 for couples with substantial income from interest, dividends, capital gains, and similar sources.<sup>58</sup> The December 2017 tax law did not repeal these provisions of the ACA.<sup>59</sup> Nor did it alter the ACA’s premium assistance credit,<sup>60</sup> which can add a marriage penalty of more than \$1000 for two-earner couples slightly above the poverty line.<sup>61</sup>

As the previous paragraphs indicate, “blame” for marriage penalties lies at both parties’ feet. Congressional Republicans and a Republican President exacerbated the marriage penalty for low- to middle-income single parents as part of the December 2017 tax law;<sup>62</sup> Congressional Democrats and a Democratic President exacerbated the marriage penalty for very high-income, equal-earner couples as

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56. On the disparate geographic impact and political economy of the \$10,000 SALT cap, see Daniel Hemel, *The Death and Life of the State and Local Tax Deduction*, 72 TAX L. REV. (forthcoming 2019).

57. See I.R.C. § 3101(b)(2).

58. See *id.* § 1411 (a)–(b).

59. See Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, 131 Stat. 2054 (2017) (codified as amended in scattered sections of 26 U.S.C.).

60. See I.R.C. § 36B.

61. For a characteristically clear illustration of the potential marriage penalty embedded in the premium assistance credit, see Zelenak, *supra* note 8, at 802-04.

62. For single parents who claim the standard deduction, the 2017 tax law expanded the marriage penalty for equal-income single parents by rolling personal exemptions into a larger marriage-dependent standard deduction. Compare *Publication 501 (2017), Exemptions, Standard Deduction, and Filing Information*, INTERNAL REVENUE SERV., <https://www.irs.gov/pub/irs-prior/p501--2017.pdf>, with *Publication 501 (2018), Dependents, Standard Deduction, and Filing Information*, INTERNAL REVENUE SERV., <https://www.irs.gov/publications/p501> (last updated Jan. 7, 2019). Under prior law, a couple’s combined “zero bracket” shrunk by \$6000 when two heads of household married. See *Publication 501 (2017), Exemptions, Standard Deductions, and Filing Information*, INTERNAL REVENUE SERV., <https://www.irs.gov/pub/irs-prior/p501--2017.pdf>. Under current law, the \$6000 figure jumps to \$12000. *Publication 501 (2018), Dependents, Standard Deduction, and Filing Information*, INTERNAL REVENUE SERV., <https://www.irs.gov/publications/p501> (last updated Jan. 7, 2019).

part of the 2012 Affordable Care Act.<sup>63</sup> And as I argue in Part V, “blame” is not obviously the right word to describe the appropriate response to the realization that the tax code penalizes (some) marriages. Marriage penalties may be a feature, not a bug, of our tax laws. The goal of the discussion here is simply to show that— notwithstanding news reports regarding the near-elimination of marriage penalties—federal tax law still penalizes many potential marriages.

To be sure, millions of couples stand to reduce their tax bills via marriage—sometimes quite substantially.<sup>64</sup> Couples with disparate incomes benefit the most from knot-tying (at least as far as tax liability is concerned); couples with equal incomes often lose out.<sup>65</sup> However, it is clear that Congress’ resolution to the marriage tax trilemma is the opposite of the solution that many academic commentators have recommended:<sup>66</sup> rather than prioritizing marriage neutrality over couples neutrality, Congress has hewn closely to couples neutrality while letting marriage neutrality fall by the wayside.

### III. HACKING THE MARRIAGE TAX TRILEMMA

It does not have to be this way. As noted in the introduction, marriage non-neutrality is not a necessary byproduct of our choice to maintain couples neutrality within a progressive tax system. The trilemma, it turns out, is not as intractable as it initially seems.

The solution lies in a linear income tax with a demogrant. To see how that might work, return to our two hypothetical couples: Addison and Blake, and Casey and Dana. Again, Addison and Blake each earn \$100,000, while Casey earns \$200,000 and Dana earns \$0. In Tables 1 through 4, we sought to achieve progressivity through a two-bracket rate structure. Imagine instead that we impose a 35% flat tax rate and a \$10,000 per person refundable tax credit, or demogrant. Table 7 illustrates the resulting distribution of income and tax burdens when Addison, Blake, Casey, and Dana earn the same as before and are unmarried:

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63. The ACA also led to larger marriage penalties for many lower-income couples claiming premium assistance subsidies for the purchase of health insurance on the individual market. See J. Sebastian Leguizamon & Susane Leguizamon, *Health Insurance Subsidies and the Expansion of an Implicit Marriage Penalty: A Regional Comparison of Various Means-Tested Programmes*, 25 APPLIED ECON. LETTERS 130 (2018).

64. Laura Saunders, *Everything You Need to Know About the New Tax Law—Before the End of the Year*, WALL ST. J.: YOUR MONEY (Nov. 2, 2018, 5:30 AM), <https://www.wsj.com/articles/everything-you-need-to-know-about-the-new-tax-law-before-the-end-of-the-year-1541151030>.

65. See *supra* Table 6.

66. See sources cited *supra* note 7.



TABLE 7. DISTRIBUTION OF INCOME AND TAX BURDENS FOR  
HYPOTHETICAL UNMARRIED INDIVIDUALS—FLAT TAX (35%) WITH  
DEMOGRANT (\$10,000)

	<b>Addison</b>	<b>Blake</b>	<b>Casey</b>	<b>Dana</b>
Income	\$100,000	\$100,000	\$200,000	\$0
Tax	\$25,000	\$25,000	\$60,000	-\$10,000
Effective Tax Rate	25%	25%	30%	—

The tax system still is progressive in terms of effective rate: the higher your income, the higher your effective rate. The net revenue raised by the government (\$100,000) also is the same in both systems. But now consider what happens when Addison and Blake marry and when Casey and Dana marry:

TABLE 8. DISTRIBUTION OF INCOME AND TAX BURDENS FOR  
HYPOTHETICAL UNMARRIED AND MARRIED INDIVIDUALS— FLAT TAX  
(35%) WITH DEMOGRANT (\$10,000)

	<b>Addison</b>	<b>Blake</b>	<b>Addison &amp; Blake</b>	<b>Casey</b>	<b>Dana</b>	<b>Casey &amp; Dana</b>
Income	\$100,000	\$100,000	\$200,000	\$200,000	\$0	\$200,000
Tax	\$25,000	\$25,000	\$50,000	\$60,000	-\$10,000	\$50,000
Effective Tax Rate	25%	25%	25%	30%	—	25%

As Table 8 illustrates, the combined amount paid by Addison and Blake is \$50,000 regardless of whether they are married. So too for Casey and Dana. Marriage neutrality and couples neutrality have been restored.

Only the most credulous of readers would stop at this point and conclude that the marriage tax trilemma has been solved once and for all. There are several potential objections to replacing the current graduated rate schedule with a flat tax plus a demogrant. Three merit particular attention.

First, one might wonder whether a flat tax plus a demogrant can actually achieve the same degree of progressivity as a graduated rate structure. One way to approach that question is to imagine a revenue-neutral reform that substituted such a structure for the existing tax system. To illustrate: the Treasury Department's Office of Tax Analysis estimates that in 2019, total U.S. family cash income will be \$16.424 trillion and the IRS will collect \$3.020 trillion in

taxes.<sup>67</sup> Before accounting for possible changes in labor supply (which conceivably could bias the calculation in either direction), Congress could more or less match that total by imposing a 27 percent flat tax with a \$4000 demogrant, or a 29 percent flat tax with a \$5000 demogrant, or a 31 percent flat tax with a \$6000 demogrant.<sup>68</sup>

How would the distribution of tax burdens under those systems compare to the status quo? Table 9 shows the total amount of tax paid (in billions of dollars) and the share of the tax burden borne (in percentage terms) by each income decile under current law and three alternative systems. The three alternatives all satisfy the revenue neutrality constraint (i.e., all raise net revenue of at least the \$3.020 trillion, the amount that the Office of Tax Analysis expects will be raised in 2019<sup>69</sup>). Each of the alternatives is more generous to taxpayers in the bottom four deciles and somewhat less generous to taxpayers in the middle and upper-middle class (50th through 90th percentile). Taxpayers in the top 0.1 percent of the income distribution fare slightly better under all of these alternatives—but not all that much. The key point is that the distribution of tax burdens under a flat tax with a demogrant need not stray all that dramatically from the distribution of tax burdens under current law.

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67. U.S. DEP'T OF THE TREASURY, OFFICE OF TAX ANALYSIS, DISTRIBUTION TABLE 2019 001—DISTRIBUTION OF FAMILIES, CASH INCOME, AND FEDERAL TAXES UNDER 2019 CURRENT LAW (2018).

68. The calculation is concededly crude. The U.S. Census Bureau projects a population of approximately 328.2 million as of January 1, 2019. See Press Release, U.S. Census Bureau, Census Bureau Projects U.S. and World Populations on New Year's Day (Feb. 1, 2019), <https://www.census.gov/newsroom/press-releases/2019/new-years-population.html>. 27% x \$16.424 trillion — (\$4,000 x 328.2 million) ≈ \$3.12 trillion. That is, a 27% tax rate on family cash income of \$16.424 trillion, combined with a per-person demogrant of \$4,000 paid to 328.2 million people, would leave \$3.12 trillion. Likewise, 29% x \$16.424 trillion — (\$5,000 x 328.2 million) ≈ \$3.12 trillion, and 31% x \$16.424 trillion — (\$6,000 x 328.2 million) ≈ \$3.12 trillion.

69. See U.S. DEP'T OF THE TREASURY, *supra* note 67.

TABLE 9. TAX LIABILITY (BILLIONS OF DOLLARS AND PERCENT DISTRIBUTION OF TAX BURDEN) BY INCOME GROUP—CURRENT LAW VS. FLAT TAX PLUS DEMOGRANT

Percentile	Current Law		27% Flat Rate + \$4k Demogrant		29% Flat Rate + \$5k Demogrant		31% Flat Rate + \$6k Demogrant	
	(\$B)	(%)	(\$B)	(%)	(\$B)	(%)	(\$B)	(%)
0-10	1	0.0%	-63	-2.1%	-83	-2.7%	-103	-3.4%
10-20	-14	-0.5%	-48	-1.6%	-74	-2.4%	-100	-3.3%
20-30	-3	-0.1%	-17	-0.6%	-43	-1.4%	-68	-2.2%
30-40	27	0.9%	26	0.9%	5	0.1%	-17	-0.6%
40-50	69	2.3%	80	2.6%	63	2.0%	45	1.5%
50-60	121	4.0%	151	4.9%	138	4.5%	125	4.1%
60-70	188	6.2%	238	7.7%	231	7.5%	223	7.3%
70-80	296	9.8%	355	11.5%	356	11.6%	356	11.7%
80-90	484	16.0%	542	17.6%	556	18.1%	570	18.6%
90-100	1849	61.2%	1826	59.3%	1934	63.1%	2042	66.8%
<b>Total</b>	<b>3020</b>	<b>100.0%</b>	<b>3077</b>	<b>100.0%</b>	<b>3066</b>	<b>100.0%</b>	<b>3056</b>	<b>100.0%</b>
90-95	389	12.9%	466	15.1%	496	16.2%	527	17.2%
95-99	560	18.5%	641	20.8%	685	22.3%	730	23.9%
99-99.9	440	14.6%	430	14.0%	461	15.0%	492	16.1%
Top 0.1	460	15.2%	399	13.0%	428	14.0%	458	15.0%

Dollar amounts in billions. Percentiles reflect rankings by adjusted family cash income. Based on author's calculations and data from U.S. Dep't of the Treasury, Office of Tax Analysis, Distribution Table 2019 001—Distribution of Families, Cash Income, and Federal Taxes Under 2019 Current Law (Apr. 18, 2018).<sup>70</sup>

There are, of course, an infinite set of options for setting the flat tax rate and the demogrant size, and each item in that set generates different distributive results. Not all distributions of tax burdens that are possible under a graduated rate structure can be replicated through a flat tax plus a demogrant, and we cannot match the current distribution exactly. There is, however, nothing magical about the existing distribution of tax burdens: the status quo is not necessarily preferable to an alternative that would be more generous to very low-income households and somewhat less generous to the middle- and upper-middle households. Moreover, taxation is not the only lever that affects redistribution.<sup>71</sup> If we are seriously concerned that a flat tax plus demogrant does too much to shrink the middle- and upper-

70. *See id.*

71. *See, e.g.,* Roland Bénabou, *Tax and Education Policy in a Heterogeneous-Agent Economy: What Levels of Redistribution Maximize Growth and Efficiency?*, 70 *ECONOMETRICA* 481, 482 (2002) (demonstrating economic redistribution achieved through both income tax and education finance policy).

middle class's share of the pie, then we could consider non-tax offsets (e.g., changes to educational funding formulas that redound to the benefit of suburban school districts).

A second concern with a flat tax plus a demogrant is that it complicates efforts to impose a very high marginal tax rate on very high-income individuals and households. In the 2016 presidential campaign, Democratic candidate Bernie Sanders proposed a top marginal rate of 50.2% on incomes above \$2 million and 54.2% on incomes above \$10 million.<sup>72</sup> Economists Thomas Piketty, Emanuel Saez, and Stefanie Stantcheva have prominently argued that the social welfare-maximizing tax rate on very high earners in the United States likely exceeds 80%.<sup>73</sup> At some points in U.S. history, the top marginal rate has exceeded 90%.<sup>74</sup>

The case for a very high tax rate on very high incomes does not require a graduated rate schedule at lower echelons. A two-bracket structure with a second bracket that applies only to the top 1 percent of earners would achieve couples neutrality and marriage neutrality for the overwhelming majority of taxpayers. We could solve the trilemma for all but the very highest income Americans (and their potential partners) while also maintaining a highly progressive average-rate structure.<sup>75</sup> The desire to tax the rich at quasi-confiscatory rates—something we do not do today—is not the trilemma's primary source.

Third, some readers may object to the idea—implicit in the flat tax plus demogrant proposal—of making substantial cash transfers to low-income individuals and households. Elsewhere, Miranda Perry Fleischer and I have argued that the concerns regarding cash transfers are largely unwarranted.<sup>76</sup> For those who remain unconvinced by the case for cash transfers, a possible solution is to provide any refund that exceeds tax liability in restricted form. For example, refunds could be distributed through debit cards that—like electronic benefit transfer cards issued to recipients of Temporary Assistance to Needy Families in many states—cannot be used for alcohol, tobacco products, gambling, lottery tickets, guns, tattoos,

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72. Alan Cole & Scott Greenberg, *Details and Analysis of Senator Bernie Sanders's Tax Plan*, TAX FOUND. (Jan. 28, 2016), <https://taxfoundation.org/details-and-analysis-senator-bernie-sanders-s-tax-plan>.

73. See Thomas Piketty et. al., *Optimal Taxation of Top Labor Incomes: A Tale of Three Elasticities*, 6 AM. ECON. J.: ECON. POL'Y 230, 268 (2014).

74. The top marginal income tax rate was 94 percent in 1944 and 1945, and above 90 percent again from 1951 to 1963. See *Historical Highest Marginal Income Tax Rates*, TAX POLICY CTR. (Jan. 18, 2019), <https://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates>.

75. See *supra* Table 9 (showing the consistency that would stay in place for the lower bracket).

76. See Miranda Perry Fleischer & Daniel Hemel, *The Architecture of a Basic Income*, 87 U. CHI. L. REV. (forthcoming 2020).

body piercings, jewelry, or adult entertainment.<sup>77</sup> An even more restrictive approach might limit the use of refunds to a small set of expenses (e.g., food, rent, transportation, medical care, and education). To be clear, none of this is to suggest that cash transfers *should* be limited in this way. The narrower point is that any unease regarding unrestricted cash transfers to low-income individuals and households does not necessarily put us back into the trilemma.

Importantly, the argument here is emphatically not that we ought to switch to a flat tax plus a demogrant. The point of the flat tax plus demogrant discussion is that we *could* switch to such a system and make the marriage tax trilemma go away. The distributional results here are presented not as precise estimates but instead used to motivate a thought experiment—to convince the reader that a flat tax plus a demogrant is a feasible way of achieving progressivity. But even if we did overcome the marriage tax trilemma through a flat tax plus a demogrant, we would likely want to reintroduce features that violate the principles of couples neutrality and marriage neutrality. If that is the case, then the trilemma is not the central problem in the taxation of marriage.

#### IV. THE CASE AGAINST COUPLES NEUTRALITY

The argument in this Part and the one that follows is that even if we can achieve both couples neutrality and marriage neutrality, we probably do not want to. This Part focuses on couples neutrality; the next Part takes up marriage neutrality. The goal is, by the end, to convince the reader that given a choice between couples neutrality and marriage neutrality, the most sensible answer is likely: neither.

Couples neutrality—the idea that two married couples with the same income should pay the same amount in tax, regardless of the division of income among spouses—is sometimes characterized as an instantiation of what tax scholars call “horizontal equity”: the idea that tax liabilities should be similar across units with similar abilities to pay.<sup>78</sup> Setting aside the question of whether the couple (rather than the individual) should be the relevant unit for horizontal equity analysis, the notion that couples with the same income are similarly situated for ability-to-pay purposes is questionable. Consider again the example from Parts II and III in which Addison and Blake each earn \$100,000, Casey earns \$200,000, and Dana earns \$0. If Addison and Blake marry and Casey and Dana marry, couples neutrality would require that both couples pay the same amount in tax. Yet it is difficult to see why any substantive conception of horizontal equity

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77. See *Restrictions on Use of Public Assistance Electronic Benefit Transfer (EBT) Cards*, NAT'L CONFERENCE OF ST. LEGISLATURES (May 8, 2015), <http://www.ncsl.org/research/human-services/ebt-electronic-benefit-transfer-card-restrictions-for-public-assistance.aspx>.

78. See, e.g., Jonathan Barry Forman, *What Can Be Done About Marriage Penalties?*, 30 FAM. L.Q. 1, 1 n.3 (1996).

would require that result. Addison and Blake do not have the same combined ability to pay as Casey and Dana, because Dana—who does not work outside the home—can perform a range of household tasks that Addison and Blake must hire someone else to do (e.g., care for children while Addison and Blake are working in the market economy) or that Addison and Blake must fit into the few hours of the week in which they are not working outside the home (cooking, cleaning, laundry, and so on). Moreover, Addison and Blake likely both incur nondeductible employment-related expenses (e.g., commuting costs, clothing suitable for work, etc.)<sup>79</sup> that only one member of the Casey-Dana unit must pay.

While couples neutrality is questionable from a horizontal equity perspective, there is a superficially strong efficiency argument for taxing married couples as a unit in any system with multiple tax rates on labor income. To see why, imagine again a two-bracket progressive income tax schedule with a 20% rate on the first \$100,000 of income and a 40% rate on income over \$100,000. If Casey and Dana are treated as different tax units, then Casey—with \$200,000 of income—will be in the 40 percent bracket, and Dana—with no income—will be in the 20 percent bracket. Now imagine that Casey and Dana are deciding which one should prepare dinner and which one should work an extra hour in the market economy. Assume that dinner preparation takes an hour and that Casey and Dana are equally skilled chefs. Assume as well that Casey's hourly wage is \$100, that Dana could earn an hourly wage of \$80 as a freelancer, and that in both cases the wage is equal to the marginal product of labor.

The socially optimal outcome would be for Casey to work in the market economy and for Dana to cook: that option would produce \$100 plus a home-cooked dinner; while the alternative (Casey cooking and Dana working) would generate \$80 plus a home-cooked dinner. But that is not the privately optimal outcome for Casey and Dana, because Casey's after-tax income (taking into account Casey's 40% marginal rate) would be \$60 while Dana's after-tax income (taking into account Dana's 20% rate) would be \$64. Taxing Casey and Dana at different rates results in an inefficient allocation of household and market labor within the marital unit (i.e., Casey cooks and Dana works when the reverse arrangement would be more efficient).<sup>80</sup>

Efficiency arguments do not, however, point unambiguously toward equalizing the tax rate among members of the same marital unit. The reason why is that the price elasticity of labor supply is generally thought to be higher for the secondary earner than for the

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79. *Deducting Business Expenses*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/deducting-business-expenses> (last updated June 3, 2019).

80. See generally Piggott & Whalley, *supra* note 23, at 415 (discussing how taxing individuals rather than households is more efficient).

primary earner in a couple whose members have different incomes.<sup>81</sup> Note that while some authors refer to the difference in the price elasticity of labor supply across *genders*,<sup>82</sup> recent evidence suggests that primary earner versus secondary earner status may be a more accurate proxy for price elasticity than gender.<sup>83</sup> In other words, to predict how responsive Casey and Dana will be to tax changes, knowing their genders likely matters less than knowing who earns more.

This insight points toward a potentially efficiency-enhancing policy intervention. If we start out with a flat rate of 30 percent on all income and then ever-so-slightly raise the rate on Casey (the primary earner) and reduce the rate on Dana (the secondary earner), Casey's taxable income will likely fall by less than Dana's taxable income rises. Since the efficiency gain or loss from an income tax change is, approximately the change in taxable income times the tax rate,<sup>84</sup> setting Casey's tax rate equal to Dana's tax rate effectively amounts to leaving money on the table. We could instead raise the tax rate on Casey, reduce the tax rate on Dana, and thereby raise the same amount of money with lower overall deadweight loss.<sup>85</sup> Or, instead of seeking to hold revenue constant, we could seek to hold deadweight loss constant—in which case raising the tax rate on Casey and reducing the rate on Dana would allow us to raise more money to spend on the provision of public goods.

Thus, we encounter a genuine tradeoff in the tax treatment of married couples. On the one hand, if the marginal tax rate on primary earners is higher than the marginal tax rate on secondary earners, married couples will inefficiently reallocate household labor

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81. *Id.* at 410.

82. *See, e.g.*, EDWARD J. MCCAFFERY, *TAXING WOMEN* 180 (2d ed. 1999) (stating that “the variance between male and female labor supply elasticities” is “striking”).

83. *See, e.g.*, Emily Fitzgibbons Shafer, *Wives' Relative Wages, Husbands' Paid Work Hours, and Wives' Labor-Force Exit*, 73 *J. MARRIAGE & FAM.* 250, 250 (2011) (finding that the probability of a wife exiting the labor force is significantly lower if she earns more than her husband); *see also* Alex Baldwin, Michael Allgrunn & Raymond Ring, *Does the Male-Female Partition Still Apply to Household Labor Supply?*, 8 *INT'L J. OF APPLIED ECON.* 46, 50 (2011) (primary versus secondary earner status appears to be more predictive of labor supply than gender); Robert McClelland et al., *Labor Force Participation Elasticities of Women and Secondary Earners Within Married Couples*, 17–18 (Cong. Budget Office, Working Paper 2014-06, Sept. 2014), <https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/workingpaper/49433-laborforce.pdf> (finding generally low elasticities on the extensive margin—i.e., the choice between working and not working—but somewhat higher elasticities for secondary earners than for women).

84. *See* Martin Feldstein, *Tax Avoidance and the Deadweight Loss of the Income Tax*, 81 *REV. ECON. & STATS.* 674, 674–75 (1999).

85. For a formal derivation of this result, see Patricia F. Apps & Ray Rees, *Individual Versus Joint Taxation in Models with Household Production*, 107 *J. POL. ECON.* 393, 395–400 (1999).

responsibilities from the secondary earner to the primary earner. On the other hand, if the marginal tax rate on primary earners is equal to the marginal tax rate on secondary earners, then we forgo an opportunity to reduce the deadweight loss of the income tax. The result is a dilemma rather than a trilemma, and it is a dilemma that a flat tax plus a demogrant does not allow us to escape.<sup>86</sup>

Fortunately, the dilemma is not intractable—at least at a conceptual level. We can arrive at a first-cut solution by applying the “elasticity of taxable income” approach proposed by economist Martin Feldstein in the late 1990s and refined by Raj Chetty a decade later.<sup>87</sup> That approach yields a formula for determining the optimal difference in rates between primary and secondary earners.<sup>88</sup>

The elasticity of taxable income approach posits that the deadweight loss from an increase in the income tax rate is approximately equal to the decrease in taxable income resulting from the change multiplied by the tax rate.<sup>89</sup> For a tax cut, it is the reverse: the reduction in deadweight loss is equal to the increase in taxable income times the tax rate.<sup>90</sup> To see why, return to the previous scenario involving Casey and Dana, where Casey’s wage is \$100 and Casey’s tax rate is 40%, and Dana’s wage is \$80 and Dana’s tax rate is 20%. Casey allocates time between market labor and household production until Casey is indifferent between (a) working one hour outside the home, earning \$100, and paying a \$40 tax, for after-tax income of \$60, and (b) engaging in household labor that results in home production of \$60. Society, however, is not indifferent between these two options, because when Casey works outside the home, Casey generates an extra \$40 of tax revenue, which can be used to finance public goods or tax rebates. So when Casey reallocates one hour from market labor to household production, Casey is roughly as well off as before, but society loses out on \$40 of tax revenue.

The same is true for Dana. Dana allocates time between market labor and household production until Dana is indifferent between (a) working one hour outside the home, earning \$80, and paying a \$16

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86. I am certainly not the first to suggest a lower rate on secondary earners than on primary earners. See, e.g., Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1035–46 (1993). McCaffery’s pathbreaking work on the taxation of the family does not consider the distortions to household labor allocation decisions that would arise if different spouses of the same couple faced different marginal rates. See generally *id.*

87. See Feldstein, *supra* note 82, at 674; Raj Chetty, *Is the Taxable Income Elasticity Sufficient to Calculate Deadweight Loss? The Implications of Evasion and Avoidance*, 1 AM. ECON. J.: ECON. POL’Y 31, 32 (2009). For an application of this framework in a different context, see David Weisbach, Daniel Hemel & Jennifer Nou, *The Marginal Revenue Rule in Cost-Benefit Analysis*, 160 TAX NOTES 1507, 1508 (2018).

88. Chetty, *supra* note 85, at 31.

89. *Id.* at 32.

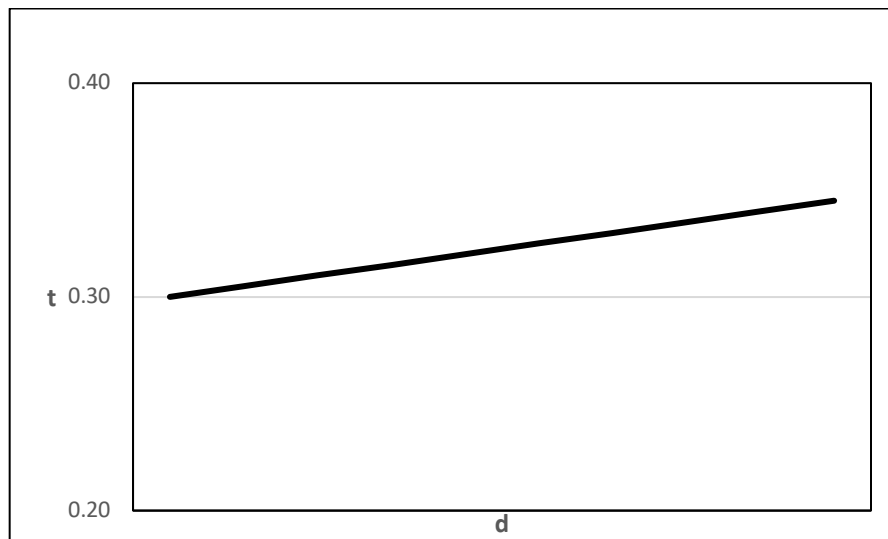
90. *Id.*



tax, and (b) engaging in household labor that results in home production of \$64. When a small reduction in the tax rate on secondary earners causes Dana to reallocate one hour from household labor to market labor, Dana is roughly as well off as before, but society benefits from the \$16 in additional taxes that Dana pays.

Congress, meanwhile, can set a tax rate ( $t$ ) on all income and then add a discount ( $d$ ) for secondary earners. Thus, the income of primary earner spouses and unmarried individuals is taxed at a rate of  $t$  while the income of secondary-earner spouses is taxed at a rate of  $t - d$ . Assume that Congress faces a fixed revenue constraint, and that the revenue constraint can be satisfied by setting  $t$  equal to 30% and  $d$  equal to 0. For any value of  $d > 0$ , there is a corresponding value of  $t > 30$  percent such that revenue remains constant. The options for  $t$  and  $d$  that satisfy this revenue constraint compose the revenue frontier, as illustrated (albeit crudely) by Figure 1.

FIGURE 1. CONGRESS' REVENUE FRONTIER



After Congress sets  $t$  and  $d$ , primary and secondary earners must decide how to allocate their time between market labor and household production. Let  $w_P$  be the wage of a primary earner and  $w_S$  be the wage of a secondary earner. The primary earner works outside the home until the after-tax return from allocating an additional hour to market labor ( $(1 - t)w_P$ ) is equal to the opportunity cost of forgoing one hour of household production. Likewise, the secondary earner works outside the home until  $((1 - (t - d))w_S)$  is equal to the value of an additional hour of household production.

Now imagine that we move ever so slightly to the right along the revenue frontier in Figure 1, increasing the overall tax rate  $t$  and

reducing the tax rate on secondary earners ( $t - d$ ) while holding total revenue constant. Primary earners will respond by reallocating time from market labor to household production (and perhaps to leisure as well). Let  $\Delta L_P$  be the change in the number of hours that primary earners devote to market labor as a result of the tax change. The elasticity of taxable income approach teaches that the change in deadweight loss due to primary earners reducing their labor output is equal to the change in taxable income times the tax rate (here:  $\Delta L_P^* w_P^* t$ ). Intuitively, since the primary earner was previously indifferent between an additional hour of market labor and an additional hour devoted to household production, the reallocation of a small quantity of labor from the market economy to the household sector has no fundamental effect on the welfare of that taxpayer, but it does reduce the resources available to society by  $\Delta L_P^* w_P^* t$ .<sup>91</sup> Secondary earners, meanwhile, will respond by reallocating time from household labor (and, perhaps, from leisure) to market labor. The elasticity of taxable income approach instructs that the increase in labor output from secondary earners reduces the total deadweight loss of the income tax by  $\Delta L_D^* w_D^* (t - d)$ , which will be positive.

If the price elasticity of labor supply is indeed higher for secondary earners than for primary earners, it is likely that secondary earners will increase their hours worked by more than primary earners reduce their labor output—at least at first. But because the deadweight loss of a tax is proportional to the square of the rate, the efficiency loss from increasing  $t$  as we move rightward along the revenue frontier will ultimately catch up to the efficiency gain from lowering  $d$ . The optimal position on the revenue frontier is the point at which the increase in deadweight loss from increasing  $t$  (due to a reduction in the taxable income of primary earners) is equal to the reduction in deadweight loss from increasing  $d$  (due to an increase in the taxable income of secondary earners). Algebraically, the challenge is to set  $t$  and  $d$  such that  $\Delta L_P^* w_P^* t = \Delta L_D^* w_D^* (t - d)$ .

One attraction of this approach is that it obviates the need to look inside the black box of the household—i.e., to directly estimate the value of each spouse's household production or leisure. We can assume (for now) that spouses allocate their time such that the value of an additional hour of household labor equals the after-tax income from an additional hour of market labor—if these values were not equal, the spouses would not be allocating their time optimally and could make themselves better off by reallocating. Note as well that in estimating deadweight loss, we need not distinguish between time that taxpayers reallocate from market labor to household production and time that taxpayers reallocate from market labor to leisure: the deadweight loss is the same. That is because taxpayers will seek to

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91. More precisely, the effect on the total quantity of resources available to society is  $\Delta L_P^* w_P^* t$ ; the reduction in the resources available to society is  $-\Delta L_P^* w_P^* t$ , because  $\Delta L_P^* w_P^* t$  is negative.

allocate their time such that the after-tax wage from an additional hour of work in the market economy equals the value of an additional hour of household production or the value of an additional hour of leisure.<sup>92</sup>

This prescription—set the wedge between the tax rate on secondary earners and primary earners so as to occupy the point on the revenue frontier at which the increase in deadweight loss from marginally raising the rate on primary earners equals the reduction in deadweight loss from marginally lowering the rate on secondary earners—offers a first-cut solution to the dilemma laid out above, but only a first cut. Aside from the empirical challenges in estimating the elasticity of taxable income for primary and secondary earners, there are at least four other factors to consider in determining whether—and by how much—to deviate from couples neutrality.

First, a reduced rate for secondary earners will inevitably result in violations of the marriage neutrality principle. If all individuals other than secondary earners (i.e., primary earners in married couples plus unmarried persons) pay tax at the higher rate and secondary earners pay tax at a reduced rate, the result will be a marriage bonus whenever both members of a couple have paying jobs.<sup>93</sup> If primary earners in married couples face a higher tax rate

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92. Three somewhat more technical notes are in order. First, the analysis does not depend on whether changes to labor supply occur along the intensive margin (i.e., how many hours a taxpayer works) or along the extensive margin (i.e., whether a taxpayer works at all). If taxpayers only make a binary choice between participating in the non-household labor force and not participating, then the marginal taxpayer will be one who is indifferent between those two options. A change in tax rates that causes a taxpayer to rejoin (or leave) the non-household labor force has no first-order effect on that taxpayer's welfare but increases (or reduces) social welfare by the change in taxable income.

Second, the elasticity of taxable income framework does not require us to separately estimate the cross-wage elasticity of primary and secondary earners. In other words, it may be that as the after-tax income of one spouse rises, the other spouse becomes less likely to work. We can capture this effect by observing the change in the taxable income of primary and secondary earners after a change in  $t$  and  $d$ —we need not know, for instance, how much of the increase in secondary earners' taxable income is due to their tax rate now being lower and how much is due to their spouse's tax rate now being higher.

Third, the change in taxable income resulting from an adjustment to  $t$  and  $d$  is not the same as the revenue effect from an adjustment to  $t$  and  $d$ . The reason why is that changes in revenue from taxpayers who do not alter their behavior should be considered transfers—rather than net benefits or net costs—for purposes of cost-benefit analysis. For example, if  $t$  rises from 40 percent to 40.1 percent and a primary earner continues to work 2000 hours a year at \$100 per hour, the primary earner will be \$200 worse off (0.1 percent x 2000 x \$100), but the government will have an additional \$200 to spend on public goods or tax rebates. The costs and the benefits balance out. Only changes in revenue that result from behavioral changes should factor directly into cost-benefit analysis. See Weisbach, Hemel & Nou, *supra* note 85, at 1508.

93. See generally Listokin, *supra* note 1, at 187 (noting that “[m]arriage neutrality requires that each couple pay the same amount of income tax they paid

than single workers while secondary earners in married couples face a lower rate, the likely result will be marriage penalties for couples in which one member earns a disproportionate share of household income. How we feel about these results will depend on our views toward marriage neutrality more broadly, and I will defer further discussion of that subject to Part V. The key point for present purposes is that this violation of marriage neutrality is not an inevitable consequence of our commitment to couples neutrality; rather, it is a direct result of our decision to deviate from couples neutrality.

Second, and relatedly, a reduced rate for secondary earners will have distributional effects. It will result in redistribution from couples with lopsided income splits (like Casey and Dana) toward couples with close-to-even income splits (like Addison and Blake).<sup>94</sup> That outcome may be one that most readers regard as acceptable or even desirable. As noted above, the nontaxation of household labor means that couples in which one spouse works mostly or exclusively inside the home are undertaxed relative to their ability to pay.<sup>95</sup> Higher taxes on those couples relative to couples with near-equal incomes can be thought of as an approximate solution to the inefficiencies and inequities that arise from our inability to include household labor within the tax base.

Third, a reduced rate for secondary earners will likely lead to an increase in female participation in the (non-household) labor force, since more than 70 percent of secondary earners in dual-income heterosexual marriages are female.<sup>96</sup> This is potentially a salubrious result.<sup>97</sup> A growing body of research suggests that an increase in the

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when single,” thus a reduced rate for secondary earners would result in the secondary earner paying a lesser amount of income tax because he or she is married).

94. Assume that if two spouses have exactly the same income, as was the case with Addison and Blake, they could take advantage of the reduced rate for one of their incomes. Otherwise, either Addison or Blake would have a very strong incentive to earn \$1 less so as to qualify for the reduced rate.

95. See Piggott & Whalley, *supra* note 23, at 415 (“We suggest that household production also needs to be taken into account, since not distorting input decisions by family members in household production instead suggests taxing on a household rather than individual basis.”).

96. See U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES: FAMILIES—TABLE F-22: MARRIED-COUPLE FAMILIES WITH WIVES’ EARNINGS GREATER THAN HUSBANDS’ EARNINGS: 1981 TO 2017 (2017), <https://www2.census.gov/programs-surveys/cps/tables/time-series/historical-income-families/f22.xls>.

97. Some might disagree on the ground that there are positive welfare effects from parents spending more time with their children, and thus there are negative externalities from secondary earners shifting from the household sector to the market economy. To this concern there are at least two responses. First, insofar as parents appropriately account for their children’s welfare in their own decisions, then the elasticity of taxable income framework fully captures these effects. For an insightful discussion of related issues, see Theodore P. Seto, *Does the Income Tax Cause Parents to Spend Too Much Time with Their Children?*:

number of women occupying corporate leadership roles may improve firm performance<sup>98</sup> and reduce corporate fraud,<sup>99</sup> among other benefits. Positive externalities resulting from female labor force participation may justify an even larger wedge between the tax rates on primary and secondary earners than the elasticity-of-taxable-income analysis would imply. However, note that the positive externalities attributable to female labor force participation tend to be associated with women in leadership positions, who are more likely than other married women to be primary earners.<sup>100</sup> A reduced tax rate on *women* rather than on secondary earners may be a better way to encourage positive externalities from female labor force participation, but such a policy would raise serious (and potentially insurmountable) constitutional concerns.<sup>101</sup>

Fourth, while a wedge between the tax rate on primary and secondary earners may lead to men (who again tend to be primary earners in heterosexual couples) allocating more time to household labor, tax is a very blunt tool with which to pursue this outcome. It is also possible that even if a reduced rate on secondary earners induces married women to work longer hours outside the home, they will continue to perform the same “second shift” of household labor and childcare as before.<sup>102</sup> Put differently, while tax changes can affect a household’s allocation of time between market labor and household production/leisure, it is much harder to know whether tax changes produce effects on the allocation of responsibilities within the household. Potentially, as secondary earners devote more time to market labor, their bargaining power within the household will rise (e.g., because their exit options become more attractive if they have a greater ability to support themselves outside the marriage). In that case, a larger wedge between the tax rate on secondary earners and everyone else may encourage a more equitable distribution of household responsibilities, but any such prediction would be highly speculative.

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*Rethinking Mirrlees*, 36 VA. TAX. REV. 55 (2017). Second, if we believe that parents spend *too little* time with their children, then the optimal policy might be an increase in the tax rate on all parents, perhaps combined with a larger demogrant for children. *Id.* at 61.

98. See, e.g., Marcus Noland et al., *Is Gender Diversity Profitable? Evidence from a Global Survey* 3 (Peterson Inst. for Int’l Econ., Working Paper 16-3, 2016), <https://piie.com/system/files/documents/wp16-3.pdf>.

99. See Darrell J. Steffensmeier et al., *Gender and Twenty-First-Century Corporate Crime: Female Involvement and the Gender Gap in Enron-Era Corporate Frauds*, 78 AM. J. SOC. 448, 453 (2013).

100. Noland et al., *supra* note 96, at 3 (noting that the “largest gains” in performance are for female executives).

101. For further discussion, see Daniel J. Hemel, *Should Tax Rates Decline with Age?*, 120 YALE L.J. 1885, 1893 (2011).

102. See ARLIE RUSSELL HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 3 (1989).

Lest the proposal for a reduced rate on secondary earners be dismissed as politically infeasible, note that the idea is actually one that Congress once adopted—and not too long ago. The Economic Recovery Tax Act of 1981 allowed dual income spouses to deduct up to 5% of the first \$30,000 of income earned by the lower earning spouse, increasing to 10% in 1983.<sup>103</sup> While the provision did not survive the 1986 tax overhaul, which eliminated a large number of perceived tax expenditures with the goal of reducing top marginal rates,<sup>104</sup> its passage suggests that couples neutrality is not in fact a third rail of American tax politics. Deviation from the couples neutrality norm may be politically plausible as well as normatively desirable.

In sum, differences in labor supply elasticities between primary and secondary earners in dual-income marriages indicate that the optimal tax treatment of married couples entails a reduced rate on the secondary earner's income. That prescription directly contradicts the principle of couples neutrality and inevitably leads to violations of marriage neutrality as well. Determining the optimal wedge between the tax rate on secondary earners and the tax rate on everyone else still raises the difficult empirical challenge of estimating the point where the reduction in deadweight loss from secondary earners working more hours equals the increase in deadweight loss from everyone else working less. But this empirical challenge is quite different from the tradeoffs the marriage tax trilemma focuses on. In this respect, the trilemma functions as a distraction rather than as a framework for understanding the optimal taxation of marriage.

#### V. IN PRAISE OF MARRIAGE PENALTIES

The previous Part focused on the arguments for and against couples neutrality. It acknowledged that deviations from couples neutrality may lead to inefficient reallocations of household labor, but argued the welfare gains from taxing secondary earners at a lower rate likely outweigh the conceded costs. This Part shifts focus to the second leg of the trilemma: marriage neutrality. I suggest that marriage neutrality may have, if anything, even less to recommend itself than couples neutrality does.

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103. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 103, 95 Stat. 172, 187 (repealed 1986); see also Pamela B. Gann, *Earned Income Deduction: Congress's 1981 Response to the Marriage Penalty Tax*, 68 CORNELL L. REV. 468, 476 (1983) (explaining that the Economic Recovery Tax Act of 1981 allowed two-worker married couples to deduct five percent of the lower spouse's income, and that number increased to ten percent in 1983).

104. See generally JEFFREY BIRNBAUM & ALAN MURRAY, SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS, AND THE UNLIKELY TRIUMPH OF TAX REFORM (1987) (discussing the emphasis on marginal rate reductions in the runup to the 1986 overhaul).

The idea that the tax system should be “neutral” with respect to marriage is widespread: intelligent commentators often accept it as an article of faith.<sup>105</sup> It is also something of a puzzle. We do not demand other areas of law be “marriage neutral.”<sup>106</sup> Marriage, after all, is a legal construct: to say that the law should be neutral with respect to marriage is a bit like saying that the law should be neutral with respect to fee simple or the corporate form.<sup>107</sup> The law advantages marriage in ways too numerous to list exhaustively. The federal Family and Medical Leave Act applies to the care of a spouse but not an unmarried partner;<sup>108</sup> tenancy by the entirety allows spouses, but not other committed couples, to hold property in a form that makes it difficult for creditors to obtain;<sup>109</sup> Social Security’s old age, survivors, and disability insurance program offers benefits to the spouses of retired and deceased workers but not their lifelong companions;<sup>110</sup> and so on. What is it about tax law that makes it inappropriate for tax to “distort” marriage decisions when virtually every other area of law does so already?

Perhaps the strongest argument that one can make in favor of a marriage-neutral tax code is that, as Alstott suggests, “marriage is no longer a good proxy for the activities that a welfarist income tax should aim to notice.”<sup>111</sup> Marriage is not—nor was it ever—perfectly predictive of cohabitation and the material advantages that arise when adults in a household can pool resources and responsibilities.<sup>112</sup> But marriage most certainly is a *proxy* for cohabitation. According to 2017 Census Bureau data, approximately 88% of adults age 18 and over who share a household with a partner are married to that person.<sup>113</sup> Of parents with children under age 18 who live with a

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105. See, e.g., MARVIN A. CHIRELSTEIN & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION: A LAW STUDENT’S GUIDE TO THE LEADING CASES AND CONCEPTS 290 (13th ed. 2015) (“One would prefer that the tax law be ‘neutral’ in its effect on the decision to marry or not marry . . .”); Martin D. Ginsburg, *Taxing the Components of Income: A U.S. Perspective*, 86 GEO. L.J. 123, 132 (1997) (“[T]wo individuals who marry should pay neither more tax nor less tax than they paid, on the same aggregate income, before marriage.”).

106. See Note, *The Effects of Marriage on the Rules of the Criminal Law*, 61 COLUM. L. REV. 73, 73 (1961).

107. Cf. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1777–82 (2005) (exploring the analogy between marriage and the corporate form).

108. 29 U.S.C. § 2612(a)(1)(C) (2012).

109. See John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 46 (1997).

110. See Alstott, *supra* note 10, at 752–56 (explaining that the systems “[a]ward benefits based on formal marriage . . .”).

111. *Id.* at 738.

112. See *id.* at 696.

113. See Table AD-3—*Living Arrangements of Adults 18 and Over, 1967 to Present*, U.S. CENSUS BUREAU (Nov. 2017), <https://www2.census.gov/programs-surveys/demo/tables/families/time-series/adults/ad3.xlsx>.

partner, 91% are married to that person.<sup>114</sup> If cohabitation with a partner is the characteristic that we are trying to identify, marriage—a measure with a sensitivity of roughly 90%—fares admirably well.<sup>115</sup>

Tax law, moreover, relies on imperfect proxies all the time. We generally think that tax burdens should be allocated on the basis of ability to pay,<sup>116</sup> but we lack a perfect way to measure ability to pay. Income is a flawed measure. Two individuals with the same income may have very different abilities to pay if, for example, one of the two succeeded to a family member's rent-controlled apartment while the other leases an equivalent unit at market rate. An individual who cares for an ailing child or spouse may have a much lower ability to pay than another individual with the same income and superficially identical household characteristics. Tax law necessarily draws distinctions that balance accuracy against efficiency—perfect accuracy is rarely possible and even more rarely desirable in light of information costs.<sup>117</sup>

Marriage, I have argued, is indeed a good proxy for cohabitation, but why is cohabitation an activity that the income tax should aim to notice? One answer is that we think tax burdens should be allocated on the basis of ability to pay, and that single parent status is a reasonably accurate proxy for (lower) ability to pay. A single parent cannot rely on a spouse for household labor or childcare while the single parent earns income in the market economy. A single parent also lacks the implicit wage insurance that results from having a second potential income earner in the household.<sup>118</sup> For similar reasons, a single parent often lacks the same ability as a married parent to exit the workforce temporarily and devote time to education or vocational training that could enhance future earnings. Moreover,

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114. See Table AD-2—Parents with Coresident Children, by Living Arrangement and Age of Child: 2007 to Present, U.S. CENSUS BUREAU (Nov. 2017), <https://www2.census.gov/programs-surveys/demo/tables/families/time-series/adults/ad2.xls>.

115. To be sure, if we frame the question as what percentage of unmarried adults with children are single parents, then we get a lower number (68 percent). See *id.* The discrepancy is a reflection of the familiar difference between sensitivities and specificities (or true positive rates and true negative rates). See Neha Shitut, *Sensitivity v. Specificity in Logistic Regression*, ANALYTICS TRAINING, <https://analyticstraining.com/sensitivity-vs-specificity-in-logistic-regression/> (last updated Nov. 30, 2018) (discussing the difference between and importance of sensitivity and specificity). Yet even if one takes 68 percent rather than 91 percent to be the relevant figure, marital status remains highly predictive of whether a parent is or is not raising her or his children with a partner in the same home.

116. See Stephen Utz, *Ability to Pay*, 23 WHITTIER L. REV. 867, 867–68 (2002).

117. See Louis Kaplow, *Accuracy, Complexity, and the Income Tax*, 14 J.L. ECON. & ORG. 61, 77–78 (1998); see also David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627, 1627–30 (1999).

118. See Jacob Goldin & Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parents*, 71 TAX L. REV. 367, 381 (2018).



price per unit generally decreases with quantity, so feeding two mouths (a single parent and a child) is more expensive per person than feeding three mouths (two parents and a child).<sup>119</sup> Thus, single parents cannot take advantage of scale economies in household consumption to the same extent as married couples with children.

Possibly for these reasons, the United States currently supports single parents in a variety of ways. As noted above, single parents are generally eligible for head of household filing status, which results in a larger standard deduction and a more favorable rate schedule, and may draw larger benefits from the EITC.<sup>120</sup> In addition, non-tax transfer programs such as the Supplemental Nutrition Assistance Program and Temporary Assistance for Needy Families entail implicit single parent bonuses.<sup>121</sup>

These features of the tax code and the welfare state are often criticized—from the left and the right—on the ground that they penalize marriage, particularly among low income parents.<sup>122</sup> And they indeed yield that consequence. A marriage penalty for households with children is a necessary corollary to a single parent bonus. If we offer larger credits (or demogrants) to single parents or tax them at lower rates, then we will be encouraging taxpayers to have children outside of marriage and penalizing parents for their decision to marry. This is effectively what we already do through the EITC and head of household filing status.<sup>123</sup>

Recognizing the inevitable tradeoff between a single parent bonus and a marriage penalty does not imply that a single parent bonus is a bad idea. Rather, it suggests that the distributional benefits of a single parent bonus should be evaluated in light of the marriage effects. Determining what weight to assign to each side of this balance is surprisingly complicated.

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119. See Brad Tuttle, *The Economic Argument for Having More Kids*, TIME (Jan. 20, 2012), <http://business.time.com/2012/01/20/the-economic-argument-for-having-more-kids/>.

120. See Goldin & Liscow, *supra* note 116, at 373–75; see also Bruce D. Meyer, *The Effects of the Earned Income Tax Credit and Recent Reforms*, 24 TAX POL'Y & ECON. 153, 156 (2010).

121. See Adam Carasso & C. Eugene Steuerle, *The Hefty Penalty on Marriage Facing Many Households with Children*, 15 FUTURE OF CHILDREN 157, 159 (2005).

122. See, e.g., ROBERT GREENSTEIN, *THE EARNED INCOME TAX CREDIT: BOOSTING EMPLOYMENT, AIDING THE POOR* 6 (2005) (arguing for a reduction in the EITC marriage penalty); Zelenak, *supra* note 8, at 816 (criticizing the “[s]evere marriage penalties” for low-income couples and suggesting that they should be replaced with marriage bonuses); David T. Ellwood & Isabel V. Sawhill, *Fixing the Marriage Penalty in the EITC*, BROOKINGS INST. (Sept. 20, 2000), <https://www.brookings.edu/research/fixing-the-marriage-penalty-in-the-eitc> (exploring options for reducing the EITC marriage penalty); Edwin J. Feulner, *Purging the Marriage Penalty*, HERITAGE FOUND. (Feb. 14, 2017), <https://www.heritage.org/marriage-and-family/commentary/purging-the-marriage-penalty> (arguing that marriage penalties embedded in the EITC are “unwise” and “perverse”).

123. Feulner, *supra* note 120, at 2; Zelenak, *supra* note 8, at 796.

Start with the distributional benefits of a single parent bonus. The argument briefly articulated at the outset of this Part was that single parents merit a bonus to reflect their reduced ability to pay. That conclusion is less closely tied to utilitarian premises than it might initially seem. Utilitarian approaches to taxation and redistribution generally focus on the diminishing marginal utility of income (or consumption)<sup>124</sup>: To a person below the poverty line, \$100 of income matters more than it does to, say, Jeff Bezos. Correspondingly, paying \$100 of taxes “hurts” less for Bezos than for the low-income individual. Redistributing \$100 from Bezos to the low-income individual raises total utility, or welfare, insofar as the utility that the low-income individual derives from having an additional \$100 exceeds the utility that Bezos loses from paying an additional \$100. At the same time, the distributional benefits of transferring resources from Bezos to the low-income individual must be balanced against the excess burden (i.e., deadweight loss) of a tax that rises with income. Optimal tax models posit that income tax rates (and demogrants) should be set so that the marginal distributional benefit of moving to a more progressive system equals the marginal excess burden.<sup>125</sup>

One might think that this utilitarian model would translate quite cleanly to the single parent context: the single parent bonus and marriage penalty should be set such that, at the margin, the distributional benefit of transferring resources to single parents equals the cost of distorting marriage choices. But matters are in fact much more nuanced. Even though single parents likely have a lower ability to pay than married couples, the marginal utility of income is not necessarily higher for a single parent than for a married couple. So, the utilitarian case for redistributing on the basis of single parent status is less straightforward than one might think.

To see why, imagine that we implement a flat tax with a demogrant and that we set the rate and the demogrant such that distributional benefit and deadweight loss are equal at the margin. Addison and Blake each earn \$100,000 and are married with one child, while Shirley earns \$100,000 and is single with one child. Shirley then argues that demogrants should be adjusted to transfer more to single parents, who face the added burden (not yet accounted for in the tax and demogrant) of raising a child alone. Shirley’s ability to pay, in other words, is impaired in ways for which the tax structure has not yet accounted. Addison and Blake respond that while Shirley’s ability to pay is compromised by Shirley’s single parent status, the marginal utility of income is not necessarily higher for Shirley and her child than for Addison, Blake, and their child.

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124. Bankman & Griffith, *supra* note 20, at 1949.

125. *See id.* For a comprehensive overview and critique of diminishing-marginal-utility arguments, see Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 MINN. L. REV. 904 (2011).

Imagine that with an extra \$100, Addison and Blake would buy an Amazon Echo smart speaker that three people—Addison, Blake, and their child—would use. By contrast, an extra \$100 in Shirley's hands would go toward the purchase of goods or services that benefit only two people. Even if Addison, Blake, and their child are materially better off than Shirley and her child, an extra \$100 for Addison and Blake may do more to improve total utility because Addison and Blake can leverage economies of scale in household consumption.<sup>126</sup>

The utilitarian thus arrives at something of an impasse. Perhaps we can increase total utility by providing larger demogrant to single parents than to married parents because single parents are materially worse off in ways the linear income tax has not yet accounted for; perhaps we can increase total utility by providing larger demogrant to married parents than to single parents because married parents can leverage scale economies in household consumption more effectively than single parents can. If we cannot accurately estimate the relative magnitude of these effects, perhaps we should throw up our hands and leave the tax structure as is, without adjusting either way for single parent status (and thus without distorting marriage decisions).

This impasse is more easily escapable for readers of some philosophical persuasions than for others. The scale-economy differences that complicate the analysis for utilitarians who posit a Benthamite social welfare function (i.e., “maximize the sum of individual welfares”) are less problematic for those who characterize the social welfare function in Rawlsian terms (i.e., “maximize the welfare level of the worst off person”).<sup>127</sup> Addison and Blake presumably would concede that Shirley is materially worse off than they are, even if Shirley's relative position does not necessarily translate into a higher marginal utility of income. Redistribution

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126. See Louis Kaplow, *Optimal Distribution and the Family*, 98 SCANDINAVIAN J. ECON. 75, 90 (1996) (observing that the marginal utility of consumption is not necessarily declining over household size because larger households can leverage economies of scale in household consumption).

127. Amartya Sen, *Rawls Versus Bentham: An Axiomatic Examination of the Pure Distribution Problem*, 4 THEORY & DECISION 301, 302 (1974); see also JOHN RAWLS, A THEORY OF JUSTICE 132–35 (rev. ed. 1999). On the application of Rawlsian theory to tax policy, see Linda Sugin, *Theories of Distributive Justice and Limitations of Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991 (2004). Notably, Rawls's theory of justice applies only to the “basic structure of society.” See RAWLS, *supra*, at 3. Possibly a better way of characterizing the intuition that society should redistribute to the less well-off even when the less well-off do not have the highest marginal utility of income would be to use the language of “prioritarianism” associated with Derek Parfit. See Derek Parfit, *Equality and Priority*, in DEBATES IN CONTEMPORARY POLITICAL PHILOSOPHY 115, (2003); Douglas Bamford, *Ethical Taxation: Progressivity, Efficiency and Hourly Averaging*, in PHILOSOPHICAL EXPLORATIONS OF JUSTICE AND TAXATION 135, 140–41 (Helmut P. Gaisbauer, Gottfried Schweiger & Clemens Sedmak eds., 2015).

toward single parents would thus seem congenial to Rawlsians, even if it is more questionable for Benthamite utilitarians.

More explicitly egalitarian theories of tax justice also can support a single parent bonus. Consider Elizabeth Anderson's argument that "a just society must assure to all citizens effective access to the social bases of equal standing," which "requires that all citizens have effective access to the means they need to escape oppressive relationships . . . and to fully participate as equals in the political, economic, and social life of the community."<sup>128</sup> Anderson acknowledges that some people (e.g., those who suffer from disabilities) require additional resources to participate in society as equal citizens, and additional transfers to those individuals are, in her view, therefore warranted.<sup>129</sup> Single parents might be in a similar, though perhaps less permanent, position: to pursue an education, advance in the workplace, and participate fully in the civic life of their communities, single parents often require resources that married couples do not (e.g., evening child care). A credit for single parents could be justified on that basis even if we are uncertain that their marginal utility of income is higher than that of married couples.

But single parent subsidies raise another obvious concern: single parent bonuses necessarily entail marriage penalties, and marriage penalties will likely lead to lower marriage rates. New research by Edward Fox indicates that marriage incentives embedded in the Revenue Act of 1948 had significant effects on marriage probabilities.<sup>130</sup> Earlier research exploiting various marriage penalties and bonuses generated by income taxes and means-tested transfers generally suggests that tax and transfer factors have a modest but measurable effect on marriage decisions.<sup>131</sup> Meanwhile, ample evidence indicates that married couples are happier than single individuals<sup>132</sup> and that children raised by married couples achieve better educational and employment outcomes than children

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128. Elizabeth Anderson, *Welfare, Work Requirements, and Dependent-Care*, 21 J. APPLIED PHIL. 243, 251 (2004).

129. See, e.g., Elizabeth Anderson, *A Basic Income for All: Optional Freedoms*, BOS. REV., Oct. 1, 2000, at 1–2.

130. See Edward G. Fox, *Do Taxes Affect Marriage? Lessons from History* 42–43 (N.Y. Univ. Sch. Of Law, NYU Ctr. for Law, Econ. & Org., Law & Econ. Research Paper Series, Working Paper No. 17–15, 2017).

131. For an updated literature review, see *id.* at 13–14 & n.24–27. For earlier reviews, see James Alm et al., *Policy Watch: The Marriage Penalty*, 13 J. ECON. PERSP. 193 (1999); Nancy Burstein, *Economic Influences On Marriage And Divorce*, 26 J. POL'Y ANALYSIS & MGMT. 387 (2007).

132. See, e.g., Shawn Grover & John F. Helliwell, *How's Life at Home? New Evidence on Marriage and the Set Point for Happiness*, 20 J. HAPPINESS STUD. 373, 384–85 (2018).

raised by single parents.<sup>133</sup> If marriage has profoundly positive effects on spouses and children, then policies that disincentivize marriage in order to improve distribution may unintentionally leave their beneficiaries worse off.

There are, however, at least two reasons to question whether marriage penalties should be a significant cause for concern. First, and most familiarly, claims about the effects of marriage on spousal and child wellbeing run the risk of conflating correlation with causation. Once controls for household income and various measures of parenting behavior are added in a multiple regression analysis, much of marriage's effect on child outcomes disappears.<sup>134</sup> Granted, marriage may contribute to a couple's income-earning ability and may allow married individuals to invest more time, energy, and resources in their children—in which case controlling for household income and parenting behavior could mask marriage's full positive effect. Still, the point remains that causal claims about marriage that are based on observational data should be viewed with healthy skepticism.

Second, and perhaps even more importantly, in assessing the implications of relatively modest marriage penalties, the relevant question is not whether *marriage* makes couples and their children better off; the question is whether *marginal* marriages improve the welfare of couples and their offspring. By *marginal marriages*, I refer to marriages that would be deterred by a modest marriage penalty (or, conversely, marriages that could be incentivized by a modest marriage bonus). Imagine, for example, that we increase the demogrant for single parents by \$500. The result will be a \$1000 marriage penalty if two single parents wed. To a first approximation, this policy will deter marriage when and only when the perceived benefits of marriage to the couple are less than \$1000 per year. It is these marginal marriages that a modest single parent bonus would potentially deter.

What are the effects of marginal marriages on spouses and their children? One of the most interesting studies on the subject examines an Austrian policy that provided large cash grants to first-time newlyweds from the early 1970s until 1987.<sup>135</sup> In August 1987, the Austrian government announced that it would end the policy effective January 1 of the following year, setting off a marriage boom in late 1987.<sup>136</sup> Wolfgang Frimmel and coauthors examined couples who wed during the marriage boom and who were eligible for the subsidy

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133. See Kimberly Howard & Richard V. Reeves, *The Marriage Effect: Money or Parenting?* BROOKINGS (Sept. 4, 2014), <https://www.brookings.edu/research/the-marriage-effect-money-or-parenting>.

134. See *id.*; Richard V. Reeves & Kimberly Howard, *The Parenting Gap*, BROOKINGS (Sept. 28, 2013), <https://www.brookings.edu/wp-content/uploads/2016/06/09-parenting-gap-social-mobility-wellbeing-reeves.pdf>.

135. See Wolfgang Frimmel et al., *Can Pro-Marriage Policies Work? An Analysis of Marginal Marriages*, 51 DEMOGRAPHY 1357, 1359 (2014).

136. *Id.* at 1359.

(“marginal marriages”), comparing those couples to a control group of subsidy-ineligible couples and couples who married before or well after the government’s announcement.<sup>137</sup> They found that the marginal marriages were not more likely to result in divorce, but marginal marriages did result in fewer children and—more disturbingly—children who were less healthy at birth (measured by birthweight) than children born to control-group marriages.<sup>138</sup> In other words, marginal marriages may differ from inframarginal marriages in welfare-relevant ways.

Studies that use temporary marriage incentives to measure the effects of marginal marriages on spouses and children are rare. A second line of research examines policy interventions that change the cost of de-marriage (i.e., divorce). In the second half of the twentieth century, most states adopted laws that allow “unilateral” divorce (allowing a spouse to initiate a divorce without proving the other spouse’s “fault” or obtaining the other spouse’s consent).<sup>139</sup> One might think of these laws as reducing the transaction costs of divorce, making it somewhat easier for spouses to exit a marriage. To be sure, divorce is possible even under a fault-based regime: New York, for example, did not allow unilateral divorce until 2010,<sup>140</sup> and divorce was not unheard-of in New York before then. The effect of unilateral divorce laws on the divorce rate appears to be small: Justin Wolfers estimates a one-half percentage point increase in the probability that a couple will divorce over the course of the first decade of marriage,<sup>141</sup> while a later study suggests that Wolfers’s estimate is—if anything—too high.<sup>142</sup> Thus, the adoption of a unilateral divorce law is a plausible candidate for a natural experiment to test the effect of marginal marriages on welfare-relevant outcomes.

The results are mixed. A 2004 study by Jonathan Gruber examined children who were exposed to unilateral divorce laws (i.e., who grew up in states that allowed unilateral divorce).<sup>143</sup> He finds that exposure to unilateral divorce laws is associated with a lower probability of graduating from high school and college, a decline in employment and income as an adult, and a rise in subsequent suicide

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137. *Id.* at 1358.

138. *Id.* at 1359

139. Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 Q. J. ECON. 267, 273 (2006); Denese Ashbaugh Vlosky & Pamela A. Monroe, *The Effective Dates of No-Fault Divorce Laws in the 50 States*, 51 FAM. REL. 317, 317 (2002).

140. *Paterson Signs No-Fault Divorce Bill*, N.Y. TIMES (Aug. 15, 2010), <https://www.nytimes.com/2010/08/16/nyregion/16divorce.html>.

141. Justin Wolfers, *Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results*, 96 AM. ECON. REV. 1802, 1818 (2006).

142. See Jin Young Lee & Gary Solon, *The Fragility of Estimated Effects of Unilateral Divorce Laws on Divorce Rates*, 11 B.E. J. ECON. ANAL. & POL’Y, no. 1, 2011, at 4.

143. Jonathan Gruber, *Is Making Divorce Easier Bad for Children? The Long-Run Implications of Unilateral Divorce*, 22 J. LAB. ECON. 799, 799 (2004).

rates.<sup>144</sup> Gruber interprets his results as suggesting a “qualified yes” answer to the question: “Does making divorce easier have negative long-run implications for children?”<sup>145</sup> There are, however, at least two reasons to hesitate before concluding that pro-marriage policies are therefore warranted. First, the causal effect of divorce on children is not necessarily the mirror-image of the causal effect of marriage on children. It may be that the welfare effects of growing up with divorced parents are more negative than the welfare effects of growing up with never-married parents. In that case, policies that encourage marriage may have perverse effects on children because without marriage there is—of course—no possibility of divorce. Second, another of Gruber’s findings is that children who are exposed to unilateral divorce laws are significantly *more* likely to get married—and to get married earlier.<sup>146</sup> The causal mechanism is unclear, but one possibility is that exposure to unilateral divorce laws reduces the perceived cost of marriage, as it makes exit appear easier. In any event, the positive correlation between exposure to unilateral divorce laws as a child and marriage as an adult suggests that some of the negative outcomes of parental divorce may in fact be attributable to one’s own marriage.

A later study by Betsey Stevenson and Wolfers paints a more positive picture of universal divorce laws (and a correspondingly darker picture of marriage).<sup>147</sup> Stevenson and Wolfers focus on the effect of universal divorce laws on adults, and they find that adoption of those laws is associated with an 8 to 16 percent decline in female suicide, a roughly 30 percent decline in domestic violence, and a 10 percent decline in the number of women murdered by their partners.<sup>148</sup> These results indicate that marginal marriages—those that would end in states with unilateral divorce laws but persist elsewhere—are in fact rather dangerous to their members, suggesting that pro-marriage policies are potentially quite destructive.

But it is premature to jump to concrete conclusions about the welfare effects of marginal marriages based on studies of unilateral divorce. The broader point is that inframarginal marriages and marginal marriages may have very different consequences, and it is the latter that are most likely to be affected by relatively modest marriage penalties. If the marginal marriages that would be deterred by a tax penalty are the marriages especially likely to result in domestic abuse (or worse), then a marriage penalty could actually improve welfare, even if marriage generally has a positive effect on welfare.

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144. *Id.* at 815–17, 822.

145. *Id.* at 830.

146. *Id.* at 815–19.

147. *See* Stevenson & Wolfers, *supra* note 137.

148. *Id.* at 267, 277, 281, 284.

Against this background of uncertainty, policy recommendations are necessarily tentative. If one believes that transferring resources to single parents yields distributional benefits (whether or not these are distributional benefits that a Benthamite social welfare function would recognize) and that marriage decisions are generally rational, then the appropriate prescription might be to increase the demogrant for single parents up to the point that the distributional benefit equals the efficiency loss from distorting marriage choices. Assuming that marriage decisions are made rationally, the efficiency loss from a marginal increase in the size of the single parent bonus is simply equal to the number of additional marriages deterred multiplied by the associated tax penalty. The deadweight loss from the distortion therefore increases geometrically over the size of the bonus or penalty. A relatively small transfer of resources to single parents may be justified on distributional grounds, but as the transfer grows larger, the corresponding distortion becomes more acute.

In any event, what should be clear by now is that the challenge of determining the size of the optimal transfer to single parents is quite distinct from the marriage tax trilemma. We *can* achieve marriage neutrality while maintaining progressivity and couples neutrality, but that does not mean we should. Whether to deviate from marriage neutrality in the direction of a single parent bonus depends upon (a) the distributional benefits of further assistance to single parents and (b) the distortion (which may in fact be a welfare improvement) from deterring marginal marriages. These are difficult—and important—questions. Tax law academia would do better to reallocate some of its collective brainpower from a soluble marriage tax trilemma to these matters.

## VI. IMPLICATIONS

So far, I have argued that the marriage tax trilemma is not a trilemma at all: not only is it soluble, but even if we solved it, we still would likely want to break two of its three legs. That argument yields implications for research, policy, and pedagogy. This final Part considers those implications.

### A. *Implications for Research*

The thought experiment of a flat tax with a demogrant refocuses our attention toward new normative and empirical questions and casts old questions in a new light. On a normative note, the thought experiment calls on us to consider the virtues—if any—of formal equality on the basis of marital status and household composition in tax law. At the same time, the thought experiment underscores the real-world empirical uncertainties whose resolution ought to shape tax policy toward marriage.

First, a flat tax with a demogrant would allow us to achieve progressivity without distinguishing among individuals on the basis



of marital status or household composition.<sup>149</sup> Simply moving to mandatory single filing in a graduated rate system does not necessarily accomplish that result, because couples would then have incentives to shift income and assets to the lower-bracket member.<sup>150</sup> A country conceivably could do nothing to police those transfers, but the effect would then be to allow income-splitting for couples, which would result in a de facto couples bonus (though not one technically tied to marriage)<sup>151</sup>. For that reason, countries with single filing systems, such as Canada, still maintain marriage-sensitive tax rules in order to guard against the avoidance opportunities that a tax system blind to marital status and household composition would create.<sup>152</sup>

A flat tax with a demogrant would solve these problems, because there are no tax advantages to shifting income and assets when everyone faces the same marginal rate. Such a system would likely reduce administrative and compliance costs, as it would obviate the need for sometimes-complicated rules and standards that are designed to guard against marginal rate arbitrage (e.g., the assignment of income doctrine,<sup>153</sup> the kiddie tax,<sup>154</sup> and many of the rules regarding the taxation of irrevocable trusts<sup>155</sup>). Perhaps most interestingly, it would allow for a tax system that is truly neutral with respect to marital and living arrangements.

I have argued above that the marriage neutrality norm in tax law carries little obvious value when lots of other areas of law distinguish on the basis of marital status.<sup>156</sup> But perhaps that conclusion is too glib. If we extend the time horizon of political possibility and imagine a world in which marital distinctions in other areas of law might be abolished, would we want to use marital status as a factor in tax and transfer decisions? Recall that the policies I have proposed are a reduced rate for secondary earners and a bonus for single parents—the first of which is the opposite of the current tax law’s privileging of married couples in which one spouse earns much more than the other. The thought experiment calls on us to ask whether objections to couples and marriage non-neutrality are objections to the direction of the non-neutrality or to the law’s reliance on marriage.

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149. *See supra* Part I.

150. *See* Lisa Philipps, *Income Splitting and Gender Equality: The Case for Incentivizing Intra-Household Wealth Transfers* 7–8 (Comparative Research in Law & Political Economy, CLPE Research Paper 04/2010, 2010).

151. *Id.* at 3.

152. *Id.* at 3–4.

153. *See* *Lucas v. Earl*, 281 U.S. 111, 114–15 (1930).

154. *See* I.R.C. § 1(g) (2012).

155. *See id.* §§ 641–85.

156. *See supra* Part V.

The question of whether the law should recognize marriage at all is, of course, not a new one.<sup>157</sup> The question takes on additional elements in the tax context. If we want to impose a lower rate on secondary earners and want to transfer resources to single parents, we could use cohabitation rather than marriage as a proxy. We could, for example, define a “secondary earner” as a person who shares a principal residence for 183 days of the year or more with another adult who earns a higher income. We could likewise define a “single parent” as a person who can claim a child below a certain age as a dependent and who does not share a principal residence with another adult between 18 and 65. We might be concerned about the distortions that such definitions would create (e.g., how many spouses would choose for tax reasons to spend their days together and then for one of them to sleep overnight at a nearby motel?), but setting aside the efficiency implications, are there meaningful harms—expressive or otherwise—when the law distinguishes among individuals on the basis of their coupling decisions?

In my view, any objections to distinguishing on the basis of household composition are not sufficiently serious to outweigh the efficiency gains from a lower rate on secondary earners and the distributive benefits from a bonus for single parents. I anticipate that others may think otherwise. My primary goal here is not to convince others of my position but to clarify the stakes of the normative debate: Do those who argue for marriage neutrality object to the particular non-neutralities observed in the current tax code, or to the idea of distinguishing among taxpayers on the basis of marital status more broadly, or to any legal distinction that hinges on the decision to cohabit? Once we move beyond the trilemma framing, these are the sorts of normative questions that we can better understand.

For empiricists, the reframing of the marriage tax problem directs attention to at least two discrete questions. First, the elasticity of taxable income for primary and secondary earners turns out to be a critically important input in the design of the optimal tax regime for couples. Note that the elasticity of taxable income is a different statistic than the price elasticity of labor supply, which is the statistic upon which most existing empirical studies focus.<sup>158</sup> It is the former and not the latter that serves as a sufficient statistic for the excess burden of marginal income tax changes. We care not only about the effect of taxes on hours worked, but also about the marginal product of that labor. For example, a higher tax rate on primary earners may cause some primary earners to continue to work the same number of hours but to switch to a job with a lower salary and

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157. See MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 2–3 (Anita Bernstein ed., 2006) (for a range of perspectives).

158. Robert McClelland & Shannon Mok, *A Review of Recent Research on Labor Supply Elasticities* 9–10 (Cong. Budget Office, Working Paper No. 2012-12, 2012).

higher untaxed fringe benefits—the sort of switch that we might overlook if we examine only the price elasticity of labor *supply*.<sup>159</sup> Refocusing empirical analysis on the elasticity of taxable income for primary and secondary earners rather than the price elasticity of labor supply would make the results more useful to the development of policy.

Second, the discussion above illustrates that in evaluating the welfare effects of marriage non-neutrality, we need to know not only whether (and how much) tax affects marital choices, but also whether (and how much) marginal marriages affect the welfare of spouses and children. The empirical literature on the former question is voluminous;<sup>160</sup> the literature on the latter question—canvassed above—is scant.<sup>161</sup> Without knowing even the sign of the welfare effect of marginal marriages, it is impossible to draw concrete conclusions as to whether the marriage disincentives embedded in a single parent bonus are worrisome. Identifying marginal marriages is, to be sure, difficult, but until we can make more progress on this front, claims about the optimal tax treatment of marriage will necessarily be tentative.

### B. *Implications for Policy*

With that last-mentioned point at front of mind, I should emphasize that the policy implications derived from the analysis above are provisional. The first recommendation, appropriately caveated, is to lower the tax rate on secondary earners relative to primary earners until the efficiency gain from secondary earners increasing their taxable income equals the efficiency loss from primary earners reducing theirs. The second recommendation is to allow for a single parent bonus even though (and perhaps especially because) such a bonus implies a penalty that will deter marginal marriages. The first change would indeed be a change—but also a return to the policy briefly implemented in the early 1980s.<sup>162</sup> The second suggestion is, in fact, reasonably close to the status quo, much-maligned though marriage penalties for single parents are today.<sup>163</sup>

The analysis above might also suggest that the design of child care subsidies should occupy a more central role in policy discussions regarding the tax treatment of marriage. Child care subsidies may operate as functional substitutes for tax cuts targeting secondary

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159. *Id.* at 4.

160. *See supra* note 129.

161. *See supra* notes 133–36 and accompanying text.

162. Gann, *supra* note 101, at 476.

163. Jacob Goldin & Zachary Liscow, *Beyond Head of Household: Rethinking the Taxation of Single Parents*, 71 TAX L. REV. 367, 369 (2018) (pointing out that the tilting of single parent bonuses toward upper-income single parents is one genuinely difficult-to-defend feature of the current tax code).

earners.<sup>164</sup> Both interventions increase the after-tax return to a secondary earner's participation in the market economy, at least where the secondary earner is also a parent. Child care subsidies may also provide alternative means of achieving the goals of a single parent bonus: by subsidizing child care, we enhance the ability of single parents to participate as equals in the political, economic, and social life of the community. The optimal design of child care subsidies is a multifaceted question that lies beyond this Essay's scope. Yet in thinking about how to achieve the objectives of (a) encouraging secondary earner participation in the market economy and (b) assisting single parents, we ought not limit our analysis to traditional tax tools.

### C. *Implications for Pedagogy*

Ultimately, the clearest implication of the preceding analysis is pedagogical. The marriage tax trilemma may play an important role in the intellectual history of U.S. tax law scholarship, but as a framework for thinking about the tax treatment of married couples in introductory courses on income taxation and upper level seminars on tax policy, the trilemma is largely a distraction. It is a problem we know how to solve, but if we were to solve it, we would likely conclude that couples neutrality is not a desirable goal and marriage neutrality might not be either. The modest proposal offered here is that instead of focusing on a problem for which we know the solution, we should shift our attention to questions whose answers do not yet lie within our grasp.

One potential exercise is to begin the unit on the tax treatment of marriage by asking students for their reactions to a hypothetical policy that provides a bonus of roughly \$650 per year to single parents working full time at the minimum wage, relative to the tax they would pay if they earned that amount as part of a two parent equal earner couple. This is, in approximate terms, a description of current law.<sup>165</sup> My prediction, based on my own experience, is that a large chunk of the class will support the policy on the grounds that it helps to offset the financial burden of raising a child alone. Next, ask students for their reactions to a policy that imposes a tax penalty of roughly \$1300 per year on single parents earning the minimum wage who marry. The policy, framed in those terms, attracts few defenders. Some will see (and the reader by now will be well aware) that these are in fact

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164. *Understanding Child Care Subsidies in the Tax System: Hearing Before the H. Democratic Women's Working Grp.*, 115th Cong. (2017) (statement of Elaine Maag, Senior Research Associate, Urban-Brookings Tax Policy Center).

165. *See Minimum Wage*, STATE OF CAL., DEP'T OF INDUS. RELATIONS (Dec. 2016), [https://www.dir.ca.gov/dlse/faq\\_minimumwage.htm](https://www.dir.ca.gov/dlse/faq_minimumwage.htm) (stating that the minimum wage for large employers in the most populous state, California, is \$12 per hour starting January 1, 2019—an individual working 40 hours per week for 50 weeks at \$12 per hour would earn \$24,000); *see also supra* Table 6.

two descriptions of the same policy. Unlike the marriage tax trilemma, the duality of single parent bonuses and marriage penalties is in fact one that “[n]o algebraic equation, no matter how sophisticated,” can crack.<sup>166</sup>

Pedagogy and policy are of course intertwined. Students’ intuitions—unadulterated (yet) by the trilemma framing—provide us with useful data on how much normative significance non-tax lawyers attach to couples neutrality and marriage neutrality, and how much resistance policies that intentionally violate those norms will engender. Class discussions also can be generative of new policy ideas and new perspectives on old ones. And students will go on to be tax policymakers—in some cases as government officials, in most cases as voters.<sup>167</sup> Studying and teaching the taxation of marriage through the lens of the trilemma sacrifices valuable opportunities to engage in potentially productive debates about the real normative and empirical questions that tax policy toward marriage must struggle to resolve.

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166. See Cohen Testimony, *supra* note 6, at 79.

167. See, e.g., David Grande, David A. Asch & Katrina Armstrong, *Do Doctors Vote?*, 22 J. GEN. INTERNAL MED. 585, 585–86 (2007) (noting high rate of voting among lawyers).