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# Joint Winners, Separate Losers: Proposals to Ease the Sting for Married Taxpayers Filing Separately

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# FLORIDA TAX REVIEW

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## JOINT WINNERS, SEPARATE LOSERS: PROPOSALS TO EASE THE STING FOR MARRIED TAXPAYERS FILING SEPARATELY

*by*

*Michelle Lyon Drumbl*[*]

### ABSTRACT

*A taxpayer who is "considered as married" according to the Internal Revenue Code's definition must file either a joint income tax return or an individual return using the "married filing separately" filing status. Those married taxpayers who file a separate, rather than a joint, income tax return are denied valuable benefits and subjected to a host of other unfavorable limitations. Low-income taxpayers, in particular, are hurt by these limitations. Certain married taxpayers, including victims of domestic violence and abandoned spouses, may have no choice but to file using the married filing separately status. Low-income taxpayers are denied tremendous benefits, such as the earned income tax credit, as they begin to rebuild their lives.*

*Perhaps intentionally because of these limitations, and in other cases perhaps unintentionally by misunderstanding or mistake, some taxpayers incorrectly choose single or head of household as their filing status when the correct status should have been married filing separately. In the context of the earned income tax credit, the cost to the government of this particular type of filing status error is estimated to be between $2.3 and $3.3 billion annually. As currently structured, not unsurprisingly, the limitations on the married filing separately filing status create an incentive for this type of taxpayer or return preparer noncompliance.*

*Further complicating this filing status frustration, the Code imposes limitations on how and when married taxpayers may amend their return to file a joint return after one or both spouses files a separate return. The*

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*Internal Revenue Service applies a restrictive reading of these limitations; whether the Service is interpreting the Code correctly remains an open question in the courts.*

*This Article explores these married taxpayer filing status limitations and the collateral consequences thereof. It briefly outlines how and why the joint filing option developed and touches upon the concepts of the marriage bonus and the marriage penalty. It concludes by proposing three alternative models to the current limitations imposed on married taxpayers who choose to (or have no choice but to) file separate returns. In each proposal, low-income taxpayers would have increased access to the credits meant to assist them. In addition to increasing fairness, each proposal would reduce or remove a structural incentive for taxpayer noncompliance.*

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## I. INTRODUCTION

Married couples can elect to file a joint income tax return, and most do. But those who do not, or cannot, file jointly often face adverse tax consequences. Taxpayers who file using the married filing separate filing status are denied certain significant deductions and credits available to all other types of filers.[1] Certain other credits and deductions are allowed to married filing separately taxpayers, but only under a narrowly defined set of circumstances.[2] Certain items of income that would be excludible on a joint return must be included in income on a married filing separately return.[3] A

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1. An Internal Revenue Service (Service) publication provides a list of these, noting "you usually pay more tax on a separate return than if you use another filing status you qualify for." INTERNAL REVENUE SERV., PUB. NO. 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION 7 (2015). Use of the married filing separate status precludes a taxpayer from taking the EITC, the American opportunity credit, and the lifetime learning credit. I.R.C. §§ 25A, 32(d). It additionally precludes a taxpayer from claiming deductions for student loan interest and qualified tuition. I.R.C. §§ 221(e)(2), 222(d)(4).

2. The premium tax credit is a recent and elaborate example of this, and I address it in detail in Part II.B. I.R.C. § 36B(c)(1)(C). Other credits have special rules that differ from the Code's general definition of who is "considered as married." For example, the credit for the elderly and disabled is allowed to a taxpayer filing married separately "in the case of a husband and wife who live apart at all times during the taxable year." I.R.C. § 22(e)(1). The child and dependent care credit is allowed to a separate filer only if the spouse did not live with the taxpayer for the last 6 months of the taxable year and the taxpayer maintains a household for more than one-half of the year for a "qualifying person" (as defined in I.R.C. § 21(b)(1)), which is a slightly relaxed version of the definition of a dependent; taxpayers in some circumstances may meet this definition while failing to meet the head of household requirements. I.R.C. § 21(e)(2). Similarly, the adoption tax credit is allowed provided that the spouse did not live in the home for the last six months of the year, and the taxpayer maintains a household for more than one-half of the year for the "eligible child" (as defined in I.R.C. § 23(d)(2)). I.R.C. § 23(f)(1).

3. A married taxpayer filing separately cannot exclude interest income from the redemption of qualified U.S. savings bonds used to pay for higher education expenses, while taxpayers in all other filing statuses can exclude such

married taxpayer who files separately cannot claim the standard deduction (which would be one-half that allowed on a joint return) if the taxpayer's spouse itemizes on his or her return.[4]

Low-income taxpayers, in particular, are adversely impacted by these rules.[5] Of perhaps greatest significance, a married taxpayer who chooses to (or is forced to) file separately becomes instantly ineligible for the earned income tax credit ("EITC"), even if he or she meets all other eligibility provisions.[6] A married taxpayer filing separately can claim the premium tax credit or the child and dependent care expense credit only if narrow and cumbersome exceptions are met.[7] Each of these three credits plays an important safety net function for low-income taxpayers; due to life's complexities and the (sometimes greater) complexities of the Internal Revenue Code (Code), taxpayers who must file separately may be shut out of these credits despite sympathetic circumstances.

Perhaps in part for these reasons, some taxpayers deliberately misrepresent their marital status, choosing single or head of household filing status despite not meeting the required criteria for those statuses. In other cases, taxpayers are led astray by an incompetent or (more likely) unscrupulous tax return preparer who selects the incorrect filing status, perhaps doing so without the taxpayer's knowledge or understanding. As currently structured, the disadvantages associated with the married filing separate status create an incentive for this type of taxpayer or preparer noncompliance. Further complicating this issue, the Code imposes limitations on how and when married taxpayers may amend their filing to file jointly after one or both spouses has filed a separate return. The Internal Revenue Service (Service) applies a restrictive reading of these limitations;

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income up to certain limitations. I.R.C. § 135(d)(3). Likewise, other filers who have social security benefits can exclude part or all of the benefits from income according to a "base amount," but a married taxpayer filing separately is not entitled to any base amount that may be excluded so long as he or she lived with his or her spouse at any time during the taxable year. I.R.C. § 86(c)(1)(C).

4. I.R.C. § 63(c)(6)(A).

5. Another disadvantage of married filing separately that is often cited is that the tax rate table income bands are overall narrower than those for an unmarried person. However, in tax year 2014, this rate difference only came into effect once the filer's taxable income exceeded $74,425. Rev. Proc. 2013–35, 2013–47 I.R.B. 537. While this is surely an additional disincentive for certain taxpayers filing separately, this particularity is outside of the scope of this Article because it does not concern low-income taxpayers.

6. I.R.C. § 32(d).

7. I.R.C. §§ 21(e)(2), 36B(c)(1)(C).

whether the Service is interpreting the Code correctly remains an open question.[8]

Curiously, not all income-based credits and deductions are denied to a taxpayer who files a married filing separate return. For example, such a taxpayer can still benefit from the child tax credit and the retirement savings contributions credit.[9] While the income threshold for the phase-out of these two credits is reduced for a married individual filing separately as compared to married individuals filing a joint return,[10] this treatment is obviously more favorable than an outright denial of eligibility.[11] The retirement savings contributions credit (sometimes called the "saver's credit") is designed specifically to benefit low-income taxpayers, in that it has income thresholds somewhat similar to the EITC.[12] The child tax credit, in contrast, is available to low-income taxpayers but also at income levels for certain filers that are decidedly not "low-income."[13]

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8. *See infra* Part III.D (discussing the recent Eighth Circuit opinion in *Ibrahim v. Commissioner*).

9. I.R.C. §§ 24, 25B.

10. In the case of the child tax credit, the threshold amounts are as follows: $110,000 for a joint return; $75,000 for an unmarried individual; and $55,000 for a married taxpayer filing a separate return. I.R.C. § 24(b)(2). In the case of the retirement savings contributions credit, the income thresholds and applicable credit percentages are the same for an unmarried taxpayer and a married taxpayer who files separately (and double these figures for joint filers). I.R.C. § 25B(b).

11. In a similar vein, I.R.C. § 121 permits married taxpayers filing separately to exclude the gain from the sale of a principal residence, but the provision halves the amount that can be excluded by each spouse to $250,000 (as compared to $500,000 for joint filers). Likewise, a married taxpayer filing separately is allowed a capital loss deduction of $1,500 (as compared to $3,000 for joint filers).

12. For an unmarried taxpayer or a married taxpayer filing separately in 2014, the saver's credit fully phased out at $30,000, while the EITC for an unmarried taxpayer with three children fully phased out at $46,997. For a married couple filing jointly in 2014, the saver's credit fully phased out at $60,000, whereas a married couple with three or more children is phased out of the EITC at $52,427. Notice 2013–73, 2013–49 I.R.B. 598; Rev. Proc. 2013–35, 2013–47 I.R.B. 537.

13. As noted *supra* in footnote 10, on a joint return the child tax credit begins to gradually phase out at an adjusted gross income of $110,000. This is more than double the adjusted gross income at which the EITC is fully phased out on a joint return (as noted *supra* in footnote 12, in tax year 2014 this figure was $52,427 for a married couple with three or more children). For a comparison and critique of the differences between the EITC and the child tax credit, see Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755 (2005).

This Article will explore some of the problems that arise from the Code's limitations on choosing a filing status, the collateral consequences of that status, and the limitations on changing that status after filing. In particular, this Article is concerned with low-income taxpayers, as this is the most economically vulnerable population and the one that is hurt disproportionately by these limitations. Part III addresses the ways in which these limitations play a role in taxpayer and preparer noncompliance, contributing to the size of the much-criticized "improper payment" rate of the EITC.[14] According to a Service study of returns filed for tax years 2006-2008, an estimated five percent of all EITC claimants (constituting approximately one million returns) incorrectly chose single or (more commonly) head of household status when the correct status should have been married filing separately.[15] The cost to the government of this specific

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14. In 2014, the estimated error rate on EITC payments was 27.2%, representing an estimated $17.7 billion in improper payments. *Government Efficiency and Effectiveness: Opportunities to Reduce Fragmentation, Overlap, Duplication, and Improper Payments and Achieve Other Financial Benefits: Testimony of U.S. Gov't Accountability Office (GAO–15–440T) Before the S. Comm. on the Budget*, 114th Cong. 35 (2015) (statement of Gene L. Dodaro, Comptroller General of the United States). As a percentage of outlays, the EITC improper payment rate is by far the highest of any government spending program. The error rate has been high for more than a decade, and despite a high examination rate of EITC returns, the Service has not been able to reduce the error rate. A recent Service compliance study concludes that the two most common causes of EITC overclaims are income misreporting and qualifying child errors. INTERNAL REVENUE SERV., PUB. NO. 5162 (8-2014), COMPLIANCE ESTIMATES FOR THE EARNED INCOME TAX CREDIT CLAIMED ON 2006–2008 RETURNS 20 [hereinafter COMPLIANCE ESTIMATES]. The study indicates that filing status errors are the third most common source of error (and a distant third to the first two causes), accounting for an estimated 9 to 17% of overclaims. Not all filing status errors arise from married taxpayers filing as single or head of household; another common filing status error is when an unmarried taxpayer erroneously chooses head of household to claim qualifying children of his or her significant other (i.e. dependents who are not his or her child or stepchild).

15. COMPLIANCE ESTIMATES, *supra* note 14, at 20. This report explains: "Five percent of all EITC claimants (two percent of those filing single and nine percent of those filing as head-of-household) are estimated to have the correct status of married-filing-separately, making them ineligible for the credit." *Id.* I discuss the significance of this statistic in Part III.D, *infra*.

type of overclaiming is estimated to be between $2.3 and $3.3 billion annually.[16]

Part IV of this Article outlines in brief how and why the joint filing option developed and touches upon the concepts of the marriage bonus and the marriage penalty. For a variety of reasons, some scholars have argued in favor of eliminating joint filing and adopting a system of individual filing for all. While this author favors such an approach,[17] I believe it unlikely that Congress will abolish the joint filing option or radically overhaul the current filing status structure.

This Article concludes in Part V by proposing three alternative models to the current limitations imposed on married taxpayers who choose to (or have no choice but to) file separately. In each proposal, low-income taxpayers would have increased access to the credits meant to assist them. In addition to increasing fairness, each proposal also would reduce or remove a structural incentive for taxpayer noncompliance.

The first proposal I describe builds upon a current provision applicable only to certain separate filers who claim the premium tax credit, which is the refundable advance credit available to taxpayers who apply for health coverage through the Health Insurance Marketplace.[18]

The second proposal draws from the example of the Canadian revenue system, which provides individual filing for all taxpayers (with no option to file jointly) but bases eligibility for a family tax credit on household (rather than individual) income. This proposal will show that with information sharing between returns, Congress can keep the two "married" filing statuses in place but could base all credit eligibility on household income. Thus, a married woman who lives with her husband but files separately would be entitled to the EITC provided that her husband's income is also sufficiently low as to meet the thresholds that apply to joint filers. In contrast, a married

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16. COMPLIANCE ESTIMATES, *supra* note 14, at 19 tbl.5. The estimates used in Table 5 of the Service's *Compliance Estimates* report treat each different EITC overclaim error type in isolation. To provide context to these figures: the report averages "returns filed for TY 2006–2008, [and estimates that during that period] 23.7 million taxpayers claimed an annual total of $49.3 billion in EITC." *Id.* at iv.

17. For my critique of joint and several liability and my argument for individual filing in light of the changing demographics of the United States, see Michelle Lyon Drumbl, *Decoupling Taxes and Marriage: Beyond Innocence and Income Splitting,* 4 COLUM. J. TAX. L. 94 (2012).

18. For information about the Healthcare Marketplace and the premium tax credit, see generally *2015 Health Coverage & Your Federal Taxes*, HEALTHCARE.GOV, https://www.healthcare.gov/taxes/ (last visited Nov. 21, 2016).

woman who lives separately from her estranged husband would be entitled to the EITC based on her own income. At the same time, this proposal calls for unmarried cohabitating parents to be subjected to the EITC phase-outs based on their combined household income rather than their filing status. As I address in the discussion of this proposal, unmarried cohabitating parents (of all income levels, including low-income) are in many cases tax-favored compared to married couples.[19] In this regard, the current Code creates a potential economic disincentive for couples of various income levels to marry.[20] My proposal would not fully correct this disparity, but at least it would relieve some of the more egregious examples of inequity faced by married taxpayers. This proposal thus would make the married filing separately status less punitive in nature, while accomplishing the same legislative purposes of the income thresholds and preserving the EITC as an anti-poverty measure.

My third proposal envisions a filing procedure more like the status quo U.S. system, but with the significant departure that credits and deductions claimed on a married filing separate return would be allowed at half the amount permitted to an unmarried taxpayer. In this proposal, a married woman who files separately and is a low-earner would be entitled to receive half the EITC amount to which an unmarried taxpayer with the same individual income is entitled. My proposal allows this even if the married taxpayer's husband's income is sufficiently high that their combined income would make them ineligible for the EITC if they filed jointly. While in this case, the wife would benefit from filing separately with her low income, the husband simultaneously loses the benefit of income splitting and the more favorable rate brackets. At lower household income levels, this proposal sometimes would result in a married couple reaping a collective benefit from filing separately. Once the household income reaches a higher threshold, married taxpayers generally still would fare better by filing a joint return. This proposal would make the married filing separately status less punitive in nature, and may also create an incentive for both spouses to work, especially at the margins of the EITC income phase-out. The advantage of such an incentive is discussed in Part V.C.

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19. *See* Drumbl, *supra* note 17, at 121.

20. *See* James Alm & Leslie A. Whittington, *For Love or Money? The Impact of Income Taxes on Marriage*, 66 ECONOMICA 297 (1999) (finding that the existence of a 'marriage tax' discourages marriage, especially for women, although its effect is generally small); James Alm, M. V. Lee Badgett & Leslie A. Whittington, *Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage*, 53 NAT'L TAX J. 201, 213 (2000) ("it seems unlikely that taxes are the main, or even a major, factor in the marriage decision for most couples").

## II. How Filing Separately Disadvantages Taxpayers, and Why Some Taxpayers Cannot Avoid It

A "married individual" can elect to file a single joint return with his or her spouse, even if one of the spouses is not required to file a return.[21] If the election to file jointly is not made, a married individual must file using "married filing separate" status.[22] Marital status is determined as of the last date of the taxable year.[23]

The Code provides three exceptions for when a married individual "shall not be considered as married" for purposes of determining filing status: 1) "an individual legally separated from his spouse under a decree of divorce or of separate maintenance";[24] 2) a taxpayer who maintains and furnishes more than one-half the cost for a household which for more than one-half the taxable year is the principal place of abode of the taxpayer's child, provided that the taxpayer's spouse was not a member of that household during the last six months of the taxable year;[25] and 3) a taxpayer whose spouse at any time during the year was a nonresident alien, provided that the taxpayer qualifies for head of household status.[26]

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21. I.R.C. § 6013(a) (stating that joint filing is an option "even though one of the spouses has neither gross income nor deductions").

22. Spouses domiciled in one of the nine community property states who file separate returns are subject to special rules; they must each report one half of the community income in addition to their separate income. I.R.C. § 66. This Article does not attempt to address the differences and the complexities that arise in community property states.

23. I.R.C. § 7703(a)(1).

24. I.R.C. § 7703(a)(2).

25. I.R.C. § 7703(b). For this purpose, the spouse is considered to live in the home if he or she is "temporarily absent from the household due to special circumstances." Reg. § 1.7703–1(b)(5). "Special circumstances" may include illness, education, business, vacation, or military service. *Id.* Note also that the rule in section 7703(b) is more restrictive than the head of household requirement insofar as the taxpayer must be entitled to claim a child as a dependent; for this purpose, the meaning of child is defined in section 152(f)(1), which includes a son, daughter, stepchild, adopted child, or eligible foster child. This is in contrast to section 2(b), which provides that an unmarried taxpayer using the head of household status must be entitled to claim as a dependent a "qualifying child" as defined in section 152(c), which is more expansive in that it includes siblings, nieces, nephews, and grandchildren.

26. I.R.C. § 2(b)(2)(B). This presumes that the couple did not elect under section 6013(g) to treat the nonresident alien spouse as a U.S. resident for tax

### A. *With All the Disadvantages, Why Would Anyone Elect Married Filing Separate Status?*

In the tax year 2012, the Service received 2,663,017 returns of married persons filing separately.[27] Perhaps a small percentage of these taxpayers as couples benefitted from a collectively lower liability due to the unusual nature of their situation.[28] Far more likely, the couple collectively paid more tax but had a compelling nontax reason to make this election, such as a desire to keep finances separate or to avoid joint and several liability.[29] But for many taxpayers, choosing this status is not so much an "election" as the absence of other viable alternatives. These taxpayers are the primary

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purposes. Note that the spouse is not a qualifying person for purposes of determining head of household status; there must be another qualifying dependent in the household. I.R.C. § 2(b)(3)(B)(i).

27. INTERNAL REVENUE SERV., PUB. NO. 1304, INDIVIDUAL INCOME TAX RETURNS 2012, at 77 tbl.1.6 (2014).

28. The oft-cited example of when a married couple may benefit from separate returns is when one spouse has a low income and also significant deductions that are subject to an adjusted gross income (AGI) floor. For example, section 213 provides that certain medical expenses are deductible (as an itemized deduction) to the extent the expenses exceed 10% of the taxpayer's AGI. On a joint return, the couple's AGI would be the floor for calculating the deduction. On a separate return, the individual taxpayer's AGI would be used; thus, if both spouses had income, a greater portion of the expense would exceed the floor. Of course, it is not a foregone conclusion that the taxpayers would collectively benefit from this. There are many other factors in computing the respective liabilities, so the benefit of the higher medical expense deduction may be offset by any number of things, including a collectively less preferential rate structure, the missed opportunity for income splitting, and the fact that both spouses must itemize if one spouse does so.

29. Another compelling nontax reason is if one spouse has student loans with income based repayment (IBR). Under current law, if married spouses file separately, the repayment is based on separate income (whereas it is based on joint income for joint filers). *See* Peter J. Reilly, *Something Borrowed Makes You Blue—Student Debt and Joint Returns*, FORBES.COM, (July 5, 2015, 2:31 PM), http://www.forbes.com/sites/peterjreilly/2015/07/05/something-borrowed-makes-you-blue-student-debt-and-joint-returns/. *See also* Victoria J. Haneman, *The Collision of Student Loan Debt and Joint Marital Taxation*, 35 VA. TAX REV. 223, 227 (2016) (arguing that "allowing a married borrower to qualify for PAYE/IBR and loan forgiveness on the basis of a separately filed tax return is problematic" due to the other disadvantages of the married filing separately status and describing how female borrowers suffer a twofold penalty due to the gender pay gap and secondary earner bias).

concern of this Article, and the following section describes different categories of taxpayers who are "considered as married" (under the Code definition set forth above) but lack viable alternatives at filing time.

*1. Separated, but Not Legally So*

A married taxpayer who is living apart from his or her spouse but not *legally* separated is not able to file as single.[30] He or she might be eligible to file using head of household status, but only if he or she meets the requirements for that status and additionally meets one of the two exceptions described above.[31] For example, a taxpayer who has been living apart from his or her spouse (and is not legally separated) for less than the last six months of the tax year cannot use the head or household status because he or she does not meet the criteria in order to "not be considered as married" for purposes of section 7703(b). For a parent living with children, this is a costly restriction. And even in cases in which one spouse does meet the definition to "not be considered as married" because the children live with him or her and the other requirements are met, the other spouse does not benefit; the noncustodial spouse is still considered to be married (absent a legal separation) and must file a separate return.

For low-income taxpayers, in particular, the cost or lack of access to legal assistance may make a court-ordered separation and subsequent divorce prohibitive. For this and many other reasons, some couples (at all income levels) part ways without completing this legal formality and remain married.[32]

Unless they meet the Code's criteria to be considered unmarried, these taxpayers are legally required to file as married filing separately, and a return preparer is ethically bound to use that status if the

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30. The Code contains a special provision for a married taxpayer whose spouse is in "missing status" due to service in a combat zone; these taxpayers can elect to file a joint return under a very narrowly defined set of circumstances. I.R.C. § 6013(f).

31. I.R.C. §§ 7703(b), 2(b)(2)(B); *supra* note 25 and accompanying text.

32. *See, e.g.*, Pamela Paul, *The Un-Divorced*, N.Y. TIMES, July 30, 2010 http://www.nytimes.com/2010/08/01/fashion/01Undivorced.html?pagewanted=all&_r=1 (citing several scenarios of couples who split up but do not divorce, and noting that such couples are "irrefutably bound by contractual links on issues like taxes"). *See also* Tumin et al., *Estimates and Meanings of Marital Separation*,77 J. MARRIAGE & FAM. 312, 313 (2015) (noting that for some couples "marital separation may become an alternative to divorce, lasting for many years without resolving in either divorce or reconciliation").

taxpayer discloses this detail. The Code does not provide any exception or safe harbor for these taxpayers, though they may conceptualize themselves as unmarried and certainly are no longer in a financial partnership with their legal spouse.

### 2. *Spouse Refuses to Sign; Spousal Abuse*

Among its other ills, domestic violence creates terrible dilemmas for taxpayers. Spousal abuse can include physical abuse as well as control, intimidation, and forms of emotional manipulation. Women or men suffering in such a relationship dynamic may be forced by an abusive spouse to sign a joint return against their better judgment. In such cases, the abused spouse later may be eligible for relief from joint liability by making a request for innocent spouse relief.[33]

Conversely, the abusive partner may refuse to provide financial information or participate in the filing process with his or her spouse, leaving the abused taxpayer with no recourse but to file a separate return. In other cases, victims of domestic violence may have fled the relationship yet remain legally married, and in such cases, they do not wish to contact the spouse to coordinate a joint return.[34]

In recognition of these circumstances, the Treasury promulgated regulations to provide a special exception to victims of spousal abuse who claim the premium tax credit but must (or choose to) file a separate return. As detailed in Part II.B.2, this exception is a relatively recent and extremely important development for domestic violence victims, but it is limited only to the premium tax credit. This exception serves as the model for one of the proposals set forth in Part V.[35]

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33. *See generally* I.R.C. § 6015.

34. *See, e.g.*, Letter from Futures Without Violence to the Internal Revenue Service 1 (October 27, 2014), https://www.regulations.gov/document?D=I RS-2014-0025-0015 (stating "Many domestic violence victims remain legally married even after they have fled their abusive relationship. Their spouse may not grant a divorce; they may be too afraid to ask for a divorce; or not enough time may have passed to be granted a divorce").

35. *See also* Mary Leto Pareja, *Beyond the Affordable Care Act's Premium Tax Credit: Ensuring Access to Safety Net Programs*, 38 HAMLINE L. REV. 241, 284 (2015) (describing the premium tax credit's exceptions and arguing that such an exception should be expanded to allow domestic violence victims to claim other benefits, including the EITC, that are typically lost by filing separately).

*3. Spousal Abandonment*

A married taxpayer who was abandoned by his or her spouse is still "considered as married" if he or she: 1) was abandoned within the last six months of the tax year (even if the taxpayer heads a separate household with his or her children); or 2) does not have dependent children. Yet, a taxpayer obviously cannot elect to file a joint return with someone who is absent and uncooperative and, thus, is forced to file a married filing separate return. In response to comments it received following the proposed regulations creating a spousal abuse exception for taxpayers filing separately and claiming the premium tax credit, the Treasury expanded the exception to include spouses who have been abandoned and cannot locate their spouse. Again, this exception is significant in that it recognizes a category of taxpayer that has no option to file jointly; but as with victims of spousal abuse, the exception is limited to the premium tax credit.

*4. U.S. Person Married to Nonresident Alien, If Head of Household Status Is Not Available and No Election Is Made Under 6013(g)*

Section 6013(a)(1) provides that a joint return cannot be made if one of the spouses is a nonresident alien. The U.S. resident spouse is allowed to file using head of household status if he or she otherwise qualifies for it.[36] This is true despite the fact that the spouses live in the household together; this rule represents a beneficial exception not available to two U.S. resident spouses.

Section 6013(g) provides the opportunity for an election to treat the nonresident spouse as a U.S. resident for tax purposes. Such an election would make the nonresident spouse subject to U.S. taxation of his or her worldwide income regardless of source, and it generally would preclude the nonresident from electing benefits under a U.S. income tax treaty. As such this may be a very undesirable election for some families.[37]

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36. I.R.C. § 2(b)(2)(B); *see supra* note 26.

37. The possible scenarios and the tax consequences of making the election to be treated as a U.S. resident are varied and full of nuance. A full discussion of this category, and of the differences in the taxation of resident and nonresident aliens, is outside the scope of this Article. That said, the statutory distinction made with respect to filing status and these couples is worth bearing in mind.

Absent the election, and without a dependent in the household that would qualify the taxpayer for head of household filing status, the U.S. resident spouse has no choice but to file married filing separately.

*5. Lack of Access to Tax Advice; Lack of Planning; Misinformed Decision Making*

Many low-income taxpayers are unsophisticated and lack formal education in financial matters. Many rely on friends or family for tax advice, and this advice is often ill-informed even if well-intended. Not all taxpayers speak English or can read it well enough to understand how to navigate the instructions on an income tax return.

Some of these taxpayers choose to self-prepare their taxes due to the cost of professional tax return preparation. Some of these taxpayers let a friend or family member prepare the return on their behalf. Others rely on questionable return preparers and lack the tools to understand, or the confidence to challenge, what the return preparer presents for signature. The low-cost tax preparation industry is replete with misinformation, preparer fraud, and questionable advice.[38] Thus, low-income taxpayers may not fully appreciate what is at stake for them or be aware of the consequences of filing incorrectly or inconsistently.

Many tax provisions available to low-income taxpayers are complex, and generally these taxpayers lack access to reliable tax advice. While free income tax return preparation is available at Service-sponsored sites such as Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE), a surprisingly small percentage of taxpayers take advantage of these valuable resources.[39]

As Part III will discuss in detail, taxpayers who lack (or do not seek) access to informed and competent tax advice may make ill-informed decisions as to filing status. Once the decision is made, the Code places limitations on the ability for these taxpayers to later change their filing status to married filing jointly.

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38. *See* CHI CHI WU, NAT'L CONSUMER LAW CTR., RIDDLED RETURNS: HOW ERRORS AND FRAUD BY PAID TAX PREPARERS PUT CONSUMERS AT RISK AND WHAT STATES CAN DO (2014), https://www.nclc.org/images/pdf/pr-reports/report-riddled-returns.pdf.

39. An estimated three percent of EITC returns are prepared by Service-sponsored return preparation sites. COMPLIANCE ESTIMATES, *supra* note 14, at 25 tbl.8.

### *6. Mutual Fear of Joint Liability, Lack of Trust, or Preference to Keep Things Separate*

Some married couples live together but choose to keep finances—and tax filings—separate. This preference may be for any number of reasons, ranging from a deep individual sense of independence, to a lack of trust, to a deliberate and rational choice to avoid joint liabilities.[40] Unlike the other categories I describe, couples in this scenario are truly making an election and do not evoke the same sympathies as married taxpayers who have no choice but to file separately. It is worth considering, however, whether the current rules are too punitive for this category of taxpayers as well. My third proposal, set forth in Part V, is broad enough to benefit certain taxpayers in this category; I argue there are compelling policy reasons to allow such a benefit.

## *B. How Are Low-Income Individuals in Particular Impacted by the Limitations on the Separate Filing Status?*

The introduction describes a number of credits and deductions that are denied to married taxpayers who file separately. This Section discusses three of these Code provisions in greater detail: the EITC; the premium tax credit; and the special rules regarding itemized deductions for married filing separate filers.

The EITC is the most financially significant to low-income taxpayers, as it is a refundable credit designed to serve as an anti-poverty program. The premium tax credit is a relatively new refundable credit designed to assist lower-income taxpayers who buy health insurance through the Affordable Care Act's marketplace. It merits special attention in this Article because Congress made it unavailable to married persons filing separately, and the Treasury and Service have given great thought to creating appropriate exceptions to this rule. The provision requiring married

40. Another dynamic that may fall in this category is a couple that remains married and continues to live together but that no longer has a romantic partnership. One reason such couples remain in a household together is that it is "too expensive to divorce"; the individuals wish to continue sharing expenses, but they function more as roommates rather than a true economic unit. These couples may benefit financially from joint filing, but by making that election they must take on joint and several liability. *See, e.g.*, Shankar Vedantam, *Marriage Economy: "I Couldn't Afford to Get Divorced,"* NPR (Dec. 20, 2011, 4:29 PM), http://www.npr.org/2011/12/20/144021297/marriage-economy-i-couldnt-afford-to-get-divorced.

taxpayers filing separately to itemize if their spouse itemizes can pose challenges to filers who are estranged from their spouse; this impacts all separate filers, but can have a harsh financial impact on low-income filers, who are less likely to have a significant amount in itemized deductions.

### 1. *Earned Income Tax Credit*

The predecessor to today's EITC was enacted as a temporary program in 1975.[41] Made permanent in 1978,[42] Congress has expanded the credit several times since then.[43] In scope and size, it has grown into one of the most significant federal anti-poverty benefit programs in the United States.[44] The legislative history describes the early proposals of the credit as having two objectives: (1) "as a way of decreasing work disincentives" for persons on welfare; and (2) as a way of addressing the regressive nature of social security taxes.[45] The maximum EITC available in 1975 was $400, and

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41. Tax Reduction Act of 1975, Pub. L. No. 94-12, § 209(b), 89 Stat. 26, 35. While this is commonly referred to as the birth of the EITC, I learned from Bryan Camp that there was a refundable version of the earned income tax credit in the mid-1920s.

42. The Revenue Act of 1978, Pub. L. 95-600, § 103(a), 92 Stat. 2763, 2771.

43. For a summary of the legislative history of the EITC, see CHRISTINE SCOTT & MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., RL31768, THE EARNED INCOME TAX CREDIT (EITC): AN OVERVIEW app. A (2014). The EITC has been amended and expanded several times, most notably by the following legislation: The Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11111, 104 Stat. 1388,1408 (expanding the credit for families with two or more qualifying children); The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, §13131, 107 Stat. 312, 433 (raising credit amounts and expanding EITC to include a modest credit for childless workers); The American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, §1002, 123 Stat. 115, 312 (temporarily expanding the credit to allow a taxpayer to claim three or more qualifying children); The Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 103 129 Stat. 2242, 3044 (making permanent the expansion to three or more qualifying children and the increased income phase-out for married taxpayers filing jointly).

44. SCOTT & CRANDALL-HOLLICK, *supra* note 43, at 17 (citing KAREN SPAR, CONG. RESEARCH SERV., R41625, FEDERAL BENEFITS AND SERVICES FOR PEOPLE WITH LOW INCOME: PROGRAMS, POLICY, AND SPENDING, FY2008–FY2009 (2011)).

45. JOINT COMM. ON INTERNAL REVENUE TAX'N, 94TH CONG., JCS-8-75, ANALYSIS OF THE HOUSE VERSION OF THE TAX REDUCTION ACT OF 1975 (H.R.

it was available only to low-income taxpayers (both unmarried and married) with a dependent child in their household.[46] The credit began to phase out if the taxpayer's adjusted gross income exceeded $4,000, and a taxpayer with an adjusted gross income of $8,000 or more would receive no credit at all. As is still the case today, the credit as originally introduced was available to a married couple only if a joint return was filed; a couple filing separately could not receive the credit.[47]

Why prevent a married couple filing separately from receiving the credit? Most likely, Congress wanted to keep the credit simple to administer and ensure that a married couple did not unduly benefit. The House Committee on Ways and Means report provided:

> The credit is to be calculated on a return-by-return basis. Individuals who are married and filing a joint return are eligible for only one credit on the combined income of both individuals. Married individuals filing separate returns are not eligible for the credit. A married individual who is treated as not being married (under sec. 143(b)) for return-filing purposes (i.e., a head of a household whose spouse has not been a member of the household for the entire year) is eligible for the credit in the same manner as a single individual (and any of the absent spouse's income attributed to him under State community property laws is to be disregarded).[48]

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2166) AND POSSIBLE ALTERNATIVES 33 (1975). *See also* S. REP. NO. 94-36, at 11 (1975) (elaborating on the EITC as follows: "This new refundable credit will provide relief to families who currently pay little or no income tax. These people have been hurt the most by rising food and energy costs. Also, in almost all cases, they are subject to the social security payroll tax on their earnings. Because it will increase their after-tax earnings, the new credit, in effect, provides an added bonus or incentive for low-income people to work, and therefore, should be of importance in inducing individuals with families receiving Federal assistance to support themselves. Moreover, the refundable credit is expected to be effective in stimulating the economy because the low-income people are expected to spend a large fraction of their increased disposable incomes.").

46. Tax Reduction Act of 1975, Pub. L. No. 94-12, § 204, 89 Stat. 26, 30. As originally enacted, it appeared in § 43 of the Code. The EITC is currently found in I.R.C. § 32.

47. I.R.C. § 43(d) (1975).

48. H.R. REP. NO. 94-19, at 30–31 (1975). Senate Report 94-36 contains nearly identical language with no further elaboration. S. REP. NO. 94-36, at 35.

As mentioned in the introduction, the child tax credit does not have such a restriction—married filing separate filers can claim it, and the income phase-out for those filers is one-half the amount allowed to joint filers.[49] While the married filing separate phase-out is set at a lower income than the phase-out set for unmarried filers, this rule makes far more sense than does denying the credit based on filing status. There is no compelling administrative reason for the Code to deny the EITC to married filing separate filers while allowing those same filers another refundable credit that is also subject to income limitations.

Currently, the EITC is most significant to taxpayers with children; the benefit is far less valuable for taxpayers without a qualifying child.[50] In 2014, the maximum EITC available to a taxpayer with no qualifying child was $496 (in contrast to the maximum of $6,143 available to a taxpayer with three or more qualifying children). The $496 maximum begins to phase out at an adjusted gross income exceeding $8,150 (or $13,550 in the case of a joint return), and phases out completely once the taxpayer's adjusted gross income reaches $14,590 (or $20,020 in the case of a joint return). Notably, however, there have been recent proposals from both Republicans and Democrats to increase the EITC amount available to taxpayers without qualifying children.[51] If this legislation were to pass, the need to adopt a proposal for relief for these married taxpayers who live apart and file separately will be even more compelling.

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49. *See supra* note 13 and accompanying text.

50. "Qualifying child" is defined in I.R.C. § 32(c)(3)(A) to include children, stepchildren, siblings, stepsiblings, and descendants of any of the above.

51. These include a proposal in President Obama's FY 2015 budget; Congressman Paul Ryan's (R-WI) *Expanding Opportunity in America* proposed doubling the maximum credit, phase-in, and phase-out rates for childless adults; and proposals from several Democrats including Senators Brown (D-OH), Durbin (D-IL), and Murray (D-WA), Congressman Neal (D-MA), and Congressman Rangel (D-NY). *See* EXEC. OFFICE OF THE PRESIDENT & U.S. TREAS. DEP'T, THE PRESIDENT'S PROPOSAL TO EXPAND THE EARNED INCOME TAX CREDIT (2014), https://www.whitehouse.gov/sites/default/files/docs/eitc_report_0.pdf; *Expanding Opportunity in America: Discussion Draft from the House Budget Comm.*, 113th Cong. 24–29 (2014) (draft by Chairman Paul Ryan); CHUCK MARR & CHYE-CHING HUANG, CTR. ON BUDGET AND POLICY PRIORITIES, STRENGTHENING THE EITC FOR CHILDLESS WORKERS WOULD PROMOTE WORK AND REDUCE POVERTY 1 & n. 4 (2015), http://www.cbpp.org/sites/default/files/atoms/files/7-15-13tax.pdf (discussing various proposals of Democratic senators).

### 2. *Premium Tax Credit*

The premium tax credit, enacted as part of the Affordable Care Act,[52] is intended to ensure that health coverage is affordable to low-income individuals by offsetting the costs of purchasing health insurance.[53] The statute provides that taxpayers who are married (within the meaning of Code section 7703) must file a joint return in order to be eligible for the credit.[54] This filing status restriction was not in the original version of the Senate bill (the "America's Healthy Future Act," sometimes known as the "Baucus Health Plan," which was introduced on September 16, 2009), but then it appears in the version passed as amended by the Senate Finance Committee on October 19, 2009.[55] The language imposing the restriction remains the same in the final version of the Affordable Care Act.

The Treasury issued a notice of proposed rulemaking and notice of public hearing on the premium tax credit in August of 2011.[56] The preamble to these proposed regulations requested comments on rules for reconciling the premium tax credit with advance payments for taxpayers whose filing status changes during the taxable year, including those "who face challenges in being able to file a joint return."[57] The preamble acknowledged that not all married persons are able to file a joint return:

> Some taxpayers who are married at the time they enroll in a qualified health plan and begin to receive advance credit payments may not be

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52. The Patient Protection and Affordable Care Act, Pub. L. No. 111–148 § 1401, 124 Stat. 119, 213 (2010). Together with the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1001(a), 124 Stat. 1029, 1030, these are collectively known as the Affordable Care Act. The credit is codified at I.R.C. § 36B.

53. S. COMM. ON FIN., 111TH CONG., EXPANDING HEALTH CARE COVERAGE: PROPOSALS TO PROVIDE AFFORDABLE COVERAGE TO ALL AMERICANS 11 (Comm. Print 2009). For purposes of the premium tax credit, "low-income" includes individuals with a household income between 100 and 400% of the federal poverty level for the taxpayer's family size. *Id.*

54. I.R.C. § 36B(c)(1)(C) provides: "If the taxpayer is married (within the meaning of section 7703) at the close of the taxable year, the taxpayer shall be treated as an applicable taxpayer only if the taxpayer and the taxpayer's spouse file a joint return for the taxpayer year."

55. S. REP. NO. 111-89, at 151–52 (2009).

56. Prop. Reg. § 1.36B–1 to –5, 76 Fed. Reg. 50,931–49 (Aug. 17, 2011).

57. *Id.* at 50,937.

> able to file a joint return for the coverage year. For example, in situations involving domestic abuse, when a divorce is pending but not yet final, or when one spouse is incarcerated, filing a joint return may not be possible or prudent.[58]

The preamble to the Treasury regulations issued in May 2012 provided a summary of the comments received in response to the notice of proposed rulemaking.[59] Commenters suggested there should be special rules or exceptions for the circumstances noted in the proposed regulation preamble and additionally suggested that abandoned spouses should be eligible for such an exception from the credit's joint filing requirement.[60] The regulations promulgated in 2012 did not include such an exception, but the preamble noted that further regulations would be forthcoming to address those issues. In March 2014, the Service released interim guidance for married victims of domestic abuse.[61] A few months later, the Treasury issued temporary regulations adopting the rules set forth in the Service's interim guidance for victims of domestic abuse and also amending the 2012 regulations to include an exception for victims of spousal abandonment.[62]

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58. *Id.* at 50,938.

59. T.D. 9590, 2012–24 I.R.B. 986.

60. *Id.* at 994. For an unofficial transcript of the testimony at the November 17, 2011, public hearing, see *Health Plan Affordability Test Focus of IRS Hearing*, 2011 TAX NOTES TODAY 223-19 (Nov. 18, 2011). Two of the speakers addressed this concern. Tara Straw, who at the time was the Legislative and Policy Director for Health Care for America Now, noted: "Abandoned spouses also warrant special protection. Some individuals have no choice but to file a separate return when they cannot locate their spouse. This is a foreign concept in a lot of communities, but I see this case at least once a week at my [volunteer tax return preparation] tax site." *Id.*

61. Notice 2014–23, 2014–16 I.R.B 942.

62. T.D. 9683, 2014–33 I.R.B. 330. The temporary regulations requested further comments on the "appropriateness of the relief provided in the temporary regulations, and the appropriateness of the scope of relief, including the circumstances that would make a taxpayer eligible for relief." *Id.* at 331. Regulations.gov (Oct. 27, 2014, 11:59 PM), https://www.regulations.gov/document?D=IRS-2014-0025-0002) reports that 17 comments were received, and the content of these is available at that site. Commenters voiced support for the regulations and applauded the fact that the agency was mindful of these issues; many commenters called for the rule to be broader still. I discuss some of the specific comments in Part V, *infra*, in connection with my proposal that builds on the premium tax credit exceptions.

These temporary regulations provide that a married taxpayer living apart from his or her spouse at the time the return is filed who is a victim of domestic abuse or spousal abandonment "satisfies the joint filing requirement" of the premium tax credit if he or she files a married filing separately return and certifies on the return that he or she meets the criteria for the exception.[63] The preamble to the temporary regulations explains that the definition of "spousal abuse" provided in the temporary regulations is based on the definition used for innocent spouse relief.[64] Spousal abandonment is separately defined.[65] The temporary regulations include a three-year rule applicable to both spousal abuse and abandonment: the married taxpayer may not avail him or herself of this special exception to joint filing for more than three consecutive tax years.[66]

To certify eligibility for the exception, taxpayers are instructed to check a box labeled "relief" on the top right corner of I.R.S. Form 8962 (Premium Tax Credit).[67] Service guidance advises taxpayers claiming such relief to keep records documenting that the criteria for the exception are met, but does not require the taxpayer to submit the records with the return. Publication 974 suggests the following examples of records "that may be useful," noting that not all records apply in any given circumstance:

- protective and/or restraining order
- police report

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63. Temp. Reg. § 1.36B–2T(b)(2)(ii), 79 Fed. Reg. 43,622, 43,627.

64. T.D. 9683, *supra* note 62, at 331. The preamble notes that the definition used is based on Rev. Proc. 2013–34, 2013–2 C.B. 397. *Id.* The definition is provided in temporary regulation § 1.36B–2T(b)(2)(iii):

> For purposes of paragraph (b)(2)(ii) of this section, domestic abuse includes physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate, and intimidate, or to undermine the victim's ability to reason independently. All the facts and circumstances are considered in determining whether an individual is abused, including the effects of alcohol or drug abuse by the victim's spouse. Depending on the facts and circumstances, abuse of the victim's child or another family member living in the household may constitute abuse of the victim.

65. Temp. Reg. § 1.36B–2T(b)(2)(iv) defines abandonment as follows: "For purposes of paragraph (b)(2)(ii) of this section, a taxpayer is a victim of spousal abandonment for a taxable year if, taking into account all facts and circumstances, the taxpayer is unable to locate his or her spouse after reasonable diligence."

66. Temp. Reg. § 1.36B–2T(b)(2)(v), 79 Fed. Reg. at 43,627.

67. INTERNAL REVENUE SERV., PUB. NO. 974, PREMIUM TAX CREDIT (PTC) (2015).

- doctor's report or letter
- A statement from someone who was aware of, or who witnessed, the abuse or the results of the abuse. The statement should be notarized if possible.
- A statement from someone who knows of the abandonment. The statement should be notarized if possible.[68]

This exception protecting victims of spousal abuse and abandonment is significant, as it is the only such exception to a rule limiting or denying credits or deductions to married taxpayers filing separate returns. This represents a very positive option for those taxpayers who qualify, provided of course that they are aware that this exception exists. As I propose in Part V, this exception and its procedural mechanism should serve as a model for allowing those taxpayers who meet the criteria to also receive the EITC (and other credits and deductions that are otherwise denied to separate filers). Taxpayers who meet these criteria are particularly sympathetic in that they cannot elect to file jointly and likely do not receive financial support from their spouse and yet cannot claim the credits allowed to a similarly situated taxpayer who can file as unmarried or head of household.

### *3. Limitations on Claiming the Standard Deduction*

Married taxpayers who file separate returns cannot claim the standard deduction if their spouse itemizes his or her deductions.[69] This is sound policy for couples who live together and act as one economic unit: if this were allowed and one spouse had a significant amount of itemized deductions to claim, the government would face a whipsaw if the other spouse were allowed to claim a standard deduction.

While this limitation is sound policy in that scenario, it is harsh if the couple is living separately and not acting as an economic unit. It is likely to disproportionately punish a low-income spouse, who is less likely to have high expenses such as home mortgage interest and state income taxes.[70] In

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68. *Id.* at 7–8.

69. I.R.C. § 63(c)(6).

70. Among all filers, approximately 30% of taxpayers itemize deductions. As estimated by tax bracket for tax year 2010, itemizers equal 3.9% of taxpayers in the 0% bracket, 16.2% of taxpayers in the 10% bracket, and 37% of taxpayers in the 15% bracket. Benjamin H. Harris & Daniel Baneman, *Who Itemizes Deductions?*,

some cases, this limitation is completely impractical for taxpayers to navigate: a couple that is estranged may not be on speaking terms with each other, so might not have access to information such as whether the spouse itemized in a particular year. This is particularly true in the case of abusive relationships or abandonment.

Ideally, married taxpayers filing separately who live apart and maintain separate households should be allowed to claim the standard deduction regardless of whether their spouse itemizes. The proposals that follow in Part V address the appropriateness of this in each scenario.

## III. LIMITATIONS ON CHANGING ONE'S MIND: SECTION 6013

In Section A of Part II, I discussed some of the reasons that a taxpayer might knowingly use married filing separate status, highlighting in particular those situations in which married taxpayers do not have a viable choice to file jointly.

I also highlighted the possibility that some low-income taxpayers do not make the choice knowingly.[71] As a result, some married couples file separately (including sometimes incorrectly as head of household and single) even though the couple lives together and may even have benefited by the election of a joint return.

A different permutation on using the incorrect filing status is that some low-income taxpayers knowingly engage in noncompliance because they recognize that in their situation the best outcome is to file as unmarried. In this context, the income limitation on joint filers claiming EITC creates a structural incentive for a dual-earner couple to incorrectly represent themselves as unmarried on individual returns so that they can each benefit from the EITC (whereas they would face the income phase-out if they filed a joint return). Leslie Book refers to this type of noncompliance as "symbolic noncompliance," which he defines as "intentional non-compliance that taxpayers commit to address perceived injustices in the system."[72]

So what happens if the taxpayer later changes his or her mind? Perhaps he or she has a change of heart about the intentional

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130 TAX NOTES 345 (Jan. 17, 2011). *See also* SEAN LOWRY, CONG. RESEARCH SERV., R43012, ITEMIZED TAX DEDUCTIONS FOR INDIVIDUALS: DATA ANALYSIS 3 (2014) (showing 32% of filers itemized in 2011; among filers with adjusted gross income up to $20,000, only 6% itemized; among filers with adjusted gross income between $20,000 and $50,000, 22% itemized).

71. *See supra* Part II.A.5.

72. Leslie Book, *Freakonomics and the Tax Gap: An Applied Perspective*, 56 AM. U. L. REV. 1163, 1176 (2007).

misrepresentation. Perhaps he or she becomes better informed of the consequences of filing using an unmarried filing status. Perhaps a separated couple reconciles and wishes to file a joint return after having filed using married filing separate status or even using an unmarried filing status, such as head of household.

Until 1951, a married taxpayer could not change his or her mind after filing: the choice to file jointly or separately was irrevocable.[73] In 1951, Congress amended section 51 (the predecessor to what is currently section 6013) to allow a change from a separate return to a joint one.[74] In describing the reason for the amendment, the Senate report noted that "a proper election frequently requires informed tax knowledge not possessed by the average person" and that the binding election "may result in substantially excessive taxes."[75] In interpreting section 6013, courts have cited this language from the legislative history.[76]

Section 51(g) (which became section 6013 with the enactment of the Internal Revenue Code of 1954) provided taxpayers the flexibility to change from separate returns to a joint return, but Congress also imposed limitations on changing one's mind. While it is generally allowed within a certain time period, it is not possible in all cases. Those taxpayers who cannot change their mind and amend to file jointly are irrevocably stuck with the negative consequences of their decision.

In its current iteration, section 6013(b)(1) provides that a taxpayer who has filed "a separate return" in a year for which a joint return could have been filed can later decide to make a joint return, except in four prohibited situations, which are as follows:

> (A) after the expiration of 3 years from the last date prescribed by law for filing the return for such taxable year (determined without regard to any extension of time granted to either spouse); or

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73. *See* Glaze v. U.S., 641 F.2d 339, 340 (5th Cir. 1981); S. REP. NO. 82-781 (1951), *as reprinted in* 1951 U.S.C.C.A.N. 1968, 2018 (Westlaw).

74. I.R.C. § 51(g) (1951).

75. S. REP. NO. 82-781, *as reprinted in* 1951 U.S.C.C.A.N. at 2018 (Westlaw). This remark referred both to the election to file a joint return and also the election to take the standard deduction in lieu of itemizing deductions; prior to the enactment of Revenue Act of 1951 (Pub. L. No. 82-183, § 312, 65 Stat. 452, 488–90 (1951)); both elections were binding.

76. *See, e.g.*, Ibrahim v. Commissioner, 788 F.3d 834, 839 (8th Cir. 2015); Morgan v. Commissioner, 807 F.2d 81, 84 (6th Cir. 1986); Glaze v. United States, 641 F.2d 339, 342 (5th Cir. 1981); Phillips v. Commissioner, 86 T.C. 433, 441 (1986); Durovic v. Commissioner, 54 T.C. 1364, 1401 (1970).

> (B) after there has been mailed to either spouse, with respect to such taxable year, a notice of deficiency under section 6212, if the spouse, as to such notice, files a petition with the Tax Court within the time prescribed in section 6213; or
> (C) after either spouse has commenced a suit in any court for the recovery of any part of the tax for such taxable year; or
> (D) after either spouse has entered into a closing agreement under section 7121 with respect to such taxable year, or after any civil or criminal case arising against either spouse with respect to such taxable year has been compromised under section 7122.[77]

Of these four situations, the first two can have a particularly punitive outcome for certain taxpayers who may regret their choice or inaction. The next Section of this Article will explain two common scenarios in which misguided or ill-informed low-income taxpayers choose to file separately (or perhaps incorrectly as head of household) instead of jointly when the latter option would have been correct and benefitted them more.

Following that, the next two Sections below describe the particular burdens of the time limitation and the notice of deficiency limitation. This Part then concludes with a discussion of a surprisingly unsettled issue: how the Service and different courts interpret the term "separate return" for purposes of 6013(b)(2).

### *A. Common Scenarios in Which Married Taxpayers File Separately and Then Later Wish to Amend*

In my work as director of a low-income taxpayer clinic, I encounter two common scenarios in which married couples are likely to disadvantage themselves by filing separately when there is no compelling reason to do so. In each scenario, the couples would benefit from the advice of a competent tax professional at the time of filing, but it is uncommon for low-income taxpayers to seek or receive such advice.

Scenario one involves married couples in which one spouse (more often than not, the wife) files a timely return and the other (more typically the husband) is a nonfiler. Commonly, the filing spouse is a wage earner subject to information reporting and withholding by the employer, while the nonfiler is an independent contractor subject to the self-employment tax. The filer makes one of two choices: she files correctly (but to her disadvantage) using the "married filing separate" status, or she files incorrectly using the

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77. I.R.C. § 6013(b)(2).

"head of household" status. If a low-income couple[78] has dependent children, by filing a joint return it may be possible that the personal exemptions, the standard deduction, the EITC, and the child tax credit would combine to offset (in part or whole) the self-employment tax and the lack of withholding. However, a couple who lacks proper information and tax advice does not realize this; fearing a tax bill because of the self-employment tax and the absence of withholding, the taxpayers make a decision to file as unmarried or as married separate (or a decision for one to file and one not to file). Assuming the independent contractor receives an I.R.S. Form 1099, the Service will eventually discover the nonfiler and pursue an assessment through the substitute for return procedure.[79] By then, however, it may be too late for the taxpayers to amend and file jointly.

Scenario two involves a married couple in which one spouse has outstanding individual debt (i.e. not a joint debt) that is subject to the Treasury Offset Program. This may include outstanding federal or state income tax liabilities, past-due child support, or federal student loan debt.[80] Often these couples are good candidates for an injured spouse allocation, which is a procedure allowing spouses to file a joint return and request that the non-liable spouse receive his or her allocable portion of the joint refund due (while the liable spouse's allocable portion is offset).[81] However, the couple is often either unaware of this option or does not know how to request it.[82] In this scenario, the non-liable spouse mistakenly believes it better to use married filing separately than to file jointly and lose part or all of the expected refund. However, in doing so, the non-liable spouse suffers the

78. In this context, the term "low-income" is intended to include any couple eligible for the EITC. According to census data, this may include around one-third of taxpayers with one or more children. Maggie R. Jones, *Changes in EITC Eligibility and Participation, 2005–2009*, at 18 tbl.6 (U.S. Census Bureau, Ctr. for Admin. Records Research & Applications, Working Paper No. 2014–04, 2014), http://www.census.gov/srd/carra/Changes_in_EITC_Eligibility_and_Participation_2005-2009.pdf.

79. I.R.C. § 6020(b).

80. I.R.C. § 6402(d).

81. *See* 31 C.F.R. §§ 285.2(f) and (g); Rev. Rul. 85–70, 1985–1 C.B. 361; I.R.M. 25.15.1.2.5 (section regarding relief from joint and several liability: injured spouse claims). The allocation formula is described in the Internal Revenue Manual in a section entitled, "Calculating the Injured Spouse's Share of the Overpayment." I.R.M. 25.18.5.3.

82. The taxpayer should request injured spouse allocation using I.R.S. Form 8379. The availability of injured spouse relief is described in the instructions to I.R.S. Form 1040; that said, the instructions for tax year 2014 were 104 pages long and the injured spouse option is mentioned in only one paragraph.

disadvantages described in this Article. He or she may have been economically better off filing jointly, even if a portion of the refund was applied to the other spouse's debt (in some cases, he or she would be better off even if the *entire* refund was applied to the other spouse's debt).

*B. Three-Years Limitation*

As noted above, section 6013(b)(2)(A) prohibits a taxpayer from amending to file a joint return after the expiration of three years from the due date of the return in question if one of the spouses has filed a separate return. Accordingly, a spouse who files married filing separately,[83] as in the two common scenarios I describe above, has a limited time in which to amend and file jointly. Thus in the nonfiler scenario, the nonfiler who comes into compliance late by more than three years will have no choice but to file as married filing separately for those years if his or her spouse filed a separate return.

There is, however, disparate treatment among similarly situated taxpayers. Where both spouses are nonfilers, no such time restriction on filing jointly applies. The Service expects nonfilers to come into compliance for at least the most recent six tax years;[84] if there has been an assessment based on a substitute return, it may be in the taxpayer's interest to file returns for still older years if doing so will reduce the liability. In cases in which both spouses are nonfilers (including the case in which the working spouse was a nonfiler and the other spouse did not have a filing requirement), these couples benefit from the EITC to reduce (or even eliminate) the liability even when they are time barred from receiving any refund that would have been due.[85] But in the cases in which one spouse was separately compliant, both

83. As explained in section D of this Part, it is an unsettled question as to whether a spouse who files single or head of household is subject to section 6013(b)(2)(A). The Service takes the view that such a spouse would be subject to the three-year limitation. *See infra* notes 109–110 and accompanying text. However, a spouse who incorrectly files as single or head of household will receive the EITC to which he or she is entitled; thus, the dollar sums at stake for the nonfiler are generally less significant than if the filing spouse correctly used the married filing separately status.

84. I.R.M. 4.12.1.3.

85. Though section 6511 provides a general three-year statute of limitation for refund claims, a taxpayer can claim the credit to reduce the liability to zero even after the refund statute expiration date has passed. The Service does not dispute that a married couple can file jointly if more than three years from the due date has passed, so long as neither spouse has filed a return for that year. Rev. Rul.

spouses are time barred from the chance to amend to married filing jointly; thus they lose the chance to claim credits that would have reduced their income tax liability. For these families, the overall higher liability will also include higher accompanying penalties for failure to timely file and failure to pay.[86]

While I do not advocate for an exception to the refund statute expiration rule, I do not like the disparate treatment currently resulting from section 6013(b)(2)(A). In the case of two nonfilers, they are allowed at any time later to file a joint return and reduce their liability by the amount of any credits that would have been due. But where only one taxpayer was a nonfiler and one filed a separate return, the couple cannot avail themselves of the benefit of a joint return once three years from the original due date have passed. This lack of symmetry results in a troubling inequity.
Married taxpayers should be allowed to amend to file jointly without regard to a time limitation in cases in which one or both spouses previously filed separately and amending could reduce or eliminate an outstanding liability.[87]

### *C. Impact of Filing a Petition in U.S. Tax Court and the Recent Case Study of Isaak Ibrahim*

The other restriction in section 6013(b)(2) that is harmful to low-income taxpayers is subsection (B), which prohibits the spouses from amending to a joint return after a Notice of Deficiency has been issued and one spouse files a petition in Tax Court. The likely scenario here is that the married taxpayers use an unscrupulous return preparer who files an incorrect return for one or both spouses using a filing status of single or head of household. Taxpayers with low levels of education and those with low

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72–539, 1972–2 C.B. 634. Prior to this revenue ruling, the Tax Court had held a taxpayer who has not yet filed any return was precluded from electing joint filing status once the three year statute of limitations had passed. Durovic v. Commissioner, 54 T.C. 1364 (1970), aff'd on this issue (but reversed in part), 487 F.2d 36 (1973). Upon reconsideration of the issue after Rev. Rul. 72–539 was issued, the Tax Court declined to continue following *Durovic* on this point, and instead followed the more taxpayer-friendly Revenue Ruling. Following the decision, the Service acquiesced. *See* Phillips v. Commissioner, 86 T.C. 433, 441 (1986), *action on dec.* 1992–004 (Oct. 22, 1991).

86. I.R.C. §§ 6651(a)(1)–(2). The penalties are calculated on the net amount due. IRC § 6651(b).

87. If this were permitted by the Code, I would also propose that upon the filing of a joint return the statute of limitations on assessment (and thus on examination) be reset for the taxpayer who had previously filed a separate return.

English proficiency are especially vulnerable. It is well-documented that unregulated return preparers intentionally misrepresent filing status and other facts on tax returns to inflate refunds.[88] The most vulnerable taxpayers may not be aware of these misrepresentations or the consequences thereof, having fully relied on the return preparer to fill out the return correctly.[89] If the return is subsequently selected for a correspondence audit,[90] the taxpayer may not understand or participate in the examination process.[91]

A recent and significant example of such a scenario is documented in the *Ibrahim v. Commissioner* case.[92] I discuss the broader statutory implications of *Ibrahim* in the next Section, because it is part of a line of cases illustrating how the definition of "separate return" is unsettled in the courts. But the facts in this case illustrate fittingly how section 6013(b)(2)(B) can be a trap for the unwary and are worthy of mention in detail here.[93]

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88. *See* WU, *supra* note 38; Michelle Lyon Drumbl, *When Helpers Hurt: Protecting Taxpayers from Preparers*, 145 TAX NOTES 1365 (Dec. 22, 2014); Nina E. Olson, *More Than a 'Mere' Preparer: Loving and Return Preparation*, 139 TAX NOTES 767 (May 13, 2013).

89. *See generally* Michelle Lyon Drumbl, *Those Who Know, Those Who Don't, and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113 (2013).

90. EITC returns are twice as likely to be audited as the average individual income tax return. NAT'L TAXPAYER ADVOCATE, 2011 ANN. REP. TO CONGRESS vol. 1, at 300; *Fiscal Outlook: Addressing Improper Payments and the Tax Gap Would Improve the Government's Fiscal Position*: *Hearing Before S. Comm. on Budget*, 114th Cong. 1 (2015) (statement of Gene L. Dodaro, Comptroller General of the United States) (also noting that "about 45 percent of correspondence audits (audits done by mail) that closed in fiscal year 2013 focused on EITC issues").

91. The Taxpayer Advocate Service conducted a research study of "audit barriers" to better understand EITC audit outcomes. Among the interesting findings, the study revealed that the letters used in correspondence audits were not clear to the recipients: more than 25% of the EITC taxpayers it surveyed "did not understand the [Service] was auditing their return"; 39% "did not understand what the [Service] was questioning about their EI[T]C claim"; and only 50% "felt they knew what they needed to do in response to the audit letter." NAT'L TAXPAYER ADVOCATE, 2011 ANN. REP. TO CONGRESS vol. 2, at 103–04.

92. 107 T.C.M. (CCH) 1050 (2014), *rev'd*, 788 F.3d 834 (8th Cir. 2015).

93. Kathryn Sedo, whose low-income taxpayer clinic represented Mr. Ibrahim before the Tax Court and the Eighth Circuit, calls section 6013(b)(2)(B) a "procedural trap." Kathryn Sedo & Frank DiPietro, Ibrahim v. Comm'r*: A Procedural Trap for Unrepresented Taxpayers*, PROCEDURALLY TAXING (Jan. 29, 2014), http://www.procedurallytaxing.com/ibrahim-v-commr-a-procedural-trap-for-unrpresented-taxpayers/.

The decisions and the briefs of the parties describe Mr. Ibrahim and his wife, Ms. Hassan, as refugee immigrants from Somalia who spoke limited to no English.[94] The couple relied on the ODAY Tax Service for tax assistance in the tax year 2011.[95] The preparers at ODAY spoke Somali, and Mr. Ibrahim asserts that he told the preparer his correct marital status, but the return was prepared incorrectly.[96] The preparer completed a return for Mr. Ibrahim as "head of household" and a separate return for Ms. Hassan as "unmarried."[97] The couple was unaware of this inaccuracy; Mr. Ibrahim's education was the equivalent of less than a high school diploma and the couple assumed that the professional tax service would prepare the tax returns accurately.[98]

Subsequent to filing, Mr. Ibrahim's return was selected for examination. He was issued a Notice of Deficiency and filed a petition with the Tax Court. Upon reviewing the evidence, the Commissioner conceded that Mr. Ibrahim was entitled to the dependency exemptions and child tax credits that were claimed.[99] With the benefit of counsel now assisting him, Mr. Ibrahim conceded that he was not entitled to head of household status. He and his wife wished to amend to use married filing joint status. However, the Commissioner argued that section 6013(b)(2)(B) applied to preclude their filing a joint return. The outcome and merits of that argument are discussed in detail in the next Section. As a practical matter for Mr. Ibrahim and Ms. Hassan, the application of section 6013(b)(2)(B) meant that they were denied the EITC they should have been entitled to, simply because they could not correct their return to file jointly. If Mr. Ibrahim had been allowed to amend, the couple would have received a refund of $5,151.[100]

Significantly, the Service examiner did not advise Mr. Ibrahim of section 6013(b)(2)(B). The Notice of Deficiency does not mention the Code section's limitation. Had Mr. Ibrahim amended prior to filing a Tax Court

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94. The taxpayer's brief states that they spoke no English. Brief for Petitioner-Appellant at 6, Ibrahim v. Comm'r, 788 F.3d 834 (8th Cir. 2015) (No. 14–2070) [hereinafter Brief for Appellant]. The government's brief states that his "proficiency in English is very limited." Brief for Appellee at 5, Ibrahim v. Comm'r, 788 F.3d. 834 (8th Cir. 2015) (No. 14–2070) [hereinafter Brief for Appellee].

95. Brief for Appellant, *supra.*note 94, at 6; Brief for Appellee, *supra* note 94, at 6.

96. Brief for Appellant, *supra* note 94, at 6.

97. *Id.* at 6–7.

98. *Id.* at 7.

99. *Id.* at 1.

100. *Id.* at 9–10.

petition, he would not have been barred from changing to joint filing status,[101] but he was not aware of this fact.

Why would a tax return preparer knowingly prepare the returns this way? One can only speculate, but it is likely that the preparer did so to maximize the tax refund for the clients. Mr. Ibrahim and his wife claimed a total of three children on their separate returns; while the EITC allows a married couple credit for up to three qualifying children, the return preparer may have calculated that by splitting the children between two returns the couple would benefit from two refunds that were collectively higher than what they would have been entitled to on a joint return.[102] Why would a return preparer seek to increase a refund beyond what the taxpayer is entitled to? Again, one can only speculate, but this practice is apparently widespread among certain types of return preparers.[103]

Leslie Book argues that the structure of the EITC presents incentives for certain types of taxpayers to intentionally misstate eligibility and claim the credit.[104] Though Book relies on different examples in making his argument, the income limitation on joint filers claiming EITC creates another such structural incentive: dual-earner married taxpayers filing jointly are subject to the EITC phase-out at a level that is far less than twice the income level for two unmarried individuals. Hence, there is an incentive for taxpayers (or

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101. Petitioner-Appellant's Reply Brief at 2–3, Ibrahim v. Comm'r, 788 F.3d 834 (8th Cir. 2015) (No. 14-2070).

102. As described in the Petitioner-Appellant's brief, Mr. Ibrahim's head of household return claimed only two children. Brief for Appellant, *supra* note 94, at 1. Ms. Hassan's return is not before the court, but the details are described in the brief for the Appellee. According to the appellee, Ms. Hassan claimed one child on her unmarried return for the same tax year; when combined with her withholding and additional child tax credit, this resulted in an overpayment amount of $3,778. Brief for Appellee, *supra* note 94, at 7. I have no first-hand knowledge of this case, but I am drawing on experience with my own clients and I presume that the return preparer would not have filed the returns incorrectly unless it resulted in a larger refund for the couple collectively. According to Appellee's brief, Ms. Hassan has four children. Mr. Ibrahim would be entitled to claim the stepchildren as dependents regardless of whether he filed as head of household or married. *Id.* at 6. Also according to Appellee's brief, Mr. Ibrahim indicated in his pretrial memorandum that he wished to claim the fourth child. *Id.* at 9 n.5. It is not clear why neither spouse claimed the fourth child on the returns as originally filed.

103. For detailed examples of unscrupulous behavior by paid preparers, see Brief for National Consumer Law Center & National Community Tax Coalition as Amici Curiae Supporting Defendants-Appellants, Loving v. Internal Revenue Serv., 742 F.3d 1013 (D.C. Cir. 2013) (No. 13–5061). *See also* WU, *supra* note 38.

104. Book, *supra* note 72, at 1171.

their unscrupulous preparers) to incorrectly represent themselves as unmarried on their return. Book argues that policymakers should consider the structural incentives to cheat "in fashioning responses to the EITC error rate."[105] In other words, removing such incentives may result in a lower rate of noncompliance. Two of the proposals set forth in Part V would remove the structural incentives in the context of filing status.

### *D. Unsettled Issue: What Is a "Separate Return" for Purposes of Section 6013(b)?*

The limitations of section 6013(b)(2) apply when a taxpayer who could have filed a joint return has instead filed "a separate return." For this purpose, however, "separate return" is not defined in the Code. Should it be read to mean any return other than a joint return (including an erroneously filed "single" or "head of household" return), or does it only apply to a "married filing separately" return? There is no consensus on this issue.

The Tax Court has consistently interpreted "separate return" to include a married taxpayer who files a return using any status other than married filing jointly.[106] The alternative interpretation gained traction in *Glaze v. United States*, a refund case in which the Fifth Circuit affirmed the U.S. District Court in interpreting "separate return" for the purpose of 6013(b)(1) to mean specifically a married taxpayer who previously elected to file using the married filing separately status.[107]

The facts in *Glaze* were somewhat unusual in that the return in question was filed posthumously by the estate's administrator, who was awaiting a jury determination as to whether the taxpayer was married at the time of his death. Thus, the administrator could not elect between married filing jointly or separately at the time of filing; he filed as single and subsequently needed to change the status because the jury determined that the taxpayer, in fact, had been married.[108]

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105. *Id.* at 1185.

106. Ibrahim v. Comm'r, 107 T.C.M. (CCH) 1050, 1052 (2014) (citing Currie v. Comm'r, 51 T.C.M. (CCH) 486 (1986); Blumenthal v. Comm'r, 47 T.C.M. (CCH) 590 (1983); Saniewski v. Comm'r, 38 T.C.M. (CCH) 1295 (1979)).

107. Glaze v. United States, 641 F.2d 339 (5th Cir. 1981).

108. The opinion, in searching for the legislative intent, emphasizes that the estate administrator in Glaze did not make an affirmative election:

> It is clear that Section 6013 was enacted as a matter of legislative grace to permit married taxpayers to escape the adverse financial consequences resulting from an injudicious election to initially file separate returns

Despite the Fifth Circuit's holding in *Glaze*, the Service and its Office of Chief Counsel since have consistently taken the position that *any* return other than a joint return is a "separate return" for purposes of section 6013(b)(1).[109] Relying on advice from Chief Counsel, the Commissioner argues that Congress could not have intended the term "separate return" to refer to the status of married filing separately because that rate schedule had not yet been created when the predecessor section to 6013(b)(1) was enacted.[110]

Since *Glaze*, the Tax Court has continued to side with the Commissioner on this issue, consistently adopting this same interpretation outside of the Fifth and Eleventh Circuit Courts of Appeals.[111] In the recent case of *Ibrahim v. Commissioner*, the facts of which are described *supra*,[112] the Tax Court again sided with the Commissioner, stating that it would follow its prior precedent and decline to follow *Glaze* because it is was not

> rather than a single joint return…. It is clear that Section 6013 was never intended to cover situations such as the one presented here where a taxpayer erroneously lists his status as single rather than married…It would be absurd to advance the proposition that in enacting Section 6013(b)(1), (2) Congress had in mind the unusual factual circumstances of this case.

*Glaze*, 641 F.2d. at 342, 344.

109. As such, the Service's published guidance adopts this interpretation. For example, Publication 501 states: "a separate return includes a return filed by you or your spouse claiming married filing separately, single, or head of household filing status." INTERNAL REVENUE SERV., *supra* note 1, at 8.

110. C.C.N. CC–2006–010, 2006 WL 587325 (Mar. 2, 2006) (noting that the predecessor section to 6013(b)(1) was enacted in 1951, whereas the married filing separately rate schedule was not created until 1969). *See also* Rev. Rul. 83–183, 1983–2 C.B. 220; A.O.D. 1981–140 (June 2, 1981).

111. *See, e.g.*, Swonder v. Commissioner, 68 T.C.M. (CCH) 579 (1994); Phillips v. Commissioner, 86 T.C. 433 (1986), *aff'd in part, rev'd in part on other issue*, 851 F.2d 1492 (D.C. Cir. 1988); Blumenthal v. Commissioner, 47 T.C.M. (CCH) 590 (1983). The Tax Court is not bound to follow *Glaze* outside of the circuits in which the decision is precedential. Golsen v. Commissioner, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). *Glaze* is precedential in both the Fifth and Eleventh Circuits because the Eleventh Circuit adopted all Fifth Circuit precedent subsequent to *Glaze*. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981). Accordingly, Chief Counsel instructed its attorneys to challenge *Glaze* in all circuits other than the Fifth and Eleventh Circuits. C.C.N. CC–2006–010.

112. *Supra* notes 94-102 and accompanying text.

controlling in a case to which appeal would lie in the Eighth Circuit.[113] As it has in the past, the Tax Court supported its decision with the rationale of timing in its statutory interpretation, noting "the fact that Congress enacted the predecessor statute to section 6013(b) in 1951 but did not establish a separate rate structure for married taxpayers filing separately until 1969."[114]

Mr. Ibrahim appealed his case to the Eighth Circuit. The Eighth Circuit reversed the Tax Court. The court rejected the Commissioner's argument that "separate return" cannot mean "married filing separately" because that filing status did not exist at the time the predecessor statute to 6013 was enacted:

> The Commissioner is incorrect. Form 1040 for 1951 lists "married person filing separately" in its tax table (with the same rate as single taxpayers). The 1952 tax-form instructions—interpreting the 1951 Act—repeatedly use "separate returns" and allow only married taxpayers to file a "separate return," with different directions for head-of-household taxpayers. Even in 1952, "separate return" did not apply to those filing as head of household.[115]

Indeed, the Commissioner was incorrect. Married taxpayers had the option to file a separate return long before 1951. In fact, the concept of a married person filing a separate return predates the concept of a joint return.[116] Married taxpayers were not given the option to report income on a joint

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113. Ibrahim v. Commissioner, 107 T.C.M. (CCH) 1050, 1052 (2014).

114. *Id.* (citing Tax Reform Act of 1969, Pub. L. No. 91-172, § 803(a), 83 Stat. 487, 676).

115. Ibrahim v. Comm'r, 788 F.3d 834, 840 (8th Cir. 2015) (citations omitted). The Commissioner made this argument in its appeals brief:

> [W]hen the first predecessor of Section 6013(b) was enacted in 1951, the filing status of 'married, filing separately,' did not even exist. It was enacted only in 1969. Congress obviously could not have meant 'separate return' to be limited to a filing status that would not be created for many years to come.

Brief for Appellee, *supra* note 94, at 15.

116. For a history of the origins of the joint return and the subsequent introduction of joint liability, see Richard C. E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317 (1990). *See also* Drumbl, *supra* note 17.

return until 1918, five years after the enactment of the modern income tax code.[117]

It is true that in 1951 there was not yet a separate *rate structure* designated as "married filing separately" and correct that the rate structure for that status was not created until 1969. The Service Chief Counsel made this point in its prior published guidance to the Commissioner,[118] and the Tax Court adopted this rationale in interpreting "separate return" to mean any return not filed jointly.[119] However, this argument fails to appreciate the historical context in which section 51(g) (current section 6013) was enacted. In 1951, a joint return was by far the most favorable option available to taxpayers. A couple who did not elect to file jointly was forsaking income splitting, an option that was relatively new and not available to unmarried taxpayers. Taken in this context, it makes sense that the oft-cited legislative history—"[a]s a proper election frequently requires informed tax knowledge not possessed by the average person, the binding election[] … may result in substantially excessive taxes"[120]— referred to married couples reducing their total tax liability through income splitting. In enacting section 51(g), Congress wanted to add flexibility to taxpayers who *could have* elected to file a joint return but did not do so—meaning only those who were married but filed a separate return.

To better appreciate this context, a review of the evolution of the filing statuses and rate brackets is instructive.

From 1918 until 1948, the applicable tax rates were the same for *all types* of filers, with the result that a married couple who chose to aggregate income on a joint return could be pushed into a higher tax bracket, which meant the couple incurred a higher liability than if they had filed as two individuals. Apart from the convenience of filling out only one form, the benefit of joint filing occurred only in a scenario in which one spouse had deductions or credits that could offset the income of the other spouse.[121]

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117. *See* Beck, *supra* note 116, at 335.

118. *See* C.C.N. CC–2006–010, 2006 WL 587325 (Mar. 2, 2006); *see also* Rev. Rul. 83–183, 1983–2 C.B. 220.

119. Ibrahim v. Commissioner, 107 T.C.M. (CCH) 1050, 1052 (2014).

120. S. REP. NO. 82-781, at 48 (1951).

121. *See* Grant v. Rose, 24 F.2d 115, 118–19 (N.D. Ga. 1928) (summarizing the advantages and disadvantages of a married couple filing jointly), *aff'd*, 39 F.2d 340 (5th Cir. 1930); s*ee also* Beck, *supra* note 116, at 337 n.78 (citing legislative history (H.R. REP. NO. 77-1040) showing that, in 1938, when it was rarely the case that a couple would benefit economically by filing jointly, 94% of married couples filed a joint return). Beck points out that federal income tax rates were low enough in 1938 that it made no difference in most people's tax rates whether they

Separate rate brackets for married filing jointly were introduced in 1948. Married taxpayers filing separately could not use these new brackets and instead were subject to the rate brackets applicable to unmarried taxpayers.[122] These new separate brackets benefitted all married taxpayers who filed jointly versus their unmarried peers and couples who filed separately, because the married filing jointly brackets were exactly twice as wide as the rate schedule for unmarried taxpayers. This allowed "income splitting" between married couples[123] and was the introduction of what we now call the "marriage bonus" for those who file jointly.[124] As is true today, in 1948 the most dramatic example of the marriage bonus existed in a one-income family: if the husband filed a separate return, he would have been subject to the narrower unmarried income bracket, but if he filed a joint return with his spouse who had no income, he was subject to an income bracket twice as wide. This meant his rate of taxation would likely be lower if he filed jointly. These differences were particularly pronounced in 1948 because the structure was steeply progressive. There were a total of 24 different rates applied to taxable income of individuals, and the marginal rates ranged from 20% to 91%.[125]

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filed jointly or separately; he posits that most of these couples filed jointly for the sake of the convenience of filling out one form rather than two, rather than to achieve tax savings. *Id.*

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

123. Between 1930 and 1948, married taxpayers in the nine community property states already enjoyed the advantage of "income splitting" because each individual was subject to tax on one-half of the couple's total income. The Revenue Act of 1948 created the wider bracket for married taxpayers in order to address the disparity between common property states and community property states. *See* S. REP. NO. 80-1013 (1948), *as reprinted in* 1948 U.S.C.C.A.N. 1163, 1184–1187 (Westlaw).

124. For a historical examination of marriage bonuses and penalties, see Lawrence Zelenak, *Doing Something about Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1 (2000). Zelenak notes that while the 1948 legislation achieved couples neutrality, its purpose was "a delayed response to geographic discrimination between husbands in separate property states and those in community property states." *Id.* at 4. Zelenak notes, as others have, that the goals of progressivity, couples neutrality, and marriage neutrality are incompatible. *Id.* at 6.

125. *Federal Individual Income Tax Rates History, Nominal Dollars, Income Years 1913-2013*, TAX FOUNDATION, http://taxfoundation.org/sites/taxfoundation.org/files/docs/fed_individual_rate_history_nominal.pdf (last visited Nov. 24, 2016). The effective rates, after statutory reductions, ranged from 16.6 to 82.13%. *SOI Tax Stats—Historical Table 23*, INTERNAL REVENUE SERV., http://www.irs.gov/uac/SOI-Tax-Stats-Historical-Table-23 (last updated May 17,

With the enactment of the Revenue Act of 1951, at the same time 51(g) was introduced, the head of household status and accompanying rate schedule was created. The purpose of this new filing status was "to grant partial income splitting benefits to widows, widowers, and single persons with dependents in their households."[126] The rate schedule for head of household taxpayers was designed such that, at any income level, a taxpayer filing as head of household would have an income tax liability "about halfway between the tax paid by a married couple filing a joint return and a single individual."[127]

Over the next two decades, the sizable marriage bonus came to be viewed by many as too unfair to unmarried taxpayers. Critics pointed out that an unmarried person's tax was as much as 42% higher than the tax paid by a married couple filing jointly reporting the same total income as the unmarried person.[128] To address this inequity, the Tax Reform Act of 1969 introduced a lower rate structure for unmarried individuals, which was separate from the rate structure applicable to married individuals filing jointly or separately and also to head of household. The 1969 Act reduced the rate structure only with respect to unmarried persons; it left intact the prior rate structure with respect to married persons filing separately. Congress did not want to leave a rate loophole for married taxpayers:

> The prior law single person rate schedule was retained for married persons filing separate returns because if each spouse were permitted to use the new tax rate schedule for single persons, many (especially those in community property states) could arrange their affairs and income in such a way that their combined tax would be less than that on a joint return.[129]

Hence, the Tax Reform Act of 1969 created the rate brackets particular to today's filing statuses—not the filing statuses themselves. It also provided

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2016) (consisting of data for "U.S. Individual Income Tax: Personal Exemptions and Lowest and Highest Bracket Tax Rates, and Tax Base for Regular Tax, Tax Years 1913–2015").

126. STAFF OF JOINT COMM. ON INTERNAL REVENUE TAX'N, 91ST CONG., JCS-16-70, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, at 222 (1970) [hereinafter JCT, 1969 ACT].

127. *Id*.

128. *Id.*

129. *Id*. at 223.

relief to unmarried taxpayers, which reduced the significance of the marriage bonus available to those who filed jointly.

Though I agree with the Eighth Circuit, reasonable legal minds can differ as to the correct statutory interpretation of "separate return" within the meaning of the Code as a whole. If the Service continues to advance its view in Tax Court cases outside of the Fifth, Eighth, and Eleventh Circuits, then perhaps a circuit split will develop as to the interpretation.

In the meantime, the Eighth Circuit's *Ibrahim* decision is an important precedent for low-income taxpayers who improperly use the filing status of single or head of household (whether knowingly or not) or rely on an unscrupulous return preparer who does so on their behalf. What is the size of the population impacted by the interpretation of "separate return"? The most recent Service report estimating EITC compliance notes that among all EITC claimants, two percent of those filing as single and nine percent of those filing as head of household are estimated to have the correct status of married filing separately.[130] The report further notes that approximately one-fifth of the taxpayers audited for EITC noncompliance due to filing status errors "chose to change their filing status to married-filing-jointly as part of the resolution of the audit rather than maintain two married-filing-separately returns."[131] If the Service and Tax Court were to accept the Eighth Circuit's interpretation, these categories of taxpayers would be allowed to change to filing jointly regardless of whether a Tax Court petition had been filed.

## IV. WHY A SPECIAL STATUS FOR MARRIED COUPLES?

### *A. A Very Brief History of Why the Joint Filing Status Exists*

Much has been written about the how and why the Code allows married taxpayers to file jointly.[132] Though joint filing was originally introduced as an administrative convenience to married taxpayers, the current system evolved over many decades from a framework in which those taxpayers who lived in community property states were permitted a tax treatment that was not available to taxpayers who lived in the common law states.[133] Following the Supreme Court's *Poe v. Seaborn* decision,[134]

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130. COMPLIANCE ESTIMATES, *supra* note 14, at 20.

131. *Id.* at 20 n.43.

132. *See, e.g.*, Beck, *supra* note 116; Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975); Zelenak, *supra* note 124.

133. *See* Beck, *supra* note 116; Bittker, *supra* note 132.

134. 282 U.S. 101, 118 (1930).

Congress recognized that it would be problematic not to allow married couples in all states the option to report income on a joint return.[135] Because those distinctions among states still exist today, the rationale for a married filing jointly rate bracket still exists.

As other scholars have on a variety of policy grounds,[136] I have argued elsewhere in favor of moving to a system of individual filing for all taxpayers regardless of marital status.[137] In this Article, however, I accept that Congress is unlikely to abolish the option of a joint return. Under that premise, my concern is to propose solutions to mitigate the inequities faced by those who are "considered as married" but cannot avail themselves of the benefits of joint filing, whether it is because joint filing is not an option or because section 6013 limits their ability to file a joint return subsequent to a non-joint one.

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135 In addition to recognizing the need for consistent treatment of married couples across community property and common law states, the legislative history to the Revenue Act of 1948 notes that providing a different rate schedule for married couples would simplify administration in other ways:

> The incentive for married couples in common-law states to attempt the reduction of their taxes by the division of their income through such devices as trusts, joint tenancies, and family partnerships will be reduced materially. Administrative difficulties stemming from the use of such devices will be diminished, and there will be less need for meticulous legislation on the income tax treatment of trusts and family partnerships.

S. REP. NO. 80-1013 (1948), *as reprinted in* 1948 U.S.C.C.A.N. 1163, 1187 (Westlaw).

136. *See, e.g.*, Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 684 (2010) (arguing that the joint return should be abolished because it penalizes single people). *See also* EDWARD J. MCCAFFERY, TAXING WOMEN 19–23 (1997) (advocating individual filing as more beneficial for women); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income Sharing, and the Joint Income Tax Return*, 45 HASTINGS L. J. 63, 108–10 (1993) (arguing that individual tax returns would be more equitable); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 395–96 (1994) (concluding that mandatory separate returns present the best option among imperfect neutralities).

137. Drumbl, *supra* note 17.

*B. A Brief Word About Marriage Penalties and Disincentives*

While it is well documented that married couples enjoy a number of tax benefits by virtue of their marital status, it is also the case that for many couples there are tax disadvantages to being married, even when they file a joint return.[138] Since 1969 when the unmarried brackets were adjusted downwards, couples with two incomes have often found themselves subject to a higher tax liability relative to what their liability would be as two unmarried persons.

It is not just high earners who face a marriage penalty. Low-income, unmarried taxpayers raising children in one household can structure their filing status, dependency exemptions, and claim for the EITC so as to receive significantly higher benefits than a similarly situated married couple would receive.[139]

And it is not just the rate brackets that sometimes favor unmarried taxpayers. The Ninth Circuit recently held that dollar limitations on the deductibility of mortgage interest apply per taxpayer, not per residence, with the result that an unmarried couple can collectively deduct twice as much mortgage interest as that allowed to a married couple.[140] In its opinion, the court acknowledged that this interpretation creates a "marriage penalty."[141]
Congress has acted in the past to address and reduce the marriage penalty, notably in 2001 when it increased the standard deduction for joint filers and also widened the 10 and 15% rate brackets for married filing jointly to twice that of unmarried persons.[142] In an earlier bill that passed the House but not the Senate, the House Committee on Ways and Means acknowledged "the

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138. *See, e.g.*, Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000); Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006); Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008).

139. *See* Drumbl, *supra* note 17, at 127–33.

140. Voss v. Commissioner, 796 F.3d 1051 (9th Cir. 2015) (holding that the Code section 163(h)(3) limitations on the deductibility of mortgage interest are applied on a per-taxpayer basis rather than on a per-residence basis), *rev'g* 138 T.C. 8 (2012); Kathleen Pender, *Tax Ruling a Win for Unmarried People Who Own a Home Together*, S.F. CHRON. (Aug. 10, 2015), http://www.sfchronicle.com/business/networth/article/Tax-ruling-a.-win-for-unmarried-people-who-own-a-6436357.php.

141. Voss, 796 F.3d at 1065.

142. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 301–02, 115 Stat. 38, 53 (2001).

inequity that arises when two working single individuals marry and experience a tax increase solely by reason of their marriage,"[143] but the report also notes that there is no solution that will please all constituents:

> Any attempt to address the marriage tax penalty involves the balancing of several competing principles, including equal tax treatment of married couples with equal incomes, the determination of equitable relative tax burdens of single individuals and married couples with equal incomes, and the goal of simplicity in compliance and administration.[144]

Indeed, there is no way Congress can solve this conundrum; as the Second Circuit wrote when it affirmed the Tax Court's rejection of a married couple's constitutional challenge to the marriage penalty: "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."[145]

Accepting that no system can result in equal treatment of all taxpayers and that mandated individual filing would create new inequities to which some groups would object, I instead propose three alternative reforms that would address the concerns I have about low-income taxpayers who are married but cannot viably elect to file a joint return.

## V. THREE PROPOSALS THAT WOULD ALLOW LESS PUNITIVE SEPARATE FILING FOR MARRIED TAXPAYERS

Parts II and III of this Article outline some of the ways in which the married filing separately option is punitive for low-income couples. Part IV

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143. H.R. REP. NO. 107-29, at 6 (2001). This House bill (H.R. 6, 107th Cong. (1st Sess. 2001)) did not pass the Senate, but parts of the bill were incorporated into H.R. 1836, which was enacted into law as Economic Growth and Tax Relief Reconciliation Act of 2001, P. L. No. 107–16, 115 Stat. 38 (2001).

144. H.R. REP. NO. 107-29, at 6 (2001).

145. Druker v. Comm'r, 697 F.2d 46, 50 (1982) (citing Bittker, *supra* note 132, and quoting, "No algebraic equation, no matter how sophisticated, can solve this dilemma. Both ends of a seesaw cannot be up at the same time." *Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working: Hearings Before the House Comm. on Ways and Means: Hearing Before the Joint Comm. on Taxation,* 92d Cong. 78–79 (1972) (Statement of Edwin S. Cohen, Assistant Secretary for Tax Policy)). *See also* Zelenak, *supra* note 136.

provides a very brief historical context of joint filing and a summary of the marriage penalty.

This Part will set forth three proposals to improve upon the current system by providing alternatives that incentivize correct filing without stripping separate married filers of the benefits to which joint filers and unmarried filers are entitled.

What each proposal has in common is simple: taxpayers should not be precluded from claiming EITC or other credits and deductions solely because of filing status. The Code can do a better job of determining eligibility and accommodating the nuances of relationships and economic partnerships.

### *A. Extend the Premium Tax Credit Exception to Other Types of Credits and Deductions*

The first and most modest alternative I propose would likely be the least costly and the smallest in scope. It builds on the exception provided for the premium tax credit: allow married taxpayers filing separately to claim the EITC (as well as any other credits or deductions otherwise denied to married filing separately filers) if they certify that they live apart from their spouse and are victims of spousal abuse or abandonment.[146] Because this exception already exists in a temporary Treasury regulation, the Service has an established procedure for claiming the exception and has developed a list of acceptable supporting criteria. The "relief" box currently shown on I.R.S. Form 8962 could be moved to page 1 of the I.R.S. Form 1040 next to the box for filing status, and it could be used for the purpose of claiming relief for all credits and deductions rather than for just the premium tax credit.[147]

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146. Fred Brown and Mary Leto Pareja have made similar recommendations. *See* Fred Brown, *Permitting Abused Spouses to Claim the Earned Income Tax Credit in Separate Returns*, 22 WM. & MARY J. WOMEN & L. 453 (2016); Pareja, *supra* note 35, at 282 ("The principles behind allowing a Premium Tax Credit to individuals who are unable to file jointly due to domestic abuse or spousal abandonment apply equally to other tax credits, like the EITC, the adoption credit, and educational credits.").

147. Some organizations expressed a concern about the privacy implications of the relief box, given that tax returns are sometimes used for mortgage applications and other credit determinations. *See, e.g.*, Letter from the National Health Law Program to the Internal Revenue Service 2 (October 27, 2014), https://www.regulations.gov/document?D=IRS-2014-0025-0006 (placing the relief box on page 1 of Form 1040 would simplify the procedure for taxpayers, but most

Because these individuals live apart from their spouse and are unlikely to receive any financial support, there is no economic rationale for denying the credits—these are not taxpayers making a filing decision based on the largest available refund. The taxpayers who fit within this exception for relief are among the most financially vulnerable of all taxpayers—they are individuals in transition, starting a life without the spouse they had partnered with because their relationship deteriorated into a cruel ending. Of all the taxpayers who should not be penalized for filing a separate return, these generally will be the most sympathetic cases.

In response to the issuance of the premium tax credit temporary regulations promulgated in July 2014, commenters on behalf of more than a dozen different organizations submitted comments to Treasury. Most of these letters begin by commending the Treasury and Service for recognizing and addressing the situation these abused or abandoned spouses face, then proceed to make specific suggestions as to how the Treasury and Service might go farther to protect these taxpayers.[148] For example, several commenters suggest rescinding the three-year limit on claiming the exception, arguing that this may be an insufficient time during which to obtain a divorce in these circumstances.[149]

This proposal is more ambitious in scope than what the commenters proposed. Taxpayers who certify that they live apart from their spouse and are victims of spousal abuse or abandonment should be entitled to claim the EITC and other credits and deductions now denied to separate filers. In a similar vein and because of the compelling economic reasons, I propose they should be entitled to claim the standard deduction regardless of whether their spouse itemized on his or her return.

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certainly exacerbates the privacy concern. For that reason, thought should be given to indicating relief on a separate schedule that accompanies Form 1040.).

148. *See, e.g.*, Letter from the Am. Cong. of Obstetricians and Gynecologists to the Internal Revenue Serv. (October 24, 2014), https://www.regulations.gov/document?D=IRS-2014-0025-0004; Letter from EverThrive Ill. to the Internal Revenue Serv. (October 27, 2014), https://www.regulations.gov/document?D=IRS-2014-0025-0017; and Letter from the N.M. Coal. of Sexual Assault Programs to the Internal Revenue Serv. (October 27, 2014), https://www.regulations.gov/document?D=IRS-2014-0025-0005.

149. *See, e.g.*, Letter from the Am. Cong. of Obstetricians and Gynecologists, *supra* note 148, at 3–4 (noting that "on average, a woman leaves an abusive partner seven to eight times before she is able to leave the relationship permanently").

### 1. *Pros of This Proposal*

The primary advantage of this proposal is that it builds upon ideas that are implemented in existing regulations and procedures. In addition, the population it would reach is especially vulnerable and sympathetic, making it a change that is easy to justify from a policy standpoint.

### 2. *Cons of This Proposal*

This proposal has two significant shortcomings, in my view.

First, it is too modest. While I certainly favor relief for these sympathetic filers, I also believe relief should be extended more broadly (as I envision in my next two proposals).

Second, this proposal would require expanding the exception to all filers, not just premium tax credit claimants. The premium tax credit is available only to those taxpayers with an annual income of between 100 and 400% of the federal poverty line.[150] For a one-person household in 2014, this meant an annual income between $11,670 and $46,680.[151] Additionally, the taxpayer cannot claim the premium tax credit if he or she is eligible for Medicaid, Medicare, or an employer-provided plan.[152] One report estimates that "more than 4.2 million households…are likely to qualify for both the EITC and premium credit."[153] An estimated 28 million tax returns claim the EITC.[154] Thus, perhaps only 15% of total returns claiming EITC would also be claiming the premium tax credit.

I fear that allowing more tax benefits through this procedure would have the perverse effect of bringing down greater scrutiny upon the taxpayers who check the "relief" box. This is a difficult subject matter for the Service

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150. I.R.C. § 36B(c)(1)(A).

151. 79 Fed. Reg. 3,593 (U.S. Dep't of Health & Human Servs. Jan. 22, 2014) (poverty guideline for D.C. and 48 contiguous states).

152. I.R.C. §§ 36B(c)(2)(B), 5000A(f).

153. Elizabeth Kneebone, Jane R. Williams & Natalie Holmes, *Connecting EITC filers to the Affordable Care Act Premium Tax Credit*, BROOKINGS INST., Mar. 18, 2015, http://www.brookings.edu/research/reports2/2015/03/eitc-filers-affordable-care-act-tax-credit-kneebone-williams-holmes. The 4.2 million figure relates to "tax returns," or tax returns filed. The authors note that this figure represents approximately 7.5 million people. *Id.*

154. *SOI Tax Stats—Historical Table 1*, INTERNAL REVENUE SERV., http://www.irs.gov/uac/SOI-Tax-Stats-Historical-Table-1 (last updated Oct. 5, 2015) (consisting of data for "Individual Income Tax Returns: Selected Income and Tax Items for Tax Years 1999–2013").

to audit, with the same sensitivities and evidentiary complexities that make innocent spouse relief determinations so time (and resource) consuming.[155] In a world in which only the premium tax credit is at stake, perhaps the Service may be more likely to take taxpayers at their word when they certify they meet the criteria for relief.

This proposal, though not my favored solution, would be better than the status quo. It also would be the easiest proposal to implement because the Service and Treasury have already developed a framework for the necessary administrative procedures to claim such an exception.

### *B. The Canadian Case Study: Credits and Deductions Should Be Determined Based on a Couple's Household Income, Not on Marital Status*

This proposal draws upon certain features of the Canadian income tax filing system. It suggests an approach to more appropriately allocate credits across households, particularly child-based credits. It proposes that the Code should not deny credits to a married taxpayer living apart from his or her spouse, but instead allocate those credits per separate household as if the taxpayers were unmarried. In tandem with this, it takes the idea of household income a step further in order to address the current inequitable practice of allowing unmarried but cohabitating parents to split multiple children among them and both benefit from the EITC at income levels that would not permit the same result if they were married filing jointly. Both ideas constitute a significant departure from our current system but together would result in a more equitable policy *vis-à-vis* households with children.

#### *1. Characteristics of the Canadian System*

In Canada, as is the case in many other countries, returns are filed by individuals—there is no option for a joint return for married taxpayers. The base for computing individual tax liability is individual income, not combined family income.

However, combined family income is used to determine eligibility for certain purposes, such as the Canada Child Tax Benefit.[156] For the

155. For a discussion of the sensitivities and complexities of innocent spouse relief determinations, see Drumbl, *supra* note 17, at 114–119 (Part III.B).

156. For a helpful overview of the various ways in which marital or family status is relevant in the Canadian income tax system despite its use of an individual filing system, see Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605 (2010).

purpose of determining this tax-free monthly benefit, which is administered by the Canada Revenue Agency, family income is defined to include that of the taxpayer's "cohabiting spouse or common-law partner," defined as:

> the person who at that time is the individual's spouse or common-law partner and who is not at that time living separate and apart from the individual and, for the purpose of this definition, a person shall not be considered to be living separate and apart from an individual at any time unless they were living separate and apart at that time, because of a breakdown of their marriage or common-law partnership, for a period of at least 90 days that includes that time[157]

The Canada Income Tax Act defines "common-law partner" as follows:

> a person who cohabits at that time in a conjugal relationship with the taxpayer and
> (a) has so cohabited throughout the 12-month period that ends at that time, or
> (b) would be the parent of a child of whom the taxpayer is a parent . . .
> and, for the purpose of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship *unless they were living separate and apart at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship*[158]

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157. Income Tax Act, R.S.C. 1985, c.1 (5th Supp.), s. 122.6 (Can.).

158. Income Tax Act, R.S.C. 1985, c.1 (5th Supp.), s. 248 (Can.) (emphasis added). *See also* Hendricken v. The Queen, 2008 T.C.C. 48, 2008 Can. Tax Ct. LEXIS 76, at *8-9 (listing factors to be considered in determining whether taxpayers were in a "conjugal relationship"); Jamie Golombek, *The Tax Costs of Shacking Up*, FIN. POST (Oct. 8, 2011, 9:00 AM), http://business.financialpost.com/personal-finance/the-tax-costs-of-shacking-up; Brad Taylor, *Married vs. Common Law—What's the Difference Anyway?,* LAW NOW, (Mar. 8, 2015), http://www.lawnow.org/married-vs-common-law-whats-the-difference/ (summarizing the distinction for tax purposes and noting that this definition of "common-law partner" is specific to the federal income tax act and is different than the meaning for family law purposes in Canada).

Under these definitions, "family income" tracks beyond that which the United States captures in relying on legal marital status. It encompasses the combined income of unmarried taxpayers living together in a relationship for more than a year, as well as unmarried couples who have a child or children together, regardless of the length of time of cohabitation.[159] In order for a taxpayer to receive the Canada Child Tax Benefit, both the taxpayer and his or her cohabitating spouse or common-law partner must file an individual income tax return, even if one is not otherwise required to do so.[160] The taxpayer is required to enter the spouse or partner's social insurance number, name, and net income in order to claim the benefit.[161]

In spite of its mandated individual filing system, it should be noted that there are certain tax advantages in Canada to being married or having a common-law partner.[162] One recent example of this is the introduction of income splitting, which gained steam particularly among proponents in the Conservative party during the time Steven Harper was Prime Minister. In 2007, Canada adopted income splitting for pension income.[163] In 2014, Canada enacted a federal "Family Tax Cut," which allowed a higher-income spouse/common-law partner to notionally transfer income to a spouse/common-law partner in a lower tax bracket if the couple has children under the age of 18.[164] Critics of the income-splitting measures charge that it

159. The cross-references in subparagraph (b) of the Canada Income Tax Act section 248(1) definition of common-law marriage serve to narrow the definition of "parent" by excluding children of the common-law partner who are not the taxpayer's children and excluding what would be in-law relationships. R.S.C. 1985, c.1 (5th Supp.), s. 248(1) (Can.) Thus, a taxpayer who cohabitates in a conjugal relationship for less than 12 months and is not the parent of a child by that relationship is not a "common-law partner" for purposes of the Canada Income Tax Act.

160. Income Tax Act, R.S.C. 1985, c.1 (5th Supp.), s. 122.61 (Can.).

161. *See* Canada Revenue Agency, Form 5000-R T1 General 2015, at 1, http://www.cra-arc.gc.ca/E/pbg/tf/5000-r/README.html.

162. Some of these policies might be rolled back or eliminated following the November 2015 election, as the Liberal party ran on a platform that proposed to eliminate income splitting (but not pension splitting) and replace the Canada Child Tax Benefit with a Canada Child Benefit. *See* JUSTIN TRUDEAU'S PLAN FOR FAIRNESS FOR THE MIDDLE CLASS, https://www.liberal.ca/files/2015/05/Fairness-for-the-Middle-Class.pdf (last visited Nov. 24, 2016).

163. Income Tax Act, R.S.C. 1985, c.1 (5th Supp.), s. 56(1)(a.2), s. 60(c), s. 60.03, s. 220(3.201) (Can.).

164. Income Tax Act, R.S.C. 1985, c.1 (5th Supp.), s. 119.1 (Can.); s*ee also* TIM SCHOLZ & TREVOR SHAW, OFFICE OF THE PARLIAMENTARY BUDGET OFFICER,

disproportionately benefits wealthier families[165] or that it provides the least benefit to low-income families.[166]

*2. My Proposal—Calculate Credits on Household Income Based on Residence, Not Strictly on Marital Status*

The United States could switch to a model built upon this Canadian approach. Under this proposal, Congress would retain the current filing statuses and brackets, keeping intact any benefits of income splitting for married taxpayers who file jointly and the less favorable brackets for married filing separately that apply at higher income levels. But instead of a blanket denial of credits to married taxpayers who file separate returns, I propose that income eligibility be determined based on whether the taxpayers live together or live, in the words of the Canada Income Tax Act, "separate and apart." This would replace (or at a minimum could supplement) the Code's current determination of whether a taxpayer is "considered as married,"[167] which in my view is far too restrictive for couples who part ways and take up separate residences.

I am in favor of a using a measurement more favorable to separated couples than what is currently permitted for the "considered as married" rule. Under current section 7703, a taxpayer must live apart for at least the last six months of the taxable year to "not be considered as married." This is too punitive a measurement, in my view, for couples who are newly separated. Recall also that if there are no qualifying children, the taxpayers who live apart the entire year but who are not yet "legally separated from his spouse

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THE FAMILY TAX CUT, (Mar. 17, 2015), http://www.pbo-dpb.gc.ca/files/files/Family_Tax_Cut_EN.pdf.

165. DAVID MACDONALD, CANADIAN CTR. FOR POLICY ALTERNATIVES, INCOME SPLITTING IN CANADA: INEQUALITY BY DESIGN 20–21 (2014), https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2014/01/Income_Splitting_in_Canada.pdf (calling income splitting "a tax loophole big enough to drive a Rolls Royce through" and stating that "[t]he richer the family, the more it stands to gain; the poorer the family, the more it stands to lose").

166. John Geddes, *The Surprising Spoils of Income-Splitting: We've Got New Numbers on Who Gets How Much,* MACLEAN'S (Mar. 20, 2015), http://www.macleans.ca/politics/ottawa/new-numbers-on-who-wins-from-income-splitting/.

167. I.R.C. § 7703; *see also supra* note 25 and accompanying text.

under a decree of divorce or of separate maintenance" will still be "considered as married" for tax filing status purposes.[168]

I prefer Canada's approach of using a 90-day period as a measure of whether taxpayers are living "separate and apart" from one another. Thus, I propose that taxpayers who have moved out of the marital home due to a break of at least 90 days in the relationship but who are not yet legally separated be given more flexibility. They still would have the option to file a joint return (assuming an amicable split) or as married filing separately, just as they do now. Unlike under the current Code, though, my proposal would not automatically deny certain credits to separate filers. Instead, these separate filers would have the option to self-designate as a "separate and apart" household, with the result that their eligibility would be calculated based upon household income. In other words, a low-income taxpayer who separates from her spouse for a period of at least 90 days would be eligible for the EITC and the rules would apply as if she were unmarried. At the same time, a higher-income taxpayer who separates would face the EITC income phase-out as if she were unmarried.

Ninety days—approximately three months of living apart—is a long enough period to measure whether a couple is having serious relationship difficulty. After such a period, the couple is likely to have diverging financial interests because they are maintaining separate households. Congress should exclude from the 90-day measure any periods of temporary absence such as attending school away, being apart for work or health reasons, or incarceration.[169] For tax purposes, the Canada Income Tax Act measures the 90 days not as physical absence but time apart "because of a breakdown of their marriage or common-law partnership."[170]

Under this proposal, I would allow taxpayers who are living apart as of December 31 to use a 90-day rule that spans two tax years (as opposed to rigidly measuring the last 90 days of the tax year). Thus, if a married couple splits up on December 15, Year 1 and remains apart (living in separate residences, not because of a temporary absence) as of March 15, Year 2, the taxpayers would be considered to be "separate and apart" as of the end of Year 1 for filing purposes. After all, relationships and life decisions do not neatly follow a calendar-year schedule. In terms of economic impact, this

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168. I.R.C. § 7703.

169. Currently, the Code does exclude similar temporary absences from its determination of marital status with respect to the principal place of abode of the taxpayer (note however, that the Treasury Regulations do not include incarceration in its list of situations that constitute a "temporary absence due to special circumstances"). Reg. § 1.7703–1(b)(3).

170. Income Tax Act, R.S.C. 1985, c.1 (5th Supp.), s. 122.6 (Can.).

would be no less arbitrary a rule than allowing taxpayers who wed on December 31 to file a joint return or than allowing taxpayers to claim as a qualifying child in Year One a baby who is born on December 31, Year One.[171] In terms of administrative convenience and certainty, taxpayers invoking the separate-and-apart rule will know whether they have satisfied the 90-day requirement in advance of the April 15 return filing deadline even if the split occurred at the very end of the tax year.

In addition to easing the rule for spouses who separate, my proposal would also move the U.S. system one important and different step further toward treating similarly situated taxpayers similarly: borrowing from the Canada Child Tax Benefit, I would predicate EITC income eligibility on the *household* income of parents who live together but are unmarried.

Currently, two unmarried taxpayers raising children together receive more favorable treatment than a married couple raising children together. This is because one taxpayer can file as single, the other as head of household; unlike a married couple filing jointly, each is subject to earned income phase-outs separately; together they receive a higher aggregate EITC than if they were married filing jointly.[172] This presents as a whipsaw and runs contrary to the intended anti-poverty policy of both the EITC and head of household filing status,[173] yet it is currently allowed by the Code.

The current rules for claiming qualifying children are complex and cover many possible situations. The rules do not allow different taxpayers to

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171. I.R.C. § 7703(a)(1).

172. For illustrations of the resulting disparities between similar households, see Drumbl, *supra* note 17, at 127–129.

173. The head of household status was enacted in 1951 as a way to extend tax relief to single persons with dependents based on an assumption that the household was run by a single parent:

> The income of a head of household who must maintain a home for a child, for example, is likely to be shared with the child to the extent necessary to maintain the home, and raise and educate the child. This, it is believed, justifies the extension of some of the benefits of income splitting. The hardship appears particularly severe in the case of the individual with children to raise who, upon the death of his spouse, finds himself in the position not only of being denied the spouse's aid in raising the children, but under present law also may find his tax load heavier.

H.R. REP. NO. 82-586, at 11 (1951).

claim the *same* child for *different* purposes.[174] For example, if an unmarried couple with one child lives together, the mother cannot claim the child for purposes of the dependency exemption and the child tax credit while the father claims the same child for the EITC and head of household filing status. If both parents claim the same child on separate returns, the Code resolves the dispute with a "tie-breaker" provision that favors the parent with the higher adjusted gross income.[175]

But the Code does allow parents filing separately to split different children between their returns in any fashion, so long as the various requirements are met. Thus, an unmarried couple that lives together with their three children can calculate which division would benefit them the most collectively based upon their respective income levels. In many situations, the couple benefits both by the fact that their incomes are not aggregated and also because they receive a collective standard deduction higher than that of a married couple. Take a very simple example, in which both individuals have adjusted gross income (all of it earned income) of $25,000. Using the inflation tables from tax year 2014,[176] an unmarried taxpayer with earned income of $25,000 would receive an EITC of $2,155 for one child and an EITC of $3,945 for two children—collectively, the unmarried couple receives EITC of $6,100 for their three children. If, however, the couple were married and filed jointly, their earned income on the joint return totals $50,000 and due to the phase-out, they would have received an EITC of only $506. Economically, the households look the same: two parents, three

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174. A significant and notable exception is provided for divorced and separated parents (including parents who were never married and are now living apart). Section 152(e) of the Code permits the custodial parent the ability to grant permission to the non-custodial parent to claim the child for purposes of the dependency exemption and the child tax credit. In this case, the custodial parent can claim the same child for purposes of head of household status and the EITC. The non-custodial parent must obtain the custodial parent's signature on I.R.S. Form 8332 and attach it to his or her return. Note that this is the only permutation: the non-custodial parent is never allowed to claim EITC or head of household status with respect to the child that does not reside with him or her at least half the nights of the year.

175. *See* I.R.C. § 152(c)(4).

176. Rev. Proc. 2013–35, 2013–47 I.R.B. 537. For the full EITC tables, see INTERNAL REVENUE SERV., PUB. NO. 596, EARNED INCOME TAX CREDIT (EIC) 29–35 (2015).

children, and $50,000 of income. But one household receives $5,594 more in anti-poverty assistance than the other.[177]

This current flexibility for unmarried filers, and the resulting tax advantages, is what drives some noncompliant taxpayers or unscrupulous return preparers to incorrectly file one parent as single and the other as head of household when in fact the couple is married (as seen in the example of the *Ibrahim* case). The noncompliance follows the opportunity and the money. If these incentives are removed from the Code, the rate of noncompliance allocable to the incentive should drop accordingly.[178]

To address this inconsistency among married and unmarried parents who live together and to provide relief to married taxpayers living apart and filing separately, I propose that the EITC tables be restructured. Currently, these tables follow the filing statuses. Instead, I propose that the income phase-outs and EITC amounts be based upon household. Taxpayer parents living alone (i.e., if married, living "separate and apart" from their spouse) or with a taxpayer who is not the parent of their child should be entitled to the phase-outs and amounts currently allowed to a single filer (the current EITC structure does not differentiate between single and head of household with regard to EITC amounts and phase-out levels, and I would keep it that way). Taxpayer parents who file individually but live with the parent of one or more of their children should be entitled to the amounts that would be allowed to a married couple filing jointly based on the couple's aggregate household income.[179]

To return to the earlier example: under my proposal two unmarried individuals, each with earned income of $25,000, must aggregate their income, and either taxpayer would be allowed to receive the amount allowed to a married couple with a joint income of $50,000. In this case, if the taxpayers chose to split their three children between their two returns, neither would receive any EITC; if one parent claimed all three children, the filer

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177. Additionally, the taxpayer who files as head of household receives a standard deduction of $9,100 as opposed to the $6,200 allowed to a single filer. Rev. Proc. 2013–35, *supra* note 176. Collectively, the couple enjoys an aggregate standard deduction on their individual returns of $15,300. Contrast this with a married couple filing jointly, which is allowed a standard deduction of only $12,400. *Id*. This is yet another tax advantage currently afforded to unmarried couples who cohabitate.

178. *See generally* Book, *supra* note 72. *See supra* Part III.C (discussing Book's theories of structural incentives for noncompliance).

179. That is, following the model of the Canadian Child Tax Benefit calculation.

would be entitled to an EITC of $506, just the same as a similarly situated married couple would receive.[180]

For similar structural reasons, I propose that a filer who lives separate and apart from his or her spouse and files a separate return should be allowed to take the standard deduction regardless of whether the spouse itemizes.

*a. Pros of This Proposal*

The major advantage of this proposal is that it sheds the rigidity of marital status in favor of the reality of how income and expenses are shared. Thus, if spouses are separated more than temporarily, each can file as married filing separately and indicate on the return that he or she lives "separate and apart" from his or her spouse. And if an unmarried couple is sharing expenses and raising children together, this too should be taken into consideration.

The EITC is an anti-poverty program, and this proposal is designed with that foremost in mind. Denying a married taxpayer filing separately the opportunity to claim the EITC makes sense only in a context in which spouses are sharing income and expenses and their combined income exceeds the income phase-out for EITC. In that context, it prevents the whipsaw of the lower-earning spouse claiming the credit while his or her spouse is earning an income well above poverty level and the couple shares expenses jointly. In the context in which spouses are living apart and not sharing income or expenses, it does not make sense to rule out EITC eligibility for married filing separately.

In the meantime, plenty of taxpayers are unmarried but sharing income and expenses, yet can claim the EITC if individually each is income eligible. As discussed, this can result in a tremendous disparity between unmarried couples and married couples (with resulting structural incentives for symbolic noncompliance). This disparity may become more significant in scale if marriage rates decline over time in favor of cohabitation, with a resulting increase in the number of cohabitating unmarried parents.[181] My

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180. The Canadian system defaults to primary caregiver as the credit recipient and includes a presumption that the mother is the primary caregiver. Income Tax Act, R.S.C. 1985, c.1 (5th Supp.), s. 122.6 (Can.). I would allow the taxpayers to choose for themselves who should receive the credit. In the event both taxpayers claim the EITC, I would follow something like the current tiebreaker rule, which gives it to the spouse with the higher adjusted gross income. I.R.C. § 152(c)(4)(B)(ii).

181. *See, e.g.*, Neil Shah, *U.S. Sees Rise in Unmarried Parents*, WSJ.COM (Mar. 10, 2015 2:08 PM), http://www.wsj.com/articles/cohabiting-parents-at-record-

proposal addresses that disparity by determining EITC based upon the combined income of the parents living together, which is how the Canadian Child Tax Benefit is designed. In this regard, the proposal addresses an issue much larger than just my concerns about married filing separately: it addresses the fundamental disparities that result from the Code using marriage as a proxy for economic interdependence.

This proposal is the approach that I would favor the most in terms of economic results for similarly situated taxpayers. As with any new proposal, there are downsides to the idea.

*b. Cons of This Proposal*

The major downsides of this proposal are: 1) it adds another layer of complexity for low-income taxpayers; and 2) while it will remove certain incentives for noncompliance, it will pose new administrative and enforcement challenges for the Services.

As to complexity, it creates two new tests for taxpayers to wade through. In the current system, one only needs to know whether the taxpayer is married and whether he or she might meet the exceptions to be not considered as married under section 7703. Under this proposal, marital status is only a starting point; taxpayers must then determine whether they qualify for the EITC on the basis of living "separate and apart" from their spouse. This is not terribly onerous, given that these taxpayers will be looking for any exception that might allow them the EITC.

The far more significant administrative challenge is that unmarried taxpayer couples with children would become subject to new rules and an income limitation that does not apply currently. The Service would need to educate taxpayers about the new rule and create new forms and schedules to help taxpayers determine whether and how it applies to them.

As to enforcement, the proposal would create a new noncompliance incentive: cohabitating unmarried parents might misrepresent their address on the return so as to claim the higher EITC to which they would not be

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high-1426010894 (citing data from the Centers for Disease Control and Prevention showing "just over a quarter of births to women of child-bearing age—defined here as 15 to 44 years old—in the past five years were to cohabiting couples, the highest on record and nearly double the rate from a decade earlier"). The CDC data reflected an overall decline in nonmarital childbearing since 2007, with an increased percentage of nonmarital births occurring within a cohabitating union. SALLY C. CURTIN ET AL., NAT'L CTR. FOR HEALTH STATISTICS, RECENT DECLINES IN NONMARITAL CHILDBEARING IN THE UNITED STATES, NCHS DATA BRIEF, NO. 162 (2014), http://www.cdc.gov/nchs/data/databriefs/db162.pdf.

entitled if their household income were aggregated.[182] The Service would have to crosscheck addresses in its enforcement data bases and undertake correspondence examinations for suspicious returns, leaving taxpayers to try and prove the address they used on the return was their bona fide address.[183] This opens up a new headache for EITC claimants, as the correspondence examination process is slow and systemically difficult to deal with;[184] some percentage of taxpayers would face delays in receiving their refund or end up unfairly denied a credit to which they should have been entitled.

The Service would have to disallow the use of post office boxes as addresses on returns, because otherwise that would be an obvious end-around for these taxpayers. Certainly some portion of taxpayers would get away with this type of noncompliance.

Another complication is what to do when one unmarried cohabitating parent is a nonfiler. For the proposal to work, the household income must be known. It seems reasonable to require both parties to file in order for one to claim EITC: after all, they share a household and thus share economic incentives. But what if one of the parents does not have any taxable income, whether because he or she doesn't work, receives social security disability benefits, or receives supplemental security income? Currently, these taxpayers are not required to file. Would the Service want to bring them back into the filing system for this purpose? This would greatly increase the number of returns the Service would receive for processing. Further, what if one parent was simply a chronic nonfiler? By the time that the Service caught up with that person via its underreporter program and substitute-for-return procedures, it may be too late for the Service to correct the amount of earned income tax credit claimed by the partner taxpayer. Should Congress enact a special rule extending the statute of limitation on assessment for such cases?

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182. Cohabitating married parents might also choose to misrepresent their address so as to claim the "separate and apart" rule, but in so doing, they would forsake the potential benefits from filing jointly, such as income splitting.

183. Proving residence is already a very common EITC audit issue, but under the current rules the taxpayer is asked to prove he or she lived with the qualifying child for more than one-half the year. Under this proposal, taxpayers may find themselves trying to prove that they did *not* live with the EITC claimant for the requisite period of time.

184. For a discussion of EITC audit barriers, see Drumbl, *supra* note 89, at 132–39.

These are certainly not insurmountable challenges. After all, the Canada Revenue Agency has implemented such a system for more than two decades.[185] But they would be new challenges.

### *C. A More Generous Idea: Allow One-Half the Credit a Single Filer Would Get, Based on the Married Filing Separately Taxpayer's Income, Regardless of Total Household Income*

The third proposal is potentially the most costly but offers interesting economic advantages. This proposal would retain the emphasis on marital status and section 7703's determination as to who is considered as married, and unlike the second proposal it is not concerned with household income. To the contrary: here I propose to ignore the household income altogether, and allow married filing separate filers to claim the EITC based on their income, but only the amount that is one-half that which an unmarried filer would be entitled to at the same income level.

This proposal is different than the prior two proposals in that it potentially affords new benefits to married taxpayers who live together: it does not contemplate that they must live apart. Thus it extends beyond the sympathetic category of married taxpayers who have no choice but to file separately. For this reason, the proposal is specific to the EITC and does not contemplate changes to the other limitations on separate filers. For example, this third proposal does not contemplate that separate filers should be entitled to claim the standard deduction if the taxpayer's spouse itemizes.

Under this proposal, married couples with relatively lower incomes may be better off (measured as an economic unit) filing separate returns than filing a joint return. This is of course a departure from our current system, in which it is quite rare for any couple to be collectively better off filing separate returns than a joint return.

At higher collective income levels, this is less likely to be true; as my examples illustrate, a relatively high-earning married couple still would be better off filing a joint return. Thus, many married couples who live together likely would still file jointly. But couples who are estranged are not penalized with the denial of EITC.

While there are seemingly endless permutations that might illustrate this idea, I have set forth three scenarios below.[186] When imagining these

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185. The Canadian Child Tax Benefit was enacted in 1993. For an overview of the Canadian Child Tax Benefit's history and the overlapping tax benefits aimed at Canadian parents, see Kevin Milligan, *A Reset for the Child Tax Benefit System*, 34 INROADS J. 52 (2013).

examples, I considered that the estimated median household income for married couples was $76,509 in 2013.[187] To use points of relative income comparison, I have chosen to illustrate a couple earning below, at, and above this figure. In each scenario, I assume the wife earns income of $20,000[188] and the couple has two children. Choosing this particular figure for the wife's income is a bit arbitrary, but it needs to be relatively low to illustrate the proposal: an unmarried person with this amount of income would receive a significant EITC if she had at least one qualifying child (though the income phase-out would have already begun to take effect at that level). The question of EITC becomes less relevant (and eventually irrelevant) as both spouses begin to earn more; for this reason, I have maintained an income disparity between the spouses, with this disparity widening as the couples' household income rises.

1. *Scenario Example*

a. *Household Income Below the Median: Married Couple Earns $60,000*

At the lower household income level, imagine a husband with an adjusted gross income of $40,000 and a wife with adjusted gross income of $20,000. As joint filers, they would not be entitled to any EITC because their $60,000 total income exceeds the married filing jointly phase-out for the

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186. All examples use tax year 2014 figures and assume the taxpayers claim the standard deduction.

187. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU ET AL., CURRENT POPULATION REPORTS: INCOME AND POVERTY IN THE UNITED STATES: 2013, at 6 tbl.1 (2014) (indicating that the estimated median household income is lower ($50,625) for a male head of household with no wife present and still lower ($35,154) for a female head of household with no husband present).

188. In my examples, the wife earns less than the husband. Statistics bear out that this is the more common gender scenario (71% of husbands earn more than their wives in dual-earner couples). *Wives Who Earn More Than Their Husbands, 1987–2014*, BUREAU OF LABOR STATISTICS, http://www.bls.gov/cps/wives-earn-more.htm (last updated Apr. 6, 2016). However, the percentage of working wives who earn more than their husbands in the United States has steadily increased in the past 25 years, and as of 2013 an estimated 38% of wives out-earned their husbands (this statistic reflects both one-earner households in which the wives were the worker and dual-earner household). *Id.*

credit. They benefit from the child tax credit, but their federal income tax liability on a joint return would be $1,866.

If for whatever reason this couple chose to file two individual returns each using the married filing separately status, with the wife claiming the two children, the husband would have a liability of $4,028 and the wife would receive a refund of $1,804 (attributable to the child tax credit). As a unit, their liability is $2,224, which is $358 higher than their joint liability would have been. This is one illustration of how the current system favors joint filers over married filing separately.

Imagine, however, if this proposal applied in this scenario and the taxpayers chose (for whatever reason) to file as married filing separately. Perhaps they are estranged but not yet legally separated. Perhaps they do not trust one another. Perhaps they have chosen to keep finances separate. Under the proposal, each taxpayer would be allowed one-half the amount of the EITC allowed to an unmarried taxpayer at the same income level. Assuming the wife claims both children on her return, the husband's liability would be the same as under the current rules: $4,028. He is not penalized, but he does not benefit individually. This is because an unmarried taxpayer earning $40,000 with no qualifying children has surpassed the EITC's income phase-out threshold. On the other hand, the wife's refund amount would be higher now, because she would be entitled to an EITC of $2,499 (one-half the amount that is allowed to an unmarried taxpayer with $20,000 of earned income and two qualifying children). Her total refund (including the child tax credit, which is the same amount as if she had filed separately) would be $4,303.

As an economic unit they are better off filing separately than jointly—when his liability is subtracted from her refund, they net a refund of $275. Contrast this to the $1,866 they would have owed on a joint return: they are better off by $2,138 for having decided to file separately.

Note, however, that unmarried cohabiting parents would fare better still (under both the current Code and this proposal). If both taxpayers filed as single and the mother claimed the children, they would receive an aggregate refund of $2,774.[189] In this scenario, as is not at all uncommon, the

189. The father would have a liability of $4,028 and the mother would receive the child tax credit plus an EITC of $4,998, resulting in a refund to her of $6,802. Note that neither can file as head of household because the father is not claiming a dependent. At her income level, it would be unlikely (though not impossible, depending on their expenses) that the wife can show that she is furnishing more than half the cost of the household shared by the four of them. The mother claiming both children is the most favorable permutation for an unmarried couple, though they have two other filing options: the father could file as head of

unmarried taxpayers fare better than the married taxpayers. This proposal would reduce the dollar amount by which this is true, but it does not eliminate the disparity or fully remove the incentive for noncompliance.

*b. Household Income at the Median: Married Couple Earns $76,500*

At this median married couple household income level, imagine a husband with an adjusted gross income of $56,500 and a wife with adjusted gross income of $20,000. They have two minor children in their home. As joint filers, they would not be entitled to any EITC because their $60,000 total income exceeds the married filing jointly phase-out for the credit. They do benefit from the child tax credit, but their federal income tax liability on a joint return would be $4,341.

If the couple in this scenario chose to file two individual returns each using the married filing separately status, with the wife claiming the two children, the husband would have a liability of $7,450 and the wife would again receive a refund of $1,804 (attributable to the child tax credit; recall that her income does not change throughout these illustrations). As a unit, their liability is $5,646, which is $1,305 higher than their joint liability would have been. Again, this illustrates how the current system favors joint filers over married filing separately.

If this proposal applied to the couple and the wife claimed both children on her return, the husband's liability would be the same as under the current rules: $7,450. His wife's refund amount would be the same as in the last scenario because her income did not change: she would be allowed an EITC of $2,499 (one-half the amount that is allowed to an unmarried taxpayer with $20,000 of earned income and two qualifying children), and her total refund would be $4,303.

As was true in the lower-income example, under this proposal the couple as an economic unit is better off filing separately than jointly—when her refund is subtracted from his liability, they owe $3,147 instead of the $4,341 they would have owed on a joint return. Thus, it is worth $1,194 for them to choose to file separately. At this higher joint income level, the benefit realized from filing separately is not as great. This is true because

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household and claim both children (while the mother files as single) or the father could file as head of household and claim one child, while the mother files as single and claims the other. The latter scenario produces an aggregate refund of $1,555, which is considerably more favorable than the outcome for the married couple filing separately in my proposal. In each of the three unmarried permutations, the taxpayers collectively owe less/receive a higher refund than if they were married filing jointly.

they have lost the advantage of income splitting afforded to joint filers. But the ability for the wife to claim EITC outweighs the income splitting in this scenario.

It is helpful to think of the couple as an economic unit when considering the fiscal impact of this proposal. But it is also important to remember that the couple may not be acting as an economic unit: if they are separated or estranged, the wife would benefit greatly from the EITC as she makes the transition from marriage to single parent household.

As in the lower-income illustration and as is generally true, unmarried cohabiting parents at this income level would still have a better outcome than the married couple filing separately in my proposal. No matter how they choose to allocate the children, the unmarried parents would collectively owe less than a married couple filing jointly; if the mother claims both children, they will collectively owe thousands of dollars less than the married couple filing separately under my proposal.[190]

*c. Household Income Above the Median: Married Couple Earns $90,000*

To illustrate the higher-income scenario, imagine that the husband earns income of $70,000 while the wife earns income of $20,000. At this income level, the incentives now shift if the married couple is acting as an economic unit because the income splitting becomes more significant. With a combined income of $90,000, the couple would owe $6,366 on a joint return. If they filed separate returns under the current law, they would collectively owe $9,021, a far worse outcome.

Under my proposal, the wife filing separately would again receive $2,499 in EITC, just as in the first two examples. However, even under my proposal the couple would now collectively owe more ($6,522) by filing separately than by filing jointly.

Presumably, spouses who live together and act in their economic interests would not make this choice. But as in the other two illustrations, the benefit to the wife is significant if the couple is parting ways, because she can use that EITC in establishing her new household.

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190. The father filing as single would have a liability of $7,450, while the mother claiming both children would receive a refund of $6,802; together they would have an aggregate liability of $648. Contrast this with the married couple filing separately under my proposal, who at these same income levels collectively would have a liability of $3,147.

As with the other scenarios, we see again that a similarly situated unmarried couple would fare better financially than a married couple filing jointly or separately: no matter how they choose to allocate the two children, they will owe less collectively than a married couple filing jointly or a married couple filing separately under my proposal.

#### 2. *Pros of this Proposal*

This proposal offers a number of advantages that the second proposal did not offer. First, there is greater simplicity under this proposal. Fewer existing provisions in the Code would change because the marital determination provisions are left intact. Unlike the second proposal, it would not create a new class of issues for potential audit.

The proposal also narrows the level of disparity between unmarried cohabitating parents and married couples, though a disparity generally would continue at all income levels. Still, the proposal would at least decrease the magnitude of the incentive for married taxpayers to misrepresent filing statuses and engage in noncompliance because taxpayers would be entitled to at least some amount of EITC.

Importantly, this proposal could motivate the spouse with less earning power to work. This is a worthwhile policy to consider for a number of reasons. Currently, married women whose husbands work face a number of economic and tax disincentives to work.[191] This proposal certainly would not erase all of those disincentives, but it could provide at least a small incentive to work. Specific to the EITC, one study found that expansions to the credit from the years 1984 to 1996 "reduced total family labor supply of married couples. In all cases, we find a decline in labor force participation by married women that more than offsets any rise in participation by their spouses."[192]

Why does it matter whether the spouse with less earning power chooses to work? Women who do not participate in the workforce are at risk

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191. For an article describing these in detail, see Margaret Ryznar, *To Work, or Not to Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921 (2009).

192. Nada Eissa & Hilary Williamson Hoynes, *Taxes and the Labor Market Participation of Married Couples: The Earned Income Tax Credit*, 88 J. PUB. ECON. 1931 (2004) ("these findings imply that the EITC is effectively subsidizing married mothers to stay home.").

if their marriage fails or their spouse dies.[193] Another angle to consider: a stated policy rationale of the EITC is that it offsets the regressive nature of payroll taxes for low-income workers. For married women with higher-earning husbands (or the gender opposite—married men with higher-earning wives), the payroll tax is especially regressive, because they will earn social security benefits based upon their spouse's earnings.[194] This regressivity can be offset by allowing a wife who earns $20,000 to claim the EITC on a married filing separate return even if the household income exceeds joint income tax phase-out amounts.

Recall the two objectives stated in the legislative history to the EITC as originally enacted in 1975: (1) "as a way of decreasing work disincentives" for persons on welfare; and (2) as a way of addressing the regressive nature of social security taxes.[195] The logic of these same objectives applies today for the lower-earning spouse.
Empowering the spouse with less earning potential might incentivize some work over none. This potential upside to the proposal should not be overlooked.

*3. Cons of This Proposal*

There are at least three drawbacks to this proposal: 1) cost, 2) blurring of the EITC's purpose of reducing household poverty, and 3) the reduced dollar amount available to estranged spouses in separate households. This Section will address these in turn.

As to cost, this third proposal would be more expensive than proposal number two because suddenly many married parents living together would reevaluate their tax return and discover that they would be better off filing separate returns. And unlike the second proposal, there is no reduction in benefits to unmarried cohabitating parents to serve as a cost offset. Of course, my proposal to allow one-half the EITC allowed to an unmarried person at the same income level is just an arbitrary figure, and I used a fixed percentage for simplicity's sake. Congress could enlist economists to determine a more appropriate amount (or percentage) of EITC allowable to

193. JOAN WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 25 (2010) (providing statistics on how even short periods out of the work force can impact long-term earning potential).

194. Sita Nataraj Slavov, *Social Security's War On Working Wives*, REAL CLEAR MARKETS (Oct. 17, 2012), http://www.realclearmarkets.com/articles/2012/10/17/social_securitys_war_on_working_wives_99940.html (arguing that for these wives "the payroll tax discourages work just like an income tax").

195. JCT, 1969 ACT, *supra* note 126, at 222.

married taxpayers filing separately. It could choose to phase out the income level faster, or allow amounts on a scale that does not track the unmarried curve at all. In my view, any amount of EITC allowed to married taxpayers filing separately is better than nothing—which is what these filers get now.

The second drawback is that this proposal moves away from the EITC as an anti-poverty program. First, it would result in a significant number of spouses receiving EITC despite living in a household whose income exceeds what the current system defines as needing a boost out of poverty. Note, though, that as household income increases and the disparity between the two spouse's income increases, the tax liability will look like the third illustration: for spouses who live together, the loss of income splitting from filing jointly hurts them far more than any EITC benefit from filing separately would help them.

In addition, this proposal does not address what I describe as a current shortcoming of the EITC as an anti-poverty program—the fact that two unmarried cohabitating parents receive a more generous household EITC than Congress intended. As described throughout both proposals, there are many examples of unmarried cohabitating households far above the poverty line that currently benefit from the EITC because the lower-income parent happens to be eligible for the credit.

The third shortcoming of this proposal is that it does not do enough to help the group with which I am most concerned, which is low-income spouses who separate and have no choice but to file separately, at a time when they could benefit greatly from receiving the credit. Under this third proposal, such a spouse would only receive half as much EITC as he or she would receive under the second proposal.

## VI. CONCLUSION

Married couples overwhelmingly choose to file joint returns.[196] Married couples acting as partners and behaving as rational economic actors will typically file jointly for the sake of simplicity and perhaps for the benefits of income splitting. However, many married individuals do not face such rosy circumstances: they are in abusive relationships, they have been abandoned, or they cannot trust their spouse. A married taxpayer who elects

196. For tax year 2012, the Service received 53,718,396 returns of married persons filing jointly. For the same year, it received 2,663,017 returns of married persons filing separately. INTERNAL REVENUE SERV., *supra* note 27, at 77 tbl.1.6.

to file separately does not make this decision lightly. If the individual is low-income, he or she faces an additional layer of vulnerability. Denying these separate filers credits that would otherwise be allowed is needlessly punitive and only compounds a difficult economic situation. In cases in which taxpayers are savvy enough to understand how the filing statuses work, the current rules also incentivize noncompliance because unmarried taxpayers are not subject to the same restrictive rules.

There are not clear policy reasons for denying so many benefits to separate married filers without regard to household income or other circumstances. Moreover, there is a curious lack of consistency among how various credits are treated when claimed by separate married filers, and a corresponding lack of legislative history explaining these differences. The current Code incents filing status noncompliance because of the disparate ways in which taxpayers are treated. The inequities resulting from these inconsistencies are further exacerbated by the limitations on amending filing status. One wonders if Congress has given coherent thought to how separate married filers should be treated, as it seems provisions have been enacted over time without much regard to the challenges faced by this filing status. With that said, the exception provided for by the Treasury regulations in the newest refundable credit—the premium tax credit—and the subsequent administrative guidance provide a precedent for creating exceptions, at least for the most sympathetic circumstances. The latitude provided by the premium tax credit exception is a small but positive step in the right direction towards recognizing the range of valid and sympathetic reasons why a married taxpayer might file a separate return.

I have set forth three proposals that remove the punitive barriers faced by these taxpayers. Proposal one is quite narrow and would not have broad application. Proposals two and three address not just the specific problems of separate filers, but also broader structural inequities in the U.S. tax system.

There are many other, less ambitious ideas to consider that might achieve relief for many filers who currently must file separately. For example, a simple approach would be for Congress to amend and liberalize the definition of "considered as married" in section 7703: if the measuring period were less than six months, it would be far less punitive to those taxpayers in marital transition. Likewise, Congress could remove section 7703(b)(1)'s requirement that the taxpayer maintain a household for a dependent child. This would correct the bizarre situation under current law in which a taxpayer who is estranged but cannot afford a divorce, or who cannot locate his or her spouse, is nonetheless required to file a married filing separate return for the rest of his or her life.

In sum, the Code's current knee-jerk approach—a flat out denial of certain credits to separate filers—is overly simplistic and punitive. Congress should revisit it in some fashion.