LOVE, GOD, AND COUNTRY: RELIGIOUS FREEDOM AND THE MARRIAGE PENALTY TAX

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The most odious of all oppressions are those which mask as justice.[1]

I. INTRODUCTION

The term "marriage penalty"[2] has become a colloquialism synonymous with many of the ills of contemporary American society and the erosion of the family. Punishment of marriage was not a consideration of Congress when it passed the Tax Reform Act of 1969 ("1969 Act"),[3] thereby eliminating income tax-splitting for married couples.[4] The 1969 Act's reformed tax structure was intended to help equalize income taxes among taxpayers but instead created a tax schedule that was inequitable for certain

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[1]Robert H. Jackson, *in* Krulewitch v. United States, 336 U.S. 440, 458 (1949).

[2]Generally, marriage penalties are those provisions in the Tax Code which increase the tax liability of two individual taxpayers upon their becoming married, over that which they would have paid had they remained single. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV., 1389, 1429-33 (1975). See *infra* notes 4-6 and accompanying text for further discussion of the term "marriage penalty."

[3]Pub. L. No. 91-172, 83 Stat. 487 (codified at I.R.C. § 1). Essentially, Congress's objective was to alleviate the single taxpayer's higher tax liability (or "single's penalty") that existed in the then current Tax Code. *See* Pamela B. Gann, *The Economic Recovery Tax Act of 1981: The Earned Income Deduction: Congress' 1981 Response to the "Marriage Penalty" Tax*, 68 CORNELL L. REV. 468 (1983) [hereinafter Gann I].

[4]The concept of income tax-splitting resulted from Congress's action in the Revenue Act of 1948 ("1948 Act"), Pub. L. No. 80-471, §§ 301-05, 62 Stat. 110, which allowed a married couple to combine their incomes and deductions onto a single joint return and to calculate the tax liability on one half of the total combined income (that of what a single person would pay), and then multiply it by two. For an in-depth discussion regarding income-splitting, see Bittker, *supra* note 2, at 1412-13. The concept that equal-income married couples (with one or two wage-earners) should pay equal taxes created an inequitable tax distribution between one and two-wage earner married couples, as the much higher one wage-earning couple would escape the higher individual tax burden and effectively get a "tax bonus." *See generally* Gann I, *supra* note 3, at 469-71.

married wage-earners.[5] This tax burden is commonly referred to as the marriage penalty, in that married couples are targeted with a greater tax burden than unmarried single wage-earners with comparable incomes.[6] Historically, the courts have held that the marriage penalty provisions do not pose an unconstitutional burden on married wage-earners.[7] In light of the

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[5]The 1969 Act provided for a separate rate schedule for single taxpayers that limited a single taxpayer's liability to 120% of that of a married couple with an equivalent income. *See* Gann I, *supra* note 3, at 471-72. *See also infra* note 28 and accompanying text (providing support for this proposition). Since the single taxpayer has but one income and the married couple may have two incomes, the schedule becomes more tax-favorable to the single taxpayer. *See* Gann I, *supra* note 3, at 471-72. The ensuing tax inequities do not encompass all married wage-earners. Rather, the "marriage penalty" imposes a graduated burden on couples where one wage-earner's income is at least 20% of the second wage-earner's income. The tax burden increases as the couple's income differential increases above 20%, becoming most extreme where their incomes are equal. *Id.* *See* Bittker, *supra* note 2, at 1429-31. With wives continuing to enter the workforce in ever greater numbers and the explosion of two wage-earner married couples, the marriage penalty affects an ever increasing percentage of the workforce. *Id.* In 1948, when income-splitting was recognized in common law states, approximately 20% of wives worked outside of the home. *Id.* By 1980, that number had increased to 50%. *Id.* In today's economic society, the two-income family has become the prevalent percentage of the taxpayer base in the amount of tax revenues paid, exposing a substantial number of individuals to the marriage penalty. *See* Gann I, *supra* note 3, at 471.

[6]*See* Bittker, *supra* note 2, at 1429-33. The tax burden, however, is not imposed upon the couple should they simply elect to cohabitate and not marry. *Id.*

The marriage penalty existed prior to 1969; its origin can be found in the federal income tax's enactment in 1913. In its original incarnation, the penalty existed primarily as the difference in the tax structure's allowable standard deduction for married or single tax filers, with the deduction being greater for two single wage-earners than for married couples. Albert B. Crenshaw, *Marriage Tax Higher for Many*, STAR LEDGER, July 18, 1994, at 19. Additionally, a 1941 United States Treasury proposal to tax married couples' combined income uniformly with that of single taxpayers was criticized as being detrimental to marriage. Bittker, *supra* note 2, at 1409. The current tax system's "marriage penalty," however, is usually attributed to the 1969 Act. *See generally id.* at 1429.

[7]*See, e.g.*, Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978), *cert. denied*, 439 U.S. 1046 (1978) (upholding the Tax Code's marriage penalty provisions as being constitutional); Druker v. Commissioner, 697 F.2d 46 (2d Cir. 1982), *cert. denied*, 461 U.S. 957 (1983) (stating that a married couple cannot use the "single person's" rate schedule and that the marriage penalty is constitutional); Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976) (holding that the marriage penalty is not offensive to the Constitution), *aff'd per curiam sub nom.* Barter v. United States, 550 F.2d 1239 (7th Cir. 1977) (holding that the marriage penalty challenges do not rise to the level of a constitutional violation), *cert. denied*, 434 U.S. 1012 (1978); Boyter v. Commissioner, 74

recent enactment of the Religious Freedom Restoration Act of 1993 ("RFRA")[8] and shifting social and economic trends, however, the time is ripe to re-evaluate the issue as being a discriminatory burden on the free exercise of religion.

This Comment will explore the historic and present inequities of the Tax Code as they relate to married wage-earners,[9] the economic and societal consequences that the marriage penalty inflicts upon married couples,[10] and the various constitutional challenges that taxpayers have made against the Tax Code's marriage penalty provisions.[11] Specifically, the marriage penalty will be evaluated against a married couple's First Amendment right to the free exercise of religion, questioning whether the marriage penalty targets and unduly burdens the religiously-motivated married couple.[12] Further, this Comment will examine legal precedent, contemporary societal trends,

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T.C. 989 (1980) (determining that the marital status must be made in accordance with state law and that a sham divorce is not a legitimate means to escape the marriage penalty); Black v. Commissioner, 69 T.C. 505 (1977) (holding that the marriage penalty does not impose an unconstitutional discrimination on the basis of violating the First Amendment Free Exercise or Fifth Amendment Due Process Clauses); Hall v. Commissioner, 51 T.C.M. (CCH) 487 (1986) (noting that the fairness of the marriage penalty was for Congress to consider); Pierce v. Commissioner, 41 T.C.M. (CCH) 580 (1980) (holding that a couple married in October of a tax year must use the "married person's" rate schedule for the entire year and cannot prorate their tax to escape the marriage penalty); Tucker v. United States, 83-1 U.S.T.C. (CCH) ¶ 86,787 (1983) (holding that the Tax Code rate schedules do not violate the Due Process, Equal Protection, or First Amendment Establishment Clauses).

[8]Pub. L. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. 2000bb). Of particular relevance to this Comment is section 3(a), entitled "FREE EXERCISE OF RELIGION PROTECTED," which reads: "Government shall *not substantially burden* a person's exercise of religion *even if the burden results from a rule of general applicability* . . . ." *Id.* (emphasis added). For the full text of § 3(a), see *infra* note 233.

[9]The author acknowledges the "tax benefits" of certain provisions of the Tax Code that are available to married wage-earners. *See infra* note 38 and accompanying text. The focus of this Comment, however, is on the growing segment of married wage-earners, compared to the economically-equivalent unmarried couples, burdened by the penalty.

[10]*See infra* notes 53-64, 266-74 and accompanying text (discussing the economic and societal consequences).

[11]*See infra* notes 82-151 and accompanying text (examining the constitutional challenges).

[12]*See infra* notes 198-265 and accompanying text (addressing the burden imposed on the freedom of religion).

and legislative actions that may influence future court challenges to the Tax Code provisions.[13]

Part II of this Comment will present an historic overview of the marriage penalty, including the progressive revisions and alterations to the Tax Code. Next, Part III will address the incongruities in the current tax system.[14] Part IV will discuss various state and federal court challenges to the Tax Code's marriage penalty. While examining the viewpoints of predominant religions regarding the marital institution and non-marital cohabitation, Part V will illustrate a First Amendment free exercise theory of a fundamental marital *requirement* for religiously-motivated adherents. Part VI will compare this theory with recent United States Supreme Court decisions considering an individual's right to unburdened religious practice and Congress's response to the Court by enacting RFRA. Finally, in light of the current political climate and congressional action purporting to advance the traditional family-based social structure, this Comment will maintain that early marriage penalty court decisions must be reconsidered in comparison to current social trends indicating a substantial increase in unmarried cohabitants. Together with the narrow free exercise theory protecting a religiously-motivated marriage, this Comment will conclude that the current Tax Code's marriage penalty unconstitutionally burdens a married couple's right to practice religion.

II. HISTORIC OVERVIEW OF THE MARRIAGE PENALTY

The first congressional action affecting marital status can be traced back to Congress's response to the Supreme Court's decision in *Poe v. Seaborn*.[15] In *Poe*, the Court considered the applicability of community property laws to marriage taxation, whereby a state would treat marriage as a legal unit, that is, a joint partnership where each spouse is vested with a

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[13]*See infra* notes 266-71, 275-79 and accompanying text (considering some social and legislative trends).

[14]For a thorough analysis of the historical basis of the marital status under the Tax Code, see Bittker, *supra* note 2.

[15]282 U.S. 101 (1930). There were three companion cases to *Poe*: Goodell v. Koch, 282 U.S. 118 (1930); Hopkins v. Bacon, 282 U.S. 122 (1930); Bender v. Pfaff, 282 U.S. 127 (1930).

present interest in half of the couple's combined income and property.[16] The Court upheld the community property laws, which promoted the concept of "income-splitting" where each spouse was to be taxed on one-half of the combined income of the couple.[17] The couple's income in *Poe* was comprised entirely of the earnings and additional investment income of the husband.[18] The Court allowed this income to be divided evenly between both spouses, reasoning that the wife held a vested interest in her portion of the community income.[19]

As a result of the Court's ruling in *Poe*, many states enacted community property laws, effectively creating a marriage "bonus" for many

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[16]*Poe*, 282 U.S. at 103-04. *See* Bittker, *supra* note 2, at 1404-05. At the time of *Poe*, community property laws existed in the southwest and pacific coast states of Arizona, California, Louisiana, Idaho, Nevada, New Mexico, Texas, and Washington. Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1582 n.27 (1977). In addition to these community property law states, there existed common law states where the tax on economically-similar married couples' combined incomes could vary greatly, depending upon how or if investment income were to be divided among the couple and whether there were one or two wage-earners. Bittker, *supra* note 2, at 1404-05.

[17]*Poe*, 282 U.S. at 118. During the time of *Poe*, the typical couple had one income (usually the husband's) or two incomes with one significantly larger than the second. *See* Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 774-75 (1989). Income-splitting lowered the tax rates of the high income spouse by effectively cutting in half the total single income and, thereby, placed the household in a lower tax bracket. By dividing the single income between the couple, each spouse would report his or her individual share of the income and pay tax only on that share. This usually resulted in a lower overall tax rate than the couple would have experienced had they paid the full rate on the larger income. *Id.*

[18]*Poe*, 292 U.S. at 109. Generally, the husband's investment income under a common law state would be taxed as a single income and, therefore, be taxed at a higher level. *Id.* The benefit of income-splitting and equally proportioning the investment income to both spouses effectively produces a lower tax liability.

[19]Poe v. Seaborn, 282 U.S. 101, 107-08 (1930). Although income-splitting under community property systems viewed each spouse as having an equally shared interest in the communal income, the husband was vested with complete managerial control of all assets. Bittker, *supra* note 2, at 1405-06. As long as the marriage continued, the husband had no duty to account for his wife's share. *Id.*

married wage-earners.[20] States not adopting these laws, generally those states operating under a common law system, were perceived by their citizens as providing a tax disadvantage to their unmarried citizens.[21] To establish geographical equality between community property and common law states, Congress responded by enacting the Revenue Act of 1948 ("1948 Act"), which legislated income-splitting into the Tax Code.[22] Specifically, the 1948 Act allowed a married taxpayer to file under the optional "joint return" marital rate schedule, thus aggregating both spouses' incomes, irrespective of their source.[23]

Income-splitting was reserved for married couples and came to be regarded as "a tax allowance for family responsibilities."[24] For this reason, the provision was seen as unfair to unmarried taxpayers, widows, widowers, and other single taxpayers who also cared for a "family."[25] Responding to this inequity, Congress in 1951 added another rate schedule to the Tax Code

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[20]Robinson & Wenig, *supra* note 17, at 774-75. Income-splitting was most beneficial to the household with a sole wage-earning spouse. The benefit decreased as the contribution of a second wage-earning spouse increased. *Id.* Since the community property states provided a substantial tax benefit to married couples, common law states were perceived as disadvantaging their married citizens. The *Poe* decision produced a rush among the states to enact community property laws and created a geographical disparity between states that had and had not enacted such laws. Shortly after *Poe*, Oklahoma, Oregon, Hawaii, Nebraska, Michigan, and Pennsylvania enacted community property statutes, while other states, including Massachusetts and New York, were considering adopting the status. Bittker, *supra* note 2, at 1411-12.

[21]Bittker, *supra* note 2, at 1411-12.

[22]The "joint return" filing status became a provision of the 1948 Act, §§ 301-05, 62 Stat. at 114-16. The status provided equalized income-splitting for federal taxes, regardless of whether the state had a community property or a common law system. *Id.* *See also* Johnson v. United States, 422 F. Supp. 958, 965 (N.D. Ind. 1976) (explaining that the congressional response to *Poe* clearly was intended to create geographical equality in the Tax Code), *aff'd. per curiam sub nom.* Barter v. United States, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978).

[23]1948 Act, §§ 301-05, 62 Stat. at 114-16.

[24]Bittker, *supra* note 2, at 1417.

[25]*Id.* A family unit or household was considered to include children, parents, or other decendents or dependents. *Id.*

to assist unmarried taxpayers who maintained households.[26] The newly created classification, referred to as the "Head of Household" category, was intended to alleviate some of the disparity in the tax liability between this class of taxpayer and the married taxpayer.[27] Although the 1948 and 1951 Acts attempted to moderate some of the newly created inequities in the tax rates, the Acts and revisions were widely criticized as disproportionately discriminating against the single wage-earner.[28] As a result, the outcry against the unfairness of the "single's penalty" in the Tax Code eventually led Congress to enact the Tax Reform Act of 1969.[29]

In the 1969 Act, Congress again established new rate schedules in an attempt to mediate the tax disparity that resulted from the previous tax reforms. While income-splitting remained part of the Code, the 1969 Act adopted four tax rate categories for individuals, expanding upon the previous Code's schedules.[30] The new rates limited a single taxpayer's tax liability

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[26]The Revenue Act of 1951 ("1951 Act"), ch. 521. § 301, 65 Stat. 452 (current version at I.R.C. § I(b)), provided for a special category of tax liability, the "Head of Household" classification for the unmarried (or no longer married) individual who headed his or her household and who's home was maintained as the principle abode of a dependent or child. *See also* Bittker, *supra* note 2, at 1417-18.

[27]The resultant tax rate was approximately halfway between the rates for a single wage-earner and the joint return of a married couple. 1951 Act, § 301, 65 Stat. at 452.

[28]Johnson v. United States, 422 F. Supp. 958, 965 (N.D. Ind. 1976) (reasoning that the disproportionate tax burden on single taxpayers induced congressional action to reduce the disparity (citation omitted)). A single person's income, relative to an equal aggregated income of a married couple filing a joint return, could have an increased tax of 22% to as much as 40.9%, depending upon the income level. *See* Bittker, *supra* note 2, at 1429. Further, some tax theorists have contended that the favoritism shown toward married couples (particularly, married couples with one dominant income) was established as a "subsidy" for being married. *Id.* Moreover, the joint return was seen as a departure from the progressive rate structure, in that the tax benefits to the married couple would actually increase as the couple's income would increase. *Id.* at 1419.

[29]*Johnson*, 422 F. Supp. at 966. *See also supra* note 3 (noting Congress's objective in enacting the 1969 Act).

[30]Bittker, *supra* note 2, at 1428. The previous two filing categories — "single" and "married, filing jointly" — were supplanted by the four tax tables of the 1969 Act, which included: (1) "married individuals filing joint returns" and "surviving spouses"; (2) "heads of households"; (3) "unmarried individuals (other than surviving spouses and heads of households)"; and (4) "married individuals filing separate returns." *See* Robinson & Wenig, *supra* note 17, at 783, nn.34, 35.

Some commentators suggest that income-splitting was "technically abolished" by the provisions of the 1969 Act. *See* Jeannette Anderson Winn & Marshall Winn, *Till Death*

to a maximum of 120% of that of a married couple with an equivalent income, regardless of the total taxable income.[31] Prior to the 1969 Act, the single tax rates rarely were used by married taxpayers because the joint return rates were more favorable.[32] With the advent of the 1969 tax reform, new rate schedules were created for married couples, and single taxpayer rates were reduced.[33]

Also in the 1969 Act, Congress prohibited the married wage-earner from using the new lower "single" taxpayer rates.[34] Specifically, two-income married couples (that is, households where both spouses are employed and contribute income) who wished to file separate returns were required to use the "married individuals filing separate returns" schedule, which had the highest tax rate of the four new tax schedules.[35] This exclusive tax schedule incorporated the higher pre-1969 single taxpayer rates and effectively precluded a couple with comparable-incomes from electing to use it, instead making it more advantageous for the couple to utilize the

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Do We Split: Married Couples and Single Persons Under the Individual Income Tax, 34 S.C. L. REV. 830, 835 (1983).

[31]Bittker, *supra* note 2, at 1428.

[32]*Id.* at 1429. It was permissible for married couples to file under the "single" category prior to the 1969 Act *Id.* To do so, however, would invariably lead to a tax increase for the couple because of the benefits realized by filing jointly, i.e., taking advantage of the income-splitting provisions in the Code. *See generally id.* Prior to the 1969 Act, the vast majority of married households had but one wage-earner (or one dominant income), making "married, filing jointly" the favored tax schedule for married couples. *See* Winn & Winn, *supra* note 30, at 833.

[33]Bittker, *supra* note 2, at 1429.

[34]*Id.* Congress foresaw that it would have been economically advantageous for certain married couples with equivalent incomes to utilize the new single rates and, therefore, disallowed the option. Robinson & Wenig, *supra* note 17, at 783 n.33.

[35]Bittker, *supra* note 2, at 1429. The four schedules of the 1969 Act, in ascending order of tax rate, are: (1) "married individuals filing joint returns" and "surviving spouses" with the lowest tax rate; (2) "heads of households" with the next highest rate; (3) "unmarried individuals (other than surviving spouses and heads of households)" with the next highest rate; and with the highest of the tables, (4) "married individuals filing separate returns." Robinson & Wenig, *supra* note 17, at 783 nn.34, 35.

lower "married, filing jointly" tax tables.[36] While the Act achieved the congressional goal of reducing the single person's tax burden, the class of two-income married taxpayers suddenly found themselves disadvantaged when using either of the married tax rates, having a tax penalty imposed on them because of their marital status.[37] Specifically, the marriage penalty affected two-earner income households where the contribution of each spouse is significant, generally where one spouse earned a minimum of twenty

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[36]Bittker, *supra* note 2, at 1429. It was apparent that after the 1969 Act two-worker married couples would try and take advantage of the lower "single" tax rates. By prohibiting this practice via the 1969 Act, Congress intended to preclude any return to the geographical disparity between common law and community property states. *Id. See also supra* note 20 and accompanying text (describing the difference between common law and community property law states). Subsequently, it no longer made economic sense for a married individual to file a separate tax return except in special circumstances, such as where the married individual was subsequently divorced. Bittker, *supra* note 2, at 1429.

Being barred from utilizing the lower "single" tax rates, the tax tables made it uneconomical for most two-income married couples to file in the "married, filing separately" category and effectively relegated them to the lower taxed "married, filing jointly" schedule. *See* Winn & Winn, *supra* note 30, at 834-35. The structuring of the tax rates was such that those couples with comparable spousal incomes ended up paying a marriage penalty over that which they would have paid had they been able to file separately at the lower "single" tax rates. *Id.*

[37]*See supra* note 5. By decreasing or eliminating the tax penalty on single taxpayers, the 1969 Act deemed that the marriage penalty imposed on some married couples was a preferable alternative to abandoning "the 1948 principle of imposing equal taxes for equal-income couples." Bittker, *supra* note 2, at 1431. This preference, however, is unrealistic because it is based on an outmoded household unit concept that all equal-income couples are married. *See, e.g.*, Winn & Winn, *supra* note 30, at 842 (referencing a study that estimates as many as 63.5% of all single persons share a dwelling with another). With the post-World War II era and the massive influx of returning United States soldiers to the workplace, as well as the subsequent displacement of women from the workforce, the typical household consisted of a one income-earning husband and a "stay at home" wife. *See generally id.* at 836. Hence, the income-splitting theory adopted in 1948 was more even-handed when the vast majority of households conformed to this norm. This household arrangement eventually eroded when women began occupying an ever-growing segment of the workforce. *Id.*

Under the 1969 Act, households with a single wage-earner still enjoyed a favorable tax advantage compared to that of a single taxpayer with an equivalent income. *See* Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 21-23 (1980) [hereinafter Gann II]. The penalty took effect when the second spouse began earning income, and the penalty proportionally increased in severity as the income increased. *See generally supra* note 5. Thus, where two single employed people became married and both spouses continued to work and earn income, the combined income could produce a substantial tax increase over their previous tax liability. Bittker, *supra* note 2, at 1429-33.

percent of the other spouse's income.[38] Further, the penalty increased in severity to the maximum point where both spouses earned equivalent incomes.[39]

The inequities created by the 1969 Act formed the impetus for Congress to make further Tax Code revisions. Statistical analysis illustrates the discrepancies between the demographics that influenced previous Tax Code intentions and the considerations of subsequent evolving socioeconomical demands. In 1948, one-income married households comprised 80% of all American families, with the percentage falling to less than 28% by 1979.[40] Concurrently, married households with both spouses working increased to 50.9% of all families.[41] Thus, the 1969 Act produced a reversal in "penalties," switching from the single unmarried wage-earner to the married two-income household.[42] Additionally, the shifting

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[38]*Id.* at 22. This remains the same with the Tax Act of 1993 ("1993 Act"), Pub. L. No. 103-66, 107 Stat. 312 (codified at I.R.C. § 1 (West Supp. 1994)), and the current Tax Code. *See also infra* notes 53-57 and accompanying text (examining the 1993 Act). The marriage penalty is not confined to income earned from employment, but may also include investment income attributed to the non-primary income spouse. *See* Bittker, *supra* note 2, at 1431 n.118.

Where the income of one spouse is below the 20% "threshold," the "married, filing jointly" provision of the Tax Code may provide a financial benefit rather than a penalty for the married couple, a situation which was prevalent at the time of the 1969 Act's enactment where the typical family had one dominant income. *See generally* Gann II, *supra* note 37, at 21-23.

[39]Gann II, *supra* note 37, at 22.

[40]Winn & Winn, *supra* note 30, at 836.

[41]*Id.* The trend away from the one-earner households continues, with two-income households rising to over 60% by 1986. Robinson & Wenig, *supra* note 17, at 785. The percentage increased to 64% by 1992. United States Bureau of the Census, *Statistical Abstract of the U.S.: 1993*, at 399, Table 631 (113th ed. 1993) (providing data on labor force participation by married women ages 16-64; the percentage was derived by adding the participation rates for each of the included age groups and dividing by the total number of these groups). Furthermore, a 1986 study indicated that 60% of all married women who worked outside of the home did so out of economic necessity. Robinson & Wenig, *supra* note 17, at 785. Such trends emphasize the increasing impact of the marriage penalty on the population. Winn & Winn, *supra* note 30, at 836.

[42]*See supra* note 36 and accompanying text. An intent of the 1969 Act was to relieve the single taxpayer of the tax penalty. Bittker, *supra* note 2, at 1428-29. The change in the economic demographics reversed the traditional spousal income contribution that had been dominated by one wage-earner, creating a marriage penalty that affected a significant number of people, whereas very few would have been effected prior to the 1969 Act.

socioeconomic trends dramatically altered the composition of the household unit, with the tax burden continuing to affect an ever increasing number of married households.[43] By 1977, one commentator estimated that as many as 65% of all two-income families bore the burden of the marriage penalty.[44]

In yet another attempt to address marital status and taxation, Congress passed the Economic Recovery Tax Act of 1981 ("ERTA").[45] Designed to provide some relief to the tax burden on two-income married couples, ERTA allowed an earned income deduction that was equal to a percentage of the earnings of the spouse with the lower income.[46] The earned income deduction, however, only partially alleviated the marriage penalty, leaving a significant penalty on higher income couples where the spouses had nearly equal incomes.[47] The various tax rate tinkerings amounted to little more than piecemeal attempts to rectify the tax burdens for select classes of

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[43]*See supra* note 41; *infra* notes 75-78 and accompanying text.

[44]Winn & Winn, *supra* note 30, at 837.

[45]Pub. L. No. 97-34, § 103(a), 95 Stat. 172, 187-88 (codified at I.R.C. § 221) (repealed 1986). Proponents of the reform criticized the Tax Code's imbalance towards married couples in that:

> [1] [T]he marriage penalty discouraged marriage and undermined respect for the family and for the tax system itself . . . .
> [2] [T]he system, in adopting the view that married couples with equal statutory income should pay equal taxes, failed to reflect in the tax base the diminished income and home production of two-worker couples compared to one-worker couples . . . .
> [3] [B]ecause the system taxed the secondary worker's income at a higher marginal tax rate as a result of consolidating income on the joint return, it discouraged the secondary worker from working outside the home.

See Gann I, *supra* note 3, at 475.

[46]Gann I, *supra* note 3, at 475.

[47]*Id.* at 478. Although the earned income deduction was an improvement over the tax rates prior to the ERTA, the marriage penalty on equal-earning married couples was not substantially reduced. *Id.* Couples were still subjected to a marriage penalty, with those earning over $40,000 per year affected the most and paying a considerably higher tax. *Id.* at 478-79.

taxpayers, culminating in 1986 when ERTA was repealed by the Tax Reform Act of 1986 ("1986 Act").[48]

The 1986 Act flattened out tax tables and decreased tax rates.[49] While the reform was enacted partially in response to the inequities associated with the marriage penalty, the penalty nevertheless remained, particularly against the two-income couple with equal or near equal incomes.[50] Approximately forty percent of all married couples were subjected to a marriage penalty, averaging $1100 more than they would have paid in taxes had they filed separate, individual tax returns as single taxpayers.[51] Additionally, fifty-three percent received a net benefit, a "marriage bonus," averaging $600.[52]

While the 1986 Act went further than many previous attempts to alleviate the marriage penalty, thus suggesting a trend in Tax Code reformation, the pendulum has swung back with the current revisions to the Code by the Tax Act of 1993 ("1993 Act").[53] The 1993 Act again increased the harshness of the penalty.[54] In 1993, changes to the Tax Code

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[48]Pub. L. No. 99-514, 100 Stat. 2085 (codified at I.R.C. § 1 *et seq.* (West Supp. 1987, 1993)). *See* Robinson & Wenig, *supra* note 17, at 783-85. The 1986 Act did not eliminate the marriage penalty, and the subsequent tax increases in the 1993 Tax Code indicate that the "piecemeal tinkering" continues to this day. *See infra* notes 53-57.

[49]*See generally* Robinson & Wenig, *supra* note 17, at 783-85. In addition to lowering the tax rates, the quasi-"flat tax" revisions incorporated into the Tax Code included just two tax brackets, 15% and 28%. *See* 1986 Act, 100 Stat. at 2085. A true flat tax would subject all taxpayers to one tax percentage rate, regardless of the individual's income.

[50]Robinson & Wenig, *supra* note 17, at 783 n.35.

[51]*Id.* *See infra* notes 57-58 and accompanying text (providing an example of when a couple may be subject to the marriage penalty).

[52]*Id.* The marriage bonus, or subsidy, is generally available when the spouses' incomes are far apart, below the 20% marriage penalty "threshold," or where there is only one wage-earner. *See generally id.*

[53]Pub. L. 103-66, 107 Stat. 312 (codified at I.R.C. § 1 (West Supp. 1994)). The 1993 Code retains the four marital status tax classifications of the previous Code. *See supra* note 30.

[54]Michael J. Graetz, *Tax Policy at the Beginning of the Clinton Administration*, 10 YALE J. ON REG. 561, 569 (1993). With the new, higher tax rates, the substantial marriage penalty on high income equal-earner married couples may make more people look favorably at divorce as a way to escape the high taxes. As Professor Graetz submits, "[i]n the late 1960s, Congress created a marriage tax penalty that gave young people a reason for living together without marrying that their parents could understand. In the 1990s,

were promised to "soak the rich,"[55] however, practically all two-income married couples have been "soaked" under the 1993 Act. Today, there are more couples being penalized with an increased tax burden than those who receive a tax benefit.[56]

The current Tax Code, which employs the 1993 Act, incorporates five tax brackets, compared to only two in the 1986 Act.[57] As a result, the

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President Clinton may be giving some of these same people a reason for divorcing that their children can comprehend." *Id.*

[55]*See id.* at 566 (referencing President Clinton's campaign rhetoric and intentions to place the burden of increased taxation on wealthy taxpayers). While the high-income wage-earners are certainly hit with a substantial marriage penalty, Professor Graetz suggests that the increased marriage penalty for low-income wage-earners could amount to more than $4,000 per year. *Id.* at 569.

The legislative history of the congressional action of the 1993 Act noted the reason for changing the previous Tax Code and increasing tax rates for higher income individuals: "[t]o raise revenue to reduce the Federal deficit, to improve tax equity, and to make the individual income tax system more progressive, . . . a higher marginal tax rate should be imposed on taxpayers with a greater ability to pay taxes." INTERNAL REVENUE ACTS 1991-1993: TEXT OF ACTS AND LEGISLATIVE HISTORY WITH TABLES AND INDEXES 623 (1994) [hereinafter IRA LEGISLATIVE HISTORY]. The burden, however, again weighs heavier upon the two-income married taxpayers, a contradiction to concepts of equality and progressivity. *See generally infra* notes 65-68 and accompanying text.

Another provision of the 1993 Act is the "alternative minimum tax," or AMT, where a taxpayer is subject to the AMT to the "extent that the taxpayer's tentative minimum tax exceeds the taxpayer's regular tax liability." IRA LEGISLATIVE HISTORY, *supra*, at 621-22. The provisions include exemptions of $40,000 for "married taxpayers filing joint returns," $30,000 for "unmarried taxpayers filing as single or head of household," and $20,000 for "married taxpayers filing separate returns." *Id.* The exemption is phased out at the thresholds of $150,000 for "married taxpayers filing joint returns," $112,500 for "unmarried taxpayers filing as single or head of household," and $75,000 for "married taxpayers filing separate returns." *Id.* Both the AMT and the threshold exemption phase-out are a direct marriage penalty, weighing more heavily upon the two-income married couple proportionately than to the single taxpayer. *See generally supra* note 6 and accompanying text.

[56]Crenshaw, *supra* note 6, at 19-20. This commentator noted that the marriage penalty in the current tax law has resurfaced "with a vengeance." *Id.* In comparing the 1986 Act, which was by no means "marriage friendly," and the 1993 Act, an economist noted that "[t]he size of the marriage tax is now quite extraordinary." *Id.*

[57]Beginning in tax year 1987, a 15% and a 28% bracket were incorporated in the 1986 Act, I.R.C. § 1. The current 1993 revisions add 31%, 36%, and 39.6% rates to all marital status schedules. 1993 Act, I.R.C. § 1. Each tax rate for "married individuals filing joint returns" is higher than the proportionately comparable income for "unmarried individuals," excerpts of which are reprinted in relevant part:

combined incomes of married wage-earners place them into higher tax brackets. For example, a single wage-earner with a taxable income of $50,000 per year would currently be taxed in the 28% bracket. Two married individuals, each earning taxable incomes of $50,000, would have a combined income of $100,000 and be taxed at the higher rate of 31%.[58]

(A) Married individuals filing joint returns:

If taxable income is:	The tax is:
Not over $36,900.	15% of taxable income.
Over $36,900 but not over $89,150.	$5,535, plus 28% of the excess over $36,900.
Over $89,150 but not over $140,000.	$20,165, plus 31% of excess over $89,150.
Over $140,000 but not over $250,000.	$35,928.50, plus 36% of the excess over $140,000.
Over $250,000.	$75,528.50, plus 39.6% of the excess over $250,000.

. . . .

(C) Unmarried individuals:

If taxable income is:	The tax is:
Not over $22,100.	15% of taxable income.
Over $22,100 but not over $53,500.	$3,315, plus 28% of the excess over $22,100.
Over $53,500 but not over $115,000.	$12,107, plus 31% of excess over $53,500.
Over $115,000 but not over $250,000.	$31,172, plus 36% of the excess over $115,000.
Over $250,000.	$79,772, plus 39.6% of the excess over $250,000.

Id.

[58]*Id.* Taxable income in these examples is based on income after subtracting the allowable standard deduction. Following the 1969 Act, the "married, filing separately" tax rates were higher than those of unmarried individuals. *See supra* note 35.

The current tax law also significantly affects a variety of two-income married couples. For example, lower income couples can have an increased tax of up to 18% of their total income.[59] As an economist noted, a married, two children, two-income couple, earning $20,000 per year may pay $3,000 in additional taxes over what they would have paid had they not chosen to marry.[60] Further, the higher the income, the more substantial the penalty, i.e., two non-married individuals are taxed at the 36% rate when their income reaches $230,000, but if they become married, the 36% rate applies when their incomes reach only $140,000, resulting in a penalty of nearly $6,000.[61] As incomes increase, additional tax surcharges are triggered, further raising the penalty.[62]

Finally, in addition to the differential in the income tax rates, the married couple is also subjected to a lower standard personal deduction, which again favors the unmarried.[63] A single-earner individual is entitled to a $3,700 deduction, whereas married persons are each allowed a deduction of only $3,100.[64]

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[59]Crenshaw, *supra* note 6, at 19 (referencing a study by the National Bureau of Economic Research of Cambridge).

[60]*Id.*

[61]Tax calculations for this example are based on the 1993 tax tables, with the actual tax penalty being $5,984.50. These calculations do not consider the difference due to the allowable standard deduction rates under § 63(c)(2) or the deduction phase-out under § 151(d)(3). *See infra* note 63.

[62]Graetz, *supra* note 54, at 569. An additional 10% tax surcharge "kicks in" when a married couple's income reaches $250,000. *Id.*

[63]*Id.* The current 1994 standard deductions, based on filing status, reprinted in relevant part:

$6,200	Married Individuals Filing Joint Returns
$5,450	Heads of Households
$3,700	Unmarried Individuals
$3,100	Married Individuals Filing a Separate Return

See 1993 Act, I.R.C. § 1. Note that a "phase-out" of the standard deduction is incorporated into the Code, effecting married individuals filing jointly beginning with incomes at $162,700 and $108,450 for unmarried individuals. *Id.*

[64]*Id.* The marriage penalty in the standard deduction is characterized by a deduction of $6,200 for the combine spousal incomes for "married filing jointly" category (or $3,100 each for "married, filing separately"). Conversely, two unmarried cohabitating taxpayers

III. DIFFICULTIES IN OBTAINING AN EQUITABLE TAX SYSTEM

Congress supports the goals of a neutral personal income tax and of "equal taxation for equal-income couples." These goals are manifested in Congress's four generally accepted objectives:

> (1) [A] progressive rate structure; (2) equal-income couples paying the same amount of tax, without regard to types of income or division between the spouses; (3) no "tax on marriage" — two single persons paying no more tax if they marry; and (4) no "tax on remaining single" — a single person saving no tax by marrying someone who has no income.[65]

These four objectives, however, are inherently contradictory.[66] Following the 1969 Act, Congress elected to maintain the first and second objectives and compromised the third and fourth.[67] Under the current Tax Code, the concept of horizontal equity, whereby equal income wage-earners pay equal taxes, suffers when it is based on marital status rather than on being uniformly applied.[68] Moreover, the 1993 Tax Code's adherence to a progressive tax system, whereby individuals are taxed in direct proportion to their ability to pay, compounds the marriage penalty. Taxpayers

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would enjoy a combined deduction of $7,400. The disparity in the treatment of marital status was first encountered in the standard deductions of the original 1913 income tax laws. *See supra* note 5.

[65]McIntyre & Oldman, *supra* note 16, at 1590-91.

[66]*See* Bittker, *supra* note 2, at 1395 (noting that criteria for equity objectives of a tax system should be (1) progressive, include (2) equal taxes on equal income, and be (3) marriage-neutral, but that such goals can not be achieved simultaneously).

[67]McIntyre & Oldman, *supra* note 16, at 1591.

[68]Horizontal equity is founded on the principle of "equally situated people [paying] equal tax[es]." *Id.* at 1591. In theory, the "equal income, equal taxes" concept is equitable. In practice, however, the system is inequitable when the *household unit* is separated into individual income earners. For example, under the current Tax Code, a married couple is assumed to have their incomes pooled, but such a two-income household is not horizontally equal compared to a one-earner household and certainly not in comparison to an unmarried two-income household. *See generally* Gann II, *supra* note 37, at 7 (discussing marital status as a factor in horizontal equity theories).

progressively pay more taxes as their income increases and, thereby, are subject to greater penalties.[69]

Traditional justification for maintaining the special tax on the married couple has been based upon several theories — including economic unity, economies of scale, and marital obligations — all of which compel the couple to pay a greater share of tax than unmarried individuals.[70] Tax theorists continue to cite these theories as justification for a marriage penalty.[71] Nevertheless, in light of current social and economic realities, it becomes apparent that these theories have lost much of their validity.[72]

The "economic unity" theory is founded on the idea that married couples pool and share their incomes and have elected to choose this economic arrangement through their act of marriage.[73] The theory ignores the fact that non-married household units may also pool their incomes without being penalized for tax purposes.[74] Moreover, not all married couples and their families share their income, especially in light of the

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[69]Professor Gann notes the disparity of the progressive tax system and its conflicting goals as follows:

> A progressive income tax system can allocate tax liabilities in two ways: all equal-income married couples can pay the same taxes, or the fact of marriage will not change an individual's tax liability. These alternatives are mutually exclusive. Since the enactment of the split-income plan for married couples in 1948, our income tax system has preferred that all equal-income married persons pay the same tax. It then has tried to assess the burden on single persons in relation to this central principle, primarily on the basis of equity criteria. The cost of its primary goal is a penalty for both single and married persons.

See Gann II, *supra* note 37, at 24.

[70]*See* Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 92-100 (1993).

[71]*Id.* at 96-105.

[72]*See, e.g.*, *infra* note 270 (discussing data concerning married and unmarried adults).

[73]Kornhauser, *supra* note 70, at 96. This theory also presupposes the option that a couple may choose to enter into the marriage, if only considering the economic ramifications of the act. Such a choice is not available to the religiously-motivated married couple, which is discussed at length at *infra* notes 153-59 and accompanying text.

[74]Kornhauser, *supra* note 70, at 96.

women's movement and its growing emphasis on economic independence of women.[75]

Next, the "economies of scale" argument supports the proposition that "two can live as cheaply as one" and argues that married households benefit from both individuals sharing common resources.[76] This theory, however, only compares married couples against the single wage-earner living alone; it does not consider single taxpayers who also may have dependents or the growing segment of the population of unmarried cohabitants.[77]

Finally, the "marital obligations" theory asserts that the legality of the marriage institution alters the rights and obligations of the individuals,

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[75]*Id.* at 96-97.

[76]Bittker, *supra* note 2, at 1422-25. *But see* Gann II, *supra* note 37, at 28-29 (reasoning that economies of scale comparisons are an inappropriate determinant); Charles R. O'Kelley, Jr., *Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the Purpose and Ideal Structure of a Progressive Income Tax*, 58 CAL. L. REV. 727, 758-59 (1985) (asserting that including economies of scale into the Tax Code is inconsistent with and irrelevant to income taxation purposes).

[77]*See* Bittker, *supra* note 2, at 1420. Cohabitating households may include heterosexual couples, same-sex couples, single parents sharing a dwelling with siblings, parents, or other relatives, and related or unrelated persons sharing expenses and the dwelling unit. *See generally id.* Such households are indicative of the changes in society. As one commentator noted:

> The American family is changing. Fewer American households consist of a "traditional" family, that is, a husband and wife and their children. A wide variety of other types of communal living arrangements are becoming more common. Many of these constitute what might be called a "non-traditional" family. The non-traditional family may consist of an unmarried couple, either homosexual or heter[o]sexual, and either with or without the minor or adult children of one or both partners; a single parent, with minor or adult children; or a step-family, with the "parents" either married or unmarried, with minor or adult children from the prior marriages or relationships of one or both of the "parents," and possibly with the joint children of the "parents." The "parents" may have been through a series of marriages, divorces, and informal relationships. With the non-traditional family, the members may be related by blood, marriage, adoption, or mere association.

Robinson & Wenig, *supra* note 17, at 848-49 (citing Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353 (1987-88)).

thereby justifying the taxation of the married couple as a singular unit.[78] This theory also does not consider non-spousal obligations of financial support, such as alimony or child support following divorce.[79]

The percentage of unmarried cohabitants as a household unit has increased dramatically since the 1969 Act targeted the two-income married taxpayer class.[80] Singling out the married household unit as a special tax category, and especially subjecting the household to an increased tax burden, can no longer be justified, because, today, equivalent income unmarried households can readily escape this burden.[81]

IV. LEGAL CHALLENGES TO IMPOSITION OF THE MARRIAGE PENALTY

The Sixteenth Amendment of the Constitution entrusts Congress with broad authority to levy taxes on the populace.[82] This taxation power has been administered through the Tax Code. With the acknowledged inequities that the tax burden imposes upon married wage-earners, the Tax Code has been repeatedly contested over the years. This section will review the different attempts to challenge the constitutionality of the Government's ability to impose the marriage penalty upon a selected group of taxpayers.

Since the enactment of the 1969 Act and its revisions to the Code, several federal court challenges have been brought against the marriage

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[78]Kornhauser, *supra* note 70, at 98-99.

[79]*Id.* at 99.

[80]Since 1970, the percentage of unmarried-couple households increased 621% from 523,000 couples in 1970 to 3,510,000 in 1993. ARLENE F. SALUTER, U.S. BUREAU OF THE CENSUS, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1993, at ix tbl. D (1994). As of 1993, six percent of all cohabitating couples were unmarried, whereas in 1970, only one percent were unmarried. *Id. See also* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1993, at 54 tbl. 62 (113th ed.) (providing the same statistical data).

[81]*See, e.g.*, Robinson & Wenig, *supra* note 17, at 851-53 (asserting that previous socioeconomic justifications to differentiate taxpayers based on marital status is incorrect).

[82]U.S. CONST. amend. XVI. The Sixteenth Amendment provides that: "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." *Id.*

penalty tax.[83] These challenges have focused on infringements of First Amendment freedom of religion rights, fundamental rights to marriage, rights of equal protection, rights to due process, and attacks that the marriage penalty provisions are arbitrary and capricious.[84] This section will examine each of these challenges.

A. FREEDOM OF RELIGION CHALLENGES

The Free Exercise Clause states "Congress shall make no law respecting . . . religion, or prohibiting the free exercise thereof . . . ."[85] Several challenges have been waged against the marriage penalty on the grounds that it unduly violated a married taxpayer's First Amendment right to the free exercise of religion.

In *Johnson v. United States*,[86] the District Court of the Northern District of Indiana upheld the marriage penalty, stating that the penalty did not violate the due process, free exercise, or fundamental right to marry

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[83]One significant challenge was Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976), which was subsequently appealed in Barter v. United States, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978). This case was followed by a succession of other actions, none of which went beyond the district courts. *See, e.g.*, *supra* note 7 and accompanying text.

[84]*See, e.g.*, Druker v. Commissioner, 697 F.2d 46 (2d Cir. 1982), *cert. denied*, 461 U.S. 957 (1983) (discussing fundamental rights to marriage and equal protection rights); Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976) (reviewing issues of freedom of religion rights, fundamental right to marriage, and due process rights), *aff'd per curiam sub nom.* Barter v. United States, 550 F.2d 1239 (7th Cir. 1977) (examining issues on grounds of freedom of religion rights and the fundamental right to marriage), *cert. denied*, 434 U.S. 1012 (1978); Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978) (addressing issues of fundamental right to marriage, equal protection and due process rights), *cert. denied*, 439 U.S. 1046 (1978); Black v. Commissioner, 69 T.C. 505 (1977) (exploring freedom of religion rights); Hall v. Commissioner, 51 T.C.M. (CCH) 487 (1986) (considering the issue that the marriage penalty was arbitrary and capricious); Pierce v. Commissioner, 41 T.C.M. (CCH) 580 (1980) (evaluating fundamental rights to marriage); Tucker v. United States, 83-1 U.S.T.C. (CCH) ¶ 9308 (1983), (discussing fundamental right to marriage and due process rights).

[85]U.S. CONST. amend. I.

[86]422 F. Supp. 958 (N.D. Ind. 1976), *aff'd per curiam sub nom.* Barter v. United States, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978).

provisions embodied in the Constitution.[87] Plaintiffs declared sincere beliefs in the marital teachings of their various religious denominations[88] and asserted, among others, a violation of the First Amendment Free Exercise Clause because the tax scheme placed a higher tax on people who practiced their religious beliefs in marriage.[89]

The district court found that the Internal Revenue Code provisions "were not enacted with a design to interfere with [P]laintiffs' free exercise of their religion[; r]ather, they were enacted to advance valid, secular

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[87]*See generally id.* at 974. In a consolidation of three cases, *Johnson* involved three Plaintiffs — Johnson, Barter, and Blair. *Id.* at 960-962. Plaintiffs in *Johnson* were seeking refunds of their income taxes on the grounds that the Internal Revenue Code's rate schedules unconstitutionally discriminated against them because of their status as married persons and that these additional taxes amounted to a marriage penalty. *Id.* at 960-61. Plaintiffs' factual scenarios were sufficiently similar, and hence, adjudicated together. *Id.* In *Johnson*, Plaintiffs filed refund claims for the difference between taxes paid based upon married persons' rate schedules and upon schedules for individual taxpayers. *Id.* Plaintiff Johnson, because of a divorce, filed for the difference between the dissimilar tax rates of "married filing separately" and "unmarried head of household." *Id.* Plaintiffs Barter and Blair filed for amounts based on the difference in rates applicable to their married status and those rates had they filed as unmarried individuals. *Id.* at 961-62.

[88]Plaintiffs' church memberships included the Lutheran Church in America, whose doctrine stated that "marriage is ordained by God as a structure of the created order," and the United Methodist Church, which proclaims the "sanctity of marriage" as being "blessed by God." *Id.* at 962.

[89]*Id.* at 962-63. Specifically, Plaintiffs argued the following:

> [1] The Due Process clause of the Fifth Amendment forbids marital classification by which higher tax rates are imposed on the taxable income of a married person (whose spouse has significant income) than are imposed on the same taxable income of an unmarried person.
>
> [2] The Free Exercise clause of the First Amendment prohibits the imposition of higher tax rates on those who practice their religious beliefs in regard to marriage.
>
> [3] The "fundamental right to marry," protected by the First, Fourth, Fifth, Ninth and Tenth Amendments is violated by a tax rate differentiation which imposes higher tax rates on the taxable income of a married person (whose spouse has significant income) than on the same taxable income of an unmarried person.

Id. Due process and fundamental right to marriage claims are discussed more fully *infra* notes 97-141 and accompanying text.

government purposes," such as raising revenue.[90] The court explained that, because the provisions were part of a general taxing statute, any "incidental effect on the religious practices of certain persons" was not prohibited by the Constitution.[91] Accordingly, the court opined that the Government's substantial interest in raising revenue and equalizing the tax differential between single and married persons, per the 1969 Act, justified this burden.[92]

Another attempted challenge to the marriage penalty can be found in *Black v. Commissioner*,[93] where the federal tax court considered the assertion that different tax classifications based upon marital status infringed on the free exercise of religion.[94] The court summarily dismissed Petitioner's argument that this status-based classification violated the free exercise of religion by intruding on Petitioner's choice to marry.[95] The court noted that a general "law with a secular purpose may have the effect of making the observance of some religious beliefs more expensive [but that result alone] does not render the statute unconstitutional under the First Amendment."[96]

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[90]*Johnson*, 422 F. Supp at 974.

[91]*Id.* at 975.

[92]*Id.* at 974-75, *aff'd per curiam sub nom.* Barter v. United States, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978). In *Barter*, the Seventh Circuit Court of Appeals, in a very brief opinion, agreed that the inequities of the marriage penalty did not reach a constitutional violation. *Id.* at 1239.

[93]69 T.C. 505 (1977).

[94]*Id.* at 507. Plaintiffs challenged the constitutionality of separate tax schedules for married and single taxpayers, arguing that the choice to marry was a religious one. *Id.* at 507. Plaintiffs also claimed the separate schedules violated the Equal Protection Clause, discussed further in *supra* note 121 and accompanying text.

[95]*Id.* (citing Braunfeld v. Brown, 366 U.S. 599, 605-07 (1961)). The court concluded that religious beliefs were consistently held to be without basis for a complaint against the tax system, where the statute in question did not specifically target religion. *Id.*

[96]*Id.*

B. CONSTITUTIONAL RIGHT TO MARRY CHALLENGES

The Supreme Court has held that the right to marry is fundamental to the Constitution and is extended protection through the Bill of Rights.[97] As such, the marriage penalty has been challenged on the grounds that it interferes with the married taxpayer's fundamental right to marriage. One such challenge was brought to the Tax Court in *Johnson*.[98] In *Johnson*, the district court began by acknowledging that marriage was a fundamental right and subject to equal protection or due process analysis, relying upon *Griswold v. Connecticut*[99] and the Supreme Court's previous recognition of a "penumbral" right to marry.[100] The district court proffered that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[101] The court, however, distinguished Plaintiff's case by noting that marriage as a fundamental right has not been considered "in the context of a constitutional challenge to the Internal Revenue Code" or that the Code provisions did not actually prohibit Plaintiffs from making a decision as to their marital status or selecting a marital mate.[102]

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[97]*See* Griswold v. Connecticut, 381 U.S. 479 (1965), discussed *infra* note 99. *Accord* Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978).

[98]Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976), *aff'd per curiam sub nom.* Barter v. United States, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978).

[99]381 U.S. 479 (1965). The Court in *Griswold* held that, although the Constitution did not specifically protect marriage, the institution was so fundamental that it garnered the protection extended by the Bill of Rights. *Id.* at 12. In so doing, the Court struck down the state of Virginia's anti-miscegenation statute on Fourteenth Amendment Equal Protection and Due Process grounds. *Id.*

[100]*Johnson*, 422 F. Supp. at 969. "Penumbral" connotes a right not specifically recognized by the Constitution, but extended recognition through the Bill of Rights. *Id.*

[101]*Id.* The *Johnson* court reiterated recognition of this fundamental right by citing the Supreme Court's holding in *Boddie v. Connecticut*. *Id.* (citing *Boddie*, 401 U.S. 371 (1971)). In a challenge to a Connecticut divorce statute which required applicants to pay a fee to file for divorce, the *Boddie* Court noted that marriage involved "interests of basic importance in our society." *Id.* at 376. *Accord* Loving v. Virginia, 388 U.S. 1 (1967), Skinner v. Oklahoma, 316 U.S. 535 (1942), Kras v. United States, 409 U.S. 434 (1973).

[102]Johnson v. United States, 422 F. Supp. 958, 970 (N.D. Ind. 1976).

While acknowledging the fundamental right to marry, the district court deferred to the Legislative Branch in exercising its taxation power[103] and noted that "[no] scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact."[104] The court dismissed the Government's "economies of scale" argument[105] and subjected the Tax Code provisions to strict judicial scrutiny.[106] Nonetheless, the court advanced that all taxes are essentially a "form of penalty" and that the constitutionally significant burden was justified by the Government's compelling interest.[107] The court explained that this "interest" was based on the 1969 Tax Reform Act's attempt to alleviate the unequal tax burden imposed on single taxpayers and that not all married taxpayers paid a marriage penalty. Additionally, the district court could not find a favorable, "less onerous means" of taxation available to the Government and, because no perfect solutions existed, did not require the Government to assume the burden to demonstrate that other, less drastic solutions did not exist.[108]

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[103]*See supra* note 97 (referring to the Sixteenth Amendment and its empowerment of taxation to Congress).

[104]*Johnson*, 422 F. Supp. at 971 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)). The Court in *Rodriguez* further noted that in an area as complex as the Tax Code, where "no perfect alternatives exist," the Court should avoid imposing "too rigorous a standard of scrutiny lest all . . . fiscal schemes become subjects of criticism under the Equal Protection Clause." *Rodriguez*, 411 U.S. at 41.

[105]*See supra* note 76 and accompanying text. The court realized that the argument failed, when viewed in light of testimony that 62.5% of all persons who filed individual tax returns did not, in fact, maintain separate households, but instead were living with parents, children, or with another wage-earner outside of marriage. *Johnson*, 422 F. Supp. at 971-72.

[106]*Johnson*, 422 F. Supp. at 973. The Court deemed the heightened strict scrutiny standard was appropriate to scrutinize governmental regulations that burdened an individual's fundamental rights and that its actions were the least restrictive means necessary to accomplish that interest. *See generally* Wisconsin v. Yoder, 406 U.S. 205 (1972).

[107]*Johnson*, 422 F. Supp. at 973. The court, while realizing the imperfections of the taxation system, upheld the government's compelling interest of exercising its legislative power to raise taxes in an orderly manner. *Id.* at 970-73.

[108]*Id.* at 974. Justice Eschback noted that the court was "ill-equipped to judge the merits" of the plaintiffs' proposed Tax Code alternatives to the marriage penalty, and deferred such analysis to the legislature. *Id.*

Three cases followed *Johnson* and employed an analysis similar to that found in *Johnson*. The first of these cases occurred in 1980 in *Pierce v. Commissioner*.[109] Petitioner in *Pierce* asserted that the marriage penalty interfered with the right to marry, was unconstitutional, and encouraged immoral behavior.[110] In a brief decision, the Tax Court in *Pierce* upheld the marriage penalty as constitutional, deferring strongly to Congress's legislative mandates.[111]

In 1981, the marriage penalty was challenged on the grounds of fundamental right to marriage and equal protection violations in *Druker v. Commissioner*.[112] The court dismissed Petitioner's claims, stating that "the differences in exposure to tax liability between married and single persons do not rise to the level of an impermissible interference with the enjoyment of the fundamental right to marry or remain married."[113] On appeal, the district court affirmed the decision, noting that the effect of the marriage penalty was "indirect," and while it may have some bearing on an individual's choice to marry, the ultimate decision was still left to the

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[109]41 T.C.M. (CCH) 580 (1980). In *Pierce*, newly-wed petitioners discovered their taxes had dramatically increased from the previous year when they were single, due to the marriage penalty. *Id.* at 580. Since they had married in mid-October, Petitioners computed their income tax based on "single" rate schedules up to the date of their marriage and computed their tax by the "married, filing jointly tables" for the remainder of the year. *Id.* at 581. The Tax Court disallowed the tactic, finding the couple to have been married for the entire year as determined by the Tax Code, which considers a couple to be married for the year if that is their status on December 31 of the year. *Id.*

[110]*Id.*

[111]*Id.* at 581-82. To overcome the constitutional challenge, the court simply adopted precedent that had stated such. *Id.* ("The marriage penalty, inequitable as it is, has been upheld as unconstitutional." (citing Mapes v. United States, 576 F.2d 896 (Ct. Cl.), *cert. denied*, 439 U.S. 1046 (1978); Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976), *aff'd per curiam sub nom.* Barter v. United States, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978))). *See also infra* note 125 and accompanying text (discussing *Mapes*).

[112]77 T.C. 867 (1981), *cert. denied*, 461 U.S. 957 (1983). In *Druker*, married petitioners filed separate tax returns under single, unmarried schedules in an attempt to avoid the marriage penalty, claiming that they should be allowed to file at the lower, single taxpayer's tax rates. *Druker*, 77 T.C. at 868-69.

[113]*Id.* at 872-73 (citing Mapes v. United States, 576 F.2d 896 (Ct. Cl.), *cert. denied*, 439 U.S. 1046 (1978); Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976), *aff'd per curiam sub nom.* Barter v. United States, 550 F.2d 1239 (7th Cir. 1977), *cert. denied*, 434 U.S. 1012 (1978)).

individual.[114] Judge Friendly, writing for the majority, posited that the marriage penalty did not absolutely prevent anyone from becoming married, and that the Tax Code placed no direct legal obstruction in the path of a couple desiring to be married.[115] The court further noted that the policy considerations of a marriage penalty was a Congressional matter.[116] It is noteworthy that Petitioners ultimately resolved their marriage penalty problem by divorcing and continuing to live together.[117]

Finally, a similar holding was handed down in 1983 by the district court in *Tucker v. United States*.[118] In *Tucker*, Plaintiffs argued that the marriage penalty amounted to a direct tax on the right to marriage and was unrelated to a person's income, thereby violating the requirement of apportionment as dictated by the Constitution.[119] The *Tucker* court noted that the tax schedules were reasonably related to the Sixteenth Amendment's objectives and stated that Petitioner's contentions, therefore, were without substance.[120]

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[114]Druker v. Commissioner, 697 F.2d 46, 49 (2d Cir. 1982). It is worth noting that such a decision to marry or not marry is not a choice available to the religiously-motivated couple who desires to cohabitate. Such a cohabitation is dictated by the adherent to be by marriage only. *See infra* notes 153-91 and accompanying text.

[115]*Druker*, 697 F.2d at 49 (citing Zablocki v. Redhail, 434 U.S. 374 (1978)).

[116]*Id.* at 50.

[117]*Id.*

[118]83-1 U.S. Tax Cas. (CCH) ¶9308 (W.D.T. 1983). The *Tucker* court dealt with the issue of whether the marriage penalty amounted to a direct or an indirect tax. *Id.* at 86,787-88.

[119]*Id.* at 86,788. The Sixteenth Amendment to the Constitution allowed taxation on income, without apportionment, from whatever source derived. *Id.* The plaintiffs argued that the difference in taxes due to the marriage penalty was a direct tax, based solely on the taxpayer's marital status. Since it was based on status and was unrelated to income, the tax became "a direct tax on the fundamental right to marry and not on income from whatever source derived." *Id.*

[120]*Id.* at 86,789.

C. EQUAL PROTECTION CHALLENGES

One of the first cases in which equal protection arguments against the marriage penalty were raised was in *Black*.[121] In *Black*, Petitioners contended that the different tax schedules between married and single taxpayers and the subsequent increased tax burden on married couples violated the Equal Protection Clause.[122] The tax court upheld the regulations, determining that the rational basis test was proper for "economic legislation," such as tax regulation, in equal protection discrimination claims.[123] The rational basis test dictated a minimum judicial scrutiny, requiring the governmental regulation to be supported simply by a rational method of promoting a legitimate public interest "free from invidious discrimination."[124]

The Tax Code's intrusion on the fundamental right to marry was also advanced in *Mapes v. United States*.[125] The plaintiffs in *Mapes* contended that the Tax Code's marriage penalty violated their constitutional rights by imposing greater tax liabilities without affording them due process or equal protection under the Constitution.[126] The United States Court of Claims decided otherwise, finding "no triable issues of fact," and granted the defendant's summary judgment motion.[127] The *Mapes* court seemed to take a tongue-in-cheek approach to the matter, noting that people could demonstrate their unselfish love for one another by marrying regardless of

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[121]Black v. Commissioner, 69 T.C. 505 (1977).

[122]*Id.* at 507. Petitioners had challenged the constitutionality of separate tax schedules for married and single taxpayers. The court subjected the Tax Code schedule to a rational basis test and found the plaintiffs were not invidiously discriminated against on account of their marital status. *Id.* at 507-08.

[123]*Id.* at 507. The court observed that economic legislation, as generally applicable, did not directly discriminate against a suspect classification on the basis of sex, marital status, or family interference. *Id.* at 508-09.

[124]*Id.* at 506-07.

[125]576 F.2d 896 (Ct. Cl. 1978), *cert. denied*, 439 U.S. 1046 (1978).

[126]*Id.* at 897. The plaintiffs in *Mapes* filed for a tax refund for the additional amount in taxes they had paid to the IRS as a result of the marriage penalty imposed on them. *Id.*

[127]*Id.*

the negative aspects of the Tax Code.[128] In addition to the Code's disparate rate schedules, the plaintiffs also noted the difference in the maximum standard deduction available to married couples and singles.[129] Evaluating both of these issues, the court acknowledged the Code's arbitrariness, but found it justified because of the need for an efficient and manageable tax system.[130] Therefore, the court found the rational basis test for equal protection grounds discrimination had been met. Furthermore, the court found that the Tax Code provisions were reasonably related to a constitutional objective as required by the Fifth Amendment Due Process Clause.[131] It is interesting to note that the court recognized that the increased tax burden might discourage some couples from marrying, but reasoned that it would not "present an insuperable barrier to marriage."[132] In finding that some married taxpayers suffered tax penalties while others received tax benefits (e.g., one-income married couples), the court conceded

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[128]While pointing out the negative effects of the Tax Code (and quoting from Gilbert and Sullivan's "Patience," where "[l]ove and marriage defy economic analysis"), the court notably proffered that:

> Formerly society frowned upon cohabitation without marriage, assessing various punitive sanctions by law and custom against the partners themselves, and their innocent offspring. Most of these have now been eliminated in our more "enlightened" society. Cohabitation without marriage, and illegitimacy, or whatever it is now called, are said to be rapidly increasing. Certainly the tax-minded young man and woman, whose relative incomes place them in the disfavored [tax] group, will seriously consider cohabitation without marriage. Thereby they can enjoy the blessings of love while minimizing their forced contribution to the federal fisc [sic]. They can synthesize the forces of love and selfishness.

Id. at 897-98.

[129]*Id.* at 898-99. *See, e.g., supra* notes 63-64 and accompanying text (explaining the difference in the standard deduction rates based on marital status). The *Mapes* court disregarded this issue because of plaintiffs' lack of standing, as they had not taken the standard deduction for the tax year in question. *Mapes*, 576 F.2d at 899.

[130]*Id.* at 898.

[131]*Id.* at 900.

[132]*Id.* at 900-01. The court analogized the similar effect of social security benefits being terminated in Califano v. Jobst, 434 U.S. 47 (1977).

that the penalty was an indirect burden on the right to marry.[133] The court posited that it was not, however, a result of marrying in and of itself, but simply a result of marrying someone in a specific income group.[134] Thus, the *Mapes* court concluded that the plaintiffs merely demonstrated that Congress's tax categories were imperfect and imprecise, but this was insufficient to find the Equal Protection Clause had been violated. In so concluding, the court opined that tax disparities were always likely to exist, no matter what revisions or adjustments ultimately were made to the Tax Code.[135] Hence, since the provisions met the minimum rationality test demonstrated in *Johnson*, the court upheld the Code's provisions.[136]

Recently, in *Rinier v. United States*,[137] the United States District Court for the District of New Jersey summarily dismissed the plaintiff's claim that the marriage penalty violated the Equal Protection and Due Process Clauses of the Constitution.[138] Citing to *Pierce*,[139] the court acknowledged the continuous difficulties courts have faced in developing an equitable tax system, and noted that several courts have upheld the penalty

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[133]Mapes v. United States, 576 F.2d 896, 901 (Ct. Cl. 1978).

[134]*Id.*

[135]*Id.* at 904. In what may be a classic example of avoiding a solution, Justice Nichols, writing for the court's majority, reasoned:

> [T]ax disparities will exist no matter how the rates are structured. This is simply the nature of the beast. The tax law is complicated enough already without the added complexity a full solution to this problem would apparently require. We in the judiciary, are neither equipped nor inclined to second guess the legislature in it determination of appropriate tax policies.

Id.

[136]*Id.* at 903-04.

[137]92-2 U.S.T.C. (CCH) ¶50,503 (D.N.J. 1992). In *Rinier*, the married plaintiffs brought their challenge on much the same grounds as previous court challenges. The court acknowledged the plaintiffs' "reasonable arguments on policy and sociological grounds," but paid them little heed in the face of the precedent cases of *Druker*, *Mapes*, and *Johnson*. *Id.* at 85,739.

[138]*Id.* The court observed that, although the plaintiff had made reasonable policy and sociological arguments, the arguments had little legal relevance in light of case precedent.

[139]Pierce v. Commissioner, 41 T.C.M. (CCH) 580 (1980). *See also supra* note 109 (discussing *Pierce*).

as constitutional.[140] The *Rinier* court went a step further, however, and inferred that Congress had vicariously approved the marriage penalty by not ameliorating the penalty's effects when it had the chance to do so in the Tax Code revisions of the 1986 Act.[141]

D. OTHER CHALLENGES TO THE MARRIAGE PENALTY

Boyter v. Commissioner[142] presents a distinct example of the creativity of taxpayers' attempts to escape the marriage penalty. In *Boyter*, petitioners travelled to a foreign country on December 31 each year for two years to obtain divorces and returned to remarry each following January.[143] By obtaining year-end divorces and filing their income tax returns as unmarried single taxpayers, the petitioners availed themselves of a lower rate schedule and paid less tax.[144]

The court held that, for the divorce to be valid and recognized by the State, domicile in the foreign country is required of at least one of the parties in a divorce proceeding conducted by the foreign court.[145] Since both the individuals remained residents and were domiciled continuously in the State of Maryland, the court found that the foreign divorce was invalid and the couple was not entitled to file as single taxpayers.[146] Additionally, the court advised that Congress had chosen to establish separate tax schedules to apply specifically to the status of the taxpayer as married or unmarried, and

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[140]*Id.* The court failed to consider the issue anew, but relied instead on precedent for affirmation of the constitutionality of the Tax Code provisions.

[141]*Id.* at 3. *See also* supra note 48 and accompanying text regarding the 1986 Act. While the Act repealed the "two earner married couples" deduction, the legislature had the opportunity to eliminate the marriage penalty by allowing a single-filing status for married wage-earners, which it did not do. *Id.*

[142]74 T.C. 989 (1980).

[143]*Id.* at 990-93.

[144]*Id.* at 992-93. The Tax Code provides that a person's marital status is determined at the end of the tax year. *See also* Pierce v. Commissioner, 41 T.C.M. (CCH) 580 (1980) discussed at *supra* note 98. It is notable that the court attributes the problem to Congress's *ad hoc* means of addressing the problem of the marriage penalty through the various tax acts. *Id.*

[145]*Boyter*, 74 T.C. at 999.

[146]*Id.* at 1000.

the State accordingly had the right to determine the marital status of the taxpayer.[147]

In *Hall v. Commissioner*,[148] the taxpayer's approach to the marriage penalty was similar to that in *Druker*. The petitioner's constitutional challenge to the marriage penalty asserted that the Internal Revenue Service's ("I.R.S.") interpretation of the tax laws and penalty was arbitrary and discriminatory.[149] In a case where a married wage-earner claimed a greater deduction that was not allowed because of the individual's actual filing status, the Tax Court held that the petitioner must comply with the provisions and categories of the Tax Code.[150] The court further concluded that the question of whether or not the marriage penalty is unfair is one that Congress must answer.[151]

E. SUMMARY

To date, the challenges against the marriage penalty appear to have run the gamut of issues. The precedential holdings, however, date back to the 1969 Act and even further to the concept of income-splitting. First Amendment free exercise challenges based on the fundamental right to practice one's religion, as a "religiously-motivated" married couple, may have been insufficiently supported at the time of these earlier cases. Recent societal trends and Congressional action support the contention that this theory be revisited with a more narrowly defined argument than previously propounded.[152]

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[147]*Id.* at 997.

[148]51 T.C.M. (CCH) 487 (1986). The petitioner attempted to use a tax schedule inappropriate to her tax status, claiming a "deduction for a married couple when both work," whereas such a deduction was only available to married persons filing joint returns. *Id.* at 487.

[149]*Id.* at 488.

[150]*Id.*

[151]*Id.*

[152]*See, e.g.*, *supra* notes 41, 77-80, 270 (providing demographical data); *infra* note 233 (discussing RFRA).

V. RELIGIOUS MANDATES ON THE INSTITUTION OF MARRIAGE

A. MARITAL PRECEPTS OF PREDOMINANT RELIGIONS

Some individuals choose to enter into a marital relationship rather than to "live together" (i.e., cohabitating outside of marriage) because of the couple's religious beliefs.[153] A couple's "religiously-motivated marriage" is a religious belief that warrants the protection of the First Amendment. For a religious practice to come under the zealous protection of the First Amendment from otherwise reasonable state restrictions, the practice must be "rooted in religious belief."[154] An examination of the major religions presently practiced in the United States illustrates that many marriages are so rooted in religious beliefs.

The institution of marriage itself is recognized in some form or another by every major culture in the world.[155] Today, marriage remains a fundamental tenet of the major religions practiced in the United States.[156] These religions have historically considered the marriage institution to be central to their respective faiths as a "sanctioning" of the cohabitation of

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[153]*See generally supra* note 88 and accompanying text for a discussion on petitioner's marital religious beliefs in Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976). *See also* discussion at *infra* notes 155-88 and accompanying text (describing marriage as a fundamental religious tenet).

[154]*See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1983). The Court in *Yoder* found fundamental Amish beliefs prevailed over the government's mandatory public education laws, and stated "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the religion clauses, the claims must be rooted in religious belief." *Id.*

[155]9 MIRCEA ELIADE, THE ENCYCLOPEDIA OF RELIGION 218 (1987). *See also* 1 JAMES HASTINGS, ENCYCLOPEDIA OF RELIGION AND ETHICS 423 (1951) ("The institution of marriage may be regarded as the central feature of all forms of human society . . . .").

[156]*See generally infra* notes 160-88 and accompanying text (marital precepts of predominant religions). This section focuses on some of the predominant religions in practice throughout the world and in the United States today, selected by the author as based on number of adherents, diversity, or cultural and historic influence. Included herein are Buddhism, Christianity, Hinduism, Islam, and Judaism. This Comment does not presume to provide an exhaustive commentary of each religion, but rather presents a brief overview of each theology's marital precepts. A review of a predominance of lesser-known religions finds most consider the marriage ritual and practice thereof to be a central doctrine to the belief. 1 HASTINGS, *supra* note 155, at 423.

heterosexual couples.[157] Moreover, as the institution of marriage is typically regulated by state statute, the religious ceremony usually is but one of several means to solemnize the act.[158] The regulatory statutes controlling marriage are an unseverable tie to the State; one cannot have a legally recognized, societally condoned, religious marriage that is not under control of the State.[159] The tax consequences are therefore unavoidably directed in part at religious-based, mandated marriages. This is especially true as the various religious marriage institutions consider concepts of family, chastity, sexual relations, and adultery regarding the practices and sanctity of each religion.

B. MARRIAGE IN SPECIFIC RELIGIONS

The practice of Buddhism emphasizes an individual's moral quality in life, with the religion bestowing respect upon chastity in relations between the sexes.[160] The Buddha is said to have proclaimed that "the life of chastity is . . . lived . . . for the purpose of Insight and Thorough Knowledge . . . . He who, after taking the vow of chastity, breaks it, and

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[157]This Comment does not ignore the obvious fact that there are practicing individuals of all the noted religions who cohabitate outside of marriage. Although the concept of cohabitating or "living together" has become increasingly prevalent in society and may be considered socially acceptable, marriage is nonetheless considered fundamental to religious convention. *See, e.g.*, *supra* note 80 (citing the increasing percentage of unmarried American households).

[158]For example, in New Jersey, the parties must obtain a state issued marriage license, delivered to a person who is authorized to solemnize the marriage, and who then does so. Such a person may be a federal, county, state or municipal judge or magistrate, a surrogate, county clerk or mayor or chairman of any Township Committee or the Village President, or any minister of any religion. N.J. STAT. ANN. § 37:1-13 (West 1994). New York also requires persons intending to marry to procure a marriage license from a city or town clerk and then deliver it to a magistrate or member of the clergy who will officiate. N.Y. DOMESTIC RELATIONS LAW § 13 (McKinney 1994).

[159]*See generally id.* The critical social significance (*e.g.*, joint property ownership, support, inheritance rights, consortium and wrongful death benefits) of marriage is cited as a rationale that it must be legally controlled. WILLIAM J. O'DONNELL & DAVID A. JONES, THE LAW OF MARRIAGE AND MARITAL ALTERNATIVES 1, 6 (1982). Thus, some courts have considered the state's role as "tantamount to that of a party to all marriages." *Id.* at 11, n.21. *See also* Morris v. Morris, 31 Misc.2d 548 (N.Y. Sup. Ct. 1961) (observing that marriage is considered a civil contract given a status in which the state has a deep concern, and which the state exercises exclusive dominion).

[160]1 HASTINGS, *supra* note 155, at 490.

he who thus causes another to fall, suffers 'in the realm of punishment and in perdition.'"[161] Buddhism historically has favored a strictly monogamous marriage, one where both men and women remain chaste before and after marriage.[162]

Christianity traces the marriage custom to the Biblical Adam and Eve, with the bride and groom joining "into one spirit in union with Christ and God," and as "a metaphor for the marriage of the church to Christ."[163] While following the Judaic prescripts on the institution of marriage at the time of Christ,[164] the New Testament of the Bible decrees that each man should have his own wife, and that each woman should have her own husband.[165] As "heirs together of the grace of life," marriage itself is considered by Catholicism to be a sacrament.[166] Protestant denominations also embrace marriage as a "divine institution" supported by the Fourth Commandment.[167] The New Testament of the Bible denounces all

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[161]*Id.*

[162]*See generally id.* "Chasteness" in this sense refers to maintaining a married couple's monogamous sexual relationship.

[163]9 ELIADE, *supra* note 155, at 218. *See generally Genesis* 2:18-24 (providing what Christians regard as the original institution of marriage). As it reads in *Genesis*:

> Then the Lord God made a woman from the rib he had taken out of the man, and he brought her to the man. The man said, "This is now bone of my bones and flesh of my flesh; she shall be called 'woman,' for she was taken out of man." For this reason a man will leave his father and mother and be united to his wife, and they will become one flesh.

Id. See, e.g., Matthew 19:3 (responding to the Pharisees questions on divorce, Christ's answer implied that the Genesis depiction of matrimony was the ideal model of marriage); *Mark* 10:2 (same). *See also* 1 HASTINGS, *supra* note 155, at 433.

[164]For a general discussion on Judaism and marriage, see *infra* notes 182-88 and accompanying text.

[165]*1 Corinthians* 7:2.

[166]*See 1 Paul* 3:7. Catholicism recognizes seven sacraments, of which marriage is one. *See generally* 1 HASTINGS, *supra* note 155, at 902-04 (discussing the sacraments of Christian denominations).

[167]*See, e.g.*, HUMAN SEXUALITY: A THEOLOGICAL PERSPECTIVE, A REPORT OF THE COMMISSION ON THEOLOGY AND CHURCH RELATIONS OF THE LUTHERAN CHURCH — MISSOURI SYNOD 10 (1981) [hereinafter HUMAN SEXUALITY]. The institution of marriage is "given by God to His creatures to nourish their common life together and to preserve

fornication, or lusts of the flesh, expounded in the Sixth and Tenth Commandments.[168] Chastity between the couple in a Christian marriage is a requirement to married life, as decreed by divine command.[169] Sexual relations between a man and woman are reserved for marriage, and such relations outside of the institution are denounced.[170]

The Islamic view of marriage is not as authoritatively specific. The Qū'ran, commonly referred to as the Koran, promulgates that a man is to "seek [a woman] in marriage, by means of your properties, not committing fornication,"[171] and further, in taking a wife, be "chaste, not committing fornication, nor taking secret paramours."[172] Furthermore, a Muslim must not commit adultery, for one who does "shall meet with the punishment of his sin and his punishment will be intensified on the Day of Judgment and he will abide therein disgraced . . . ."[173] Under Islam, chastity is considered a spiritual and physical state of cleanliness, a "necessity on the path to

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human life toward the final goal of all creation." *Id.* at 11. The Fourth Commandment states "[t]hou shalt honor they father and thy mother, that it may be well with thee, and thou mayest live long on the earth." A SHORT EXPLANATION OF DR. MARTIN LUTHER'S SMALL CATECHISM, A HANDBOOK OF CHRISTIAN DOCTRINE 6 (Concordia Publishing House 1965) (1943) [hereinafter DR. MARTIN LUTHER'S SMALL CATECHISM].

[168]The Bible's definition of "fornication" refers to sexual relations outside of marriage, as in immorality or unfaithfulness. The Seventh Commandment, "[t]hou shalt not commit adultery," considers infidelity to be either inside or outside of marriage. The Tenth Commandment states, "[t]hou shalt not covet thy neighbor's wife . . . ," which is regarded to include lusting after another's spouse or, typically, another person outside of the marital bounds, whether in thought or deed. *See* 1 HASTINGS, *supra* note 155, at 132-133. Note that under Lutheran denominations, "[t]hou shalt not commit adultery" is considered the Sixth commandment. DR. MARTIN LUTHER'S SMALL CATECHISM at 6.

[169]9 ELIADE, *supra* note 155, at 227. "Chastity," as with Hinduism, refers to maintaining a married couple's monogamous sexual relationship.

[170]*See* HUMAN SEXUALITY at 12 (stating that sexual relations outside of marriage is forbidden by Scriptures (citing to *Genesis* 2:24; *1 Thessalonians* 4:2-5)). *But cf. Galations* 5:19, *Ephesians* 5:3; *Colossians* 3:5; 1 *Corinthians* 6:16-20.

[171]MUHAMMAD ZAFRULLA KHAN, THE QŪ'RAN ch. 4:25 (Olive Branch Press, 1st Amer. ed. 1991).

[172]*Id.* at ch. 4:26.

[173]*Id.* at ch. 25:62.

God."[174] For the individual, it involves physical restraint from sexual relations outside of marriage.[175] Additionally, traditional Muslim law dictates harsh punishment for offenses of fornication, which includes adultery and any sexual intercourse between unmarried persons or persons planning to be but not yet married.[176]

Hindu life consists of four stages, including marriage, which is considered a sacred institution as well as a social duty.[177] Consequently, adultery is subject to punishment while a chaste spouse is respected.[178] The theology finds that through marriage, the couple becomes one in spirit.[179] As the central institution of Hinduism, marriage is considered greater than a sacrament, a *samskāras* or rite that purifies and consecrates the man and woman.[180] Only a married man together with his wife becomes the "complete *persona religiosa* entitled to perform the principal religious acts of sacrifice and procreation."[181]

Judaism regards illicit sexual activity, including adultery, to be "abhorrent" to God.[182] Devotees believe that "adultery is one of the three cardinal sins, along with murder and idolatry, for which death . . . is

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[174]9 ELIADE, *supra* note 155, at 227-228.

[175]*Id.* at 228.

[176]1 HASTINGS, *supra* note 155, at 131.

[177]Marriage, also referred to as *Vivāha*, is the second of the four life stages. For a more detailed discussion of this concept, see 15 MIRCEA ELIADE, THE ENCYCLOPEDIA OF RELIGION 477 (1987).

[178]Original harsh penalties for adultery and subsequent strict adultery laws are generally regarded as a means to control sexual relations outside of one's social caste and protect the purity thereof, rather than a moral regard for the sanctity of the marital institution. *See generally* 1 HASTINGS, *supra* note 155 at 128-30.

[179]9 ELIADE, *supra* note 155, at 218.

[180]*Samskāras* is defined by Hindu theologians as "a rite that prepares a person or thing for a function by imparting new qualities and/or by removing taints." *Id.* at 387. Besides the marriage rite, other *samskāras* prepare the couple for marriage, or emanate from the institution. *Id.*

[181]*Id.*

[182]GEOFFREY WIGODER, THE ENCYCLOPEDIA OF JUDAISM 157 (Macmillan Publishing Co. 1989).

preferable."[183] The theology proclaims marriage as the "ideal relationship between man and woman," with the institution attaining "a state of holiness through the practice of chastity," and the avoidance of illicit sexual activity.[184] Moreover, marriage is viewed as a "[d]ivine command, a sacred bond," and is legitimatized by Judaism as a social institution.[185] Judaism notes that marriage is the ideal, normal way of life, "a sacrament, an institution with cosmic significance legitimated by religious motifs," sanctified through Divine authority.[186] In a couple's relationship, Judaic tradition considers purity and chastity to be vital to the marriage institution, with marriage "recognized as a matter of course."[187] The historic foundation for marriage and chastity in Judaism is shared with Christianity, citing to the ancient book of Genesis.[188]

C. CONSTITUTIONAL QUESTIONS ON THE RELIGIOUSLY-MOTIVATED MARRIAGE

These religions are implicit in the importance of the marital precept; a fundamental, integral aspect of theological practice and spiritual belief. The growing societal practice of cohabitation outside of marriage is notably absent from theological comment, and unquestionably not sanctioned by the majority of religious theologies. In addition, marriage serves a social and

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[183]*Id.*

[184]*Id.*

[185]As fundamental to the "Divine Plan," marriage is embodied by the biblical story of Adam and Eve. *Id.* at 461.

[186]*Id.* Marriage is referred to by the concept of *kiddushin*, or sanctification. The book of Genesis notes that the marriage is created to provide companionship and perpetuate society through the building of a family as an independent unit. *Id.* at 461, 637.

[187]9 ELIADE, *supra* note 155, at 227.

[188]*Id.* Judaic authority on marriage is recognized in the Talmud:

> The Talmud teaches that it is imperative for a man to have a wife. After marriage, a man "leaves his father and his mother and cleaves to his wife, and they become one flesh" (Genesis 2:24). Consequently, the Jewish people generally consider the chaste marriage to have been established by God. The commands of God regarding the ties of marriage are to be complied with.

Id.

familial purpose both inside and outside of religious practice. In Western society, as the foundation of the family, marriage serves to perpetuate the society by recognizing the couple's union and bringing their children into the social fabric.[189] In a societal and moral sense, it also serves as a means of regulating relations between the sexes.[190] Moreover, the courts have continually upheld the institution of marriage and the importance of family.[191]

None of the marriage penalty court decisions addressing First Amendment concerns have examined the sincerity of the petitioner's religious beliefs as a basis of legitimacy to bring suit on those grounds. Nevertheless, examining these beliefs is an integral part of properly evaluating any First Amendment claim.[192] For secular, that is, non-religiously-motivated marriages, a generally applicable tax law perhaps burdens "only" the fundamental right to marry. As the courts have noted, such a burden does not prevent a couple from marrying, although it may affect the couple's choices for legitimate reasons, such as financial or moral impediments.[193] A substantiated religious belief, however, brings a marital party within the

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[189]*Id.* at 217. *See generally* 1 HASTINGS, *supra* note 155.

[190]1 HASTINGS, *supra* note 155, at 423.

[191]*See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923) (holding of Supreme Court recognizes the central position that marriage maintains in society); Skinner v. Oklahoma, 316 U.S. 535, 451 (1942) (noting the importance of marriage as one of man's basic civil rights, where "[m]arriage and procreation are fundamental to the very existence and survival of the race"); Griswold v. Connecticut, 381 U.S. 479 (1965) (marriage recognized as a penumbral constitutional right emanating from the Bill of Rights); Loving v. Virginia, 388 U.S. 1 (1967) (observing that marriage as fundamental to society's existence and survival); Boddie v. Connecticut, 401 U.S. 371 (1971) (marriage recognized as involving interests of basic importance to society); Zablocki v. Redhail, 434 U.S. 374 (1978) (stating that right to marry is fundamental). *See also supra* notes 101-07 and accompanying text (confirming the fundamental right to marry while leaving taxation issues to the legislature).

[192]*See supra* note 86 and accompanying text (discussing *Johnson*). In *Johnson*, the petitioners professed strong belief and adherence to their respective religion's teachings on marriage. The court did not question the petitioner's sincerity in their professed beliefs, nor their constitutional right to practice their beliefs. On this issue, the court held solely on the right of Congress to incidentally burden the religious practices of certain persons, where the burden is general and did not intentionally target the religion. *Id.* at 975.

[193]One does not have to be "religious" to be "moral." *See, e.g.*, Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978), *cert. denied*, 439 U.S. 1046 (1978), and Pierce v. Commissioner, 41 T.C.M. (CCH) 580 (1980), for court challenges based on infringements of the constitutional fundamental right to marry.

protection of the First Amendment.[194] The courts have acknowledged that First Amendment religion rights are burdened, if only "incidentally," by the inequities of the Tax Code.[195] This burden thus far has been held to be consistent with the Constitution and congressional policy.[196]

The underlying question this Comment asks is whether such a burden is still legitimate in view of today's changing social mores, the decrease in the Tax Code's benefits to married couples, and the recently enacted Religious Freedom Restoration Act. Thus, this Comment will address whether the burden has targeted the religiously-married couple while benefitting the "new" class of unmarried cohabitant couples.[197]

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[194]*See infra* note 154 and accompanying text (referencing Wisconsin v. Yoder, 406 U.S. 205, 215 (1983)). While the tax effects certainly have caused couples to either refrain from marriage or attempt to develop schemes to escape the confines of the marriage penalty, *see, e.g.*, Boyter v. Commissioner, 74 T.C. 989 (1980), a non-religious belief in marriage may make the decision to choose to marry or not marry easier. On the other hand, such a decision is unavailable to a religiously-motivated married couple. This lack of choice runs counter to the dicta of the court in *Mapes*, 576 F.2d 896, where the court stated that the individual has the choice to marry or cohabitate. *See supra* note 125 and accompanying text (discussing the *Mapes* holding).

[195]*See generally* Druker v. Commissioner, 77 T.C. 867 (1981), *cert. denied*, 461 U.S. 957 (1983); Boddie v. Connecticut, 401 U.S. 371 (1971).

[196]*Id.*

[197]*See infra* note 266 and accompanying text (noting that benefits are now conferred upon couples regardless of marital status). Some courts have questioned whether a married couple has standing to bring a suit against the Tax Code on the grounds of infringement of the fundamental right to marriage. For instance, the *Johnson* court noted that "[w]hether denominated the 'right to marry,' the 'right of marriage,' or the 'right to stay married,' [the married] plaintiffs have standing to attack a provision [i.e., the marriage penalty] which may affect that relationship adversely." Johnson v. United States, 422 F. Supp. 958, 970 (N.D. Ind. 1976). Clearly, such a declaration establishes that a married taxpayer has legitimate standing to bring an appropriate challenge.

The *Johnson* court further observed that Plaintiffs did not argue the marriage penalty had prevented them from marrying, nor caused then to consider divorce. *Id.* Moreover, the court referenced Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972) and Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972), for the supposition that the marriage right "is not limited to the act of becoming married, but encompasses the entire marriage relationship." *Johnson*, 422 F. Supp. at 970.

VI. FREE EXERCISE ANALYSIS OF THE MARRIAGE PENALTY IN A RELIGIOUS DOCTRINE-BASED MARRIAGE

A. A RELIGIOUSLY-MOTIVATED MARRIED COUPLE IS UNCONSTITUTIONALLY BURDENED IN COMPARISON TO AN UNMARRIED COHABITATING COUPLE

Black's Law Dictionary defines marriage as the "[l]egal union of one man and one woman as husband and wife."[198] Current statistics indicate that married couples comprise the majority of taxpayers.[199] Concurrently, studies also illustrate an increasing number of unmarried heterosexual couples.[200] This class of taxpayer is obviously unaffected by a marriage penalty, and in effect, receives a benefit for being unmarried. Same-sex cohabitant couples also receive such a benefit.[201]

Recent surveys indicate that 95% of the population in the United States profess a religious belief in God as a Supreme Being, and that 88% consider

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[198]BLACK'S LAW DICTIONARY 972 (6th ed. 1990).

[199]In 1992, Census data indicated that 63.3% of all males and 59.1% of all females were married. U.S. Bureau of the Census, *Statistical Abstract of the U.S.: 1993*, P20-468, 54, Table 61 (1994). Correspondingly, of all married persons ages 16-64, 92.1% of all males and 64% of all females participated in the labor force. *Id.* at 399, Table 631. These figures were derived by adding the percentages of each of the included labor force age groups and dividing by the total number of these age groups. *See id.*

[200]The "Current Population Survey," published by the United States Census Bureau, notes that there were 523,000 unmarried couples cohabitating together in 1970, 1,589,000 in 1980, and 3,510,000 in 1993. SALUTER, *supra* note 80, at ix tbl. D. Additionally, a recent survey estimates that one-sixth of all never-married couples and one-third of all divorced or separated individuals under the age of 35 cohabitate. Larry Bumpass & James Sweet, *The National Survey of Families and Households*, Center for Demography and Ecology, University of Wisconsin (1987-88).

[201]In 1988, Bureau of the Census officials estimated that 1.6 million unmarried couples were of the same sex. Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1166 # n.5 (1992). No Census data has been prepared to measure same-sex cohabitants, but it is generally assumed that this class of taxpayers has also increased in numbers. *See, e.g.*, *supra* note 77 (noting the changing composition of the cohabitating household).

religion to be important to their lives.[202] Of those surveyed, 68% are members of a church or synagogue, with 50% claiming attendance at a religious house of worship at least once a month.[203] If, on average, 59% of the population is married, then 56% of the population may have entered a religiously-motivated marriage, subject to the Tax Code and its subsequent penalty or benefit.[204] Obviously, the Tax Code's disparate treatment of married and unmarried couples and the consequent constitutional effect on religiously-motivated marriages is substantial.

The First Amendment to the Constitution guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[205] Several Supreme Court cases have established that a strong governmental interest will prevail over Free Exercise challenges in certain instances. These cases mark an erosion of religious rights in the face of generally applicable laws. For example, *Bowen v. Roy*[206] has been cited for the proposition that religious beliefs must yield to governmental regulations where the burden on the exercise of religion is only incidental.[207] In *Bowen*, the appellees claimed a state statutory requirement of providing social security numbers for receipt of welfare benefits was a direct infringement on their Native American beliefs and

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[202]*Public Opinion & Demographic Report*, Roper Center for Public Opinion Research, Faith in America 90 (1994) (listing a 95% response (citing to survey by the Tarrance Group and Mellman, Lazarus & Lake for *U.S. News & World Report*, March 5-7, 1994)). In response to a question of how important religion was in one's life, 59% surveyed answered "very important," 29% answered "fairly important" (citing to a Gallup survey conducted for *USA Today* and CNN, March 28-30, 1994) *Id.*

[203]Survey, *Religion in America 1992-1993*, The Princeton Religion Research Center, The Gallup Organization, Inc. 39 (1993) (church membership survey). *See also Public Opinion & Demographic Report*, Roper Center for Public Opinion Research, Faith in America 91 (1994) (Religious Practice survey on attendance, conducted by the National Opinion Research Center, Feb.- April 1993).

[204]Figures are based on census data of married persons. *See supra* note 199. Assuming equal populations of males and females, the calculation averages the population percentages of male/female persons. This figure is then subject to the 95% of Americans proclaiming belief in God. *See* U.S. Bureau of the Census, *Statistical Abstract of the U.S.: 1993*, P20-468, 54, Table 61 (1994).

[205]U.S. CONST. amend. I.

[206]476 U.S. 693 (1986).

[207]*Id.* at 702-703.

practice of religion.[208] Rejecting the appellees' arguments, the Court noted that the maintenance of an organized society requires some religious practices to yield to the common good, so as not to "radically restrict the operating latitude of the legislature."[209] Nonetheless, the *Bowen* Court opined that, under circumstances implicating fundamental rights, the State must demonstrate a compelling reason to allow restriction of a constitutional right, with such strict scrutiny viewed "as a protection against unequal treatment rather than a grant of favored treatment for the members of their religious sect."[210]

Likewise, in a case dealing with the Social Security tax system where the appellee contended that imposition of such taxes was an infringement on his free exercise beliefs, the Court in *United States v. Lee*[211] noted that mandatory participation in the government program was essential to its integrity, and the governmental interest was therefore important.[212] The appellee in *Lee* was an Amish farmer who had sought an exemption from collecting and paying Social Security taxes for his Amish employees, and claimed the compulsory participation in the Social Security system directly interfered with his religion.[213] In ruling for the State, the Supreme Court acknowledged the difficulty in accommodating religious beliefs to a taxation

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[208]*Id.* at 702.

[209]*Id.* The court further posited that:

> The statutory requirement . . . is wholly neutral in religious terms and uniformly applicable. There is no claim that there is any attempt by Congress to discriminate invidiously or any covert suppression of particular religious beliefs. The administrative requirement does not create any danger of censorship or place a direct condition or burden on the dissemination of religious views. It does not intrude on the organization of a religious institution or school. It may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel . . . by threat or sanctions, to refrain from religiously-motivated conduct or to engage in conduct that they find objectionable for religious reasons.

Id. at 703.

[210]Bowen v. Roy, 476 U.S. 693, 709 (1986) (citing Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963)).

[211]455 U.S. 252 (1982).

[212]*Id.* at 258.

[213]*Id.* at 254-55.

system and that to "maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good."[214] The *Lee* Court established that even a substantial burden may be justified by the "broad public interest in maintaining a sound tax system."[215] Other tax-related Supreme Court free exercise challenges have seen similar holdings.[216]

Until recently, an infringement of the Free Exercise Clause was subject to a strict scrutiny standard of review of the governmental regulation, per the Supreme Court's holdings in *Sherbert v. Verner*[217] and *Wisconsin v. Yoder*.[218] These Supreme Court cases required a compelling state interest

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[214]*Id.* at 259. Appellees argued that their Amish faith prevented them from paying Social Security taxes or receiving Social Security benefits, due to the religion's social order of care and subsistence among fellow adherents. *Id.*

[215]United States v. Lee, 455 U.S. 252, 260 (1982). The Court noted that "the tax system could not function if denominations were allowed to challenge the tax system [on the basis that the law functions] in a manner that violates their religious belief." *Id.*

[216]*See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680 (1989) (questioning whether an asserted substantial burden is placed on a central tenet of a religious belief and that even if so, a substantial burden is justified where the state has a compelling interest and provides a uniformly applicable law), *reh'g denied*, 492 U.S. 933 (1989); Bob Jones University v. United States, 461 U.S. 574 (1983) (holding that, where a university is denied a tax-exempt status and tax benefits due to an admissions policy that was deemed racially discriminatory, the Government's fundamental interest overrode the university's free-exercise interests); Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) (denying a sales use tax exemption to a religious organization for distribution of religious material was a constitutionally insignificant burden, reasoning that there was no evidence that the denial violated the organization's sincere religious beliefs).

[217]374 U.S. 398 (1963). In *Sherbert*, the Court ruled that a generally-applicable state statute violated the constitutional rights of a Seventh-Day Adventist practitioner, where she was denied unemployment compensation benefits because, in accordance with her religious beliefs, she refused to work on Saturdays. The Court applied a strict scrutiny standard and required the state of North Carolina to show a compelling state interest, not just a mere rational relationship to a state interest, in order to justify a substantial infringement on a person's constitutional free exercise rights. *Id.* at 406-09.

[218]406 U.S. 205 (1972). In *Yoder*, a Wisconsin compulsory school-attendance statute that required children's school attendance until age 16, was invalidated as applied to Amish parents who declined to send their children to school. Because of the danger of destroying the respondent's free exercise of religious belief, the Court held that the state law violated the First Amendment. *Id.* at 219. The Court applied the "strict scrutiny" test of *Sherbert v. Verner*.

to impinge upon the free exercise of religion.[219] In *Employment Division v. Smith*,[220] however, the Supreme Court held that First Amendment challenges against a generally applicable law would no longer be subject to a requirement of the government showing of a compelling interest.[221] Writing for the majority, Justice Scalia noted that individuals were protected by the Free Exercise Clause from laws interfering with and targeted against religious beliefs, but not from valid, generally applicable, neutral laws that may affect religious practices.[222] Justice Scalia distinguished earlier Supreme Court cases that held the First Amendment was a bar against the application of such generally-applicable neutral laws to religiously-motivated action.[223] The Justice argued that these earlier cases, applying strict scrutiny, were actually "hybrid" situations that involved issues other than free exercise rights alone and determined, therefore, that constitutional challenges brought under the Free Exercise Clause alone should be subject to less demanding judicial review.[224]

While concurring in the judgment, Justice O'Connor nonetheless noted that most free exercise challenges were brought against generally applicable

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[219]*See generally Yoder*, 406 U.S. 205 (1972) (holding that laws affecting free exercise rights are subject to a high level of scrutiny); *Sherbert*, 374 U.S. 398 (1963) (same). To justify a law that burdens a constitutional right, the strict scrutiny test requires the government to prove the regulation is required in order to achieve a compelling government interest by the "least restrictive means" available. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1416 (1990).

[220]494 U.S. 872 (1990).

[221]The *Smith* Court dealt with a claim of a Free Exercise infringement against Native American Indians, who contended they should be exempted from a state drug law statute, on the grounds that use of the drug peyote was for a religious ceremony. *Id.* at 874-75. The respondents were fired from their jobs for the peyote use, and were subsequently denied unemployment benefits from the state of Oregon, having been fired for work-related "misconduct." Respondents filed suit, claiming the denial of benefits was a violation of their free exercise rights. *Id.*

[222]*Id.* at 877-79.

[223]*Id.* at 876, 882.

[224]*Id.* at 882-83. The Justice cited such other "hybrid" constitutional protections to include freedom of speech, freedom of the press, and parents' privacy rights in the raising of their children. *Id.* at 882. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that parents have a fundamental right in directing the education of their children under their religious beliefs).

laws, as it was unlikely that a law would *directly* prohibit or burden a religious practice.[225] The Justice noted that the First Amendment "does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause."[226] Justice O'Connor further contended that the standard should be to require "the government to justify any substantial burden on religiously-motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."[227]

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[228] a significant free exercise challenge that followed *Smith*, the Supreme Court again held that a generally applicable, neutral law does not require the justification of a compelling governmental interest in the face of an incidental burden on religion.[229] Nevertheless, the Court espoused that where the

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[225]*Id.* at 895 (O'Connor, J., concurring).

[226]*Id.* at 893 (O'Connor, J., concurring).

[227]*Id.* at 896 (O'Connor, J., concurring). Justice O'Connor expounded that a free exercise claim from a governmentally imposed burden on religious beliefs or practices, whether "imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community." *Id.* at 898 (O'Connor, J., concurring).

In a definition of a religious burden, the Court in *Thomas v. Review Board* proffered that:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it *denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs*, a burden upon religion exists.

Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981) (emphasis added). For a discussion of *Thomas*, see *infra* note 242 and accompanying text. Such a definition is compatible with the marriage penalty burden imposed upon the religiously-motivated married couple.

[228]113 S. Ct. 2217 (1993). The Church challenged a city ordinance that prohibited the ritual sacrifice of animals. In invalidating the ordinance, the Court noted that the object of the law, although facially neutral and generally applicable, was clearly targeted at the Church and its practices. *Id.* at 2227. Such targeting was in fact not neutral and burdened petitioner's religious practice. *Id.* Consequently, the ordinance was violative of the Free Exercise Clause, and therefore subject to strict scrutiny. *Id.* at 2233.

[229]*Id.* at 2226.

generally applicable and facially neutral law was, in fact, not neutral, the law becomes subject to strict scrutiny.[230] Further, Justice Kennedy, writing for the majority, noted that the Free Exercise Clause "forbids subtle departures from neutrality," and "covert suppression of particular religious beliefs."[231]

The Court's holding in *Smith* was widely criticized by commentators, politicians, and the religious community for its interpretation of free exercise challenges.[232] As a response to *Smith*, RFRA[233] was passed by Congress

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[230]*Id.* at 2233.

[231]*Id.* at 2227 (citing Bowen v. Roy, 476 U.S. 693, 703 (1986); Gillette v. United States, 401 U.S. 437, 452 (1971)).

[232]Citing to the original Framers of the Constitution, one commentator submits:

> The *Smith* decision not only distorts free exercise precedent, but it also disregards the legislative history of the Free Exercise Clause when it rejects the concept of religious exemptions from laws of general applicability. In drafting the Free Exercise Clause, the Framers relied on state constitutional free exercise provisions, which reflected public support for broad protection of religious liberty. State constitutions defined the scope of religious liberty as encompassing both religious beliefs and actions and imposed very few limitations on the right of free exercise of religion. The only time the state could intrude upon an individuals's right of free exercise was if the individual's religious practices disturbed the safety, peace, or good order of the public.

Kathleen P. Kelley, Comment, *Abandoning the Compelling Interest Test*, 40 CATH. U. L. REV. 929, 961 (1991) (citation omitted).

[233]Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. 2000bb). Sections 2 and 3 are of particular interest to this Comment, and are reprinted herein:

> SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.
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> (a) FINDINGS. — The Congress finds that —
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> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution:
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> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
>
> (3) governments should not substantially burden religious exercise without compelling justification
>
> (4) in Employment Division v. Smith, 494 U S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

in 1993 with the purpose of reinstating the strict scrutiny test as a statutory requirement.[234] President Clinton offered additional support for RFRA by stating that the legislation "embraces the abiding principle that our laws and institutions must neither impede nor hinder, but rather preserve and promote, religious liberty."[235]

Following RFRA, the compelling interest and strict scrutiny tests of *Sherbert*[236] and *Yoder*[237] again became the standard of review for a governmental burden on religion. The tests require the State to justify any

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(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES. — The purposes of the Act are —

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL. — Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION. — Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person —

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF. — A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Id.

[234]*See* 139 CONG. REC. H8713, 8714 (daily ed. Nov. 3, 1993) (statement of Rep. Brooks).

[235]*Religious Freedom Day 1994*, Proclamation No. 6646, 59 Fed. Reg. 2925 (1994).

[236]374 U.S. 398 (1963).

[237]406 U.S. 205 (1972).

burden, even incidental, against a religion by a compelling governmental interest and, additionally, to show that the law is the least restrictive means available to achieve the Government's goal.[238]

The Supreme Court has also noted several other factors in evaluating free exercise challenges. In *Sherbert*, the Court stated that some indirect "discouragements" against religion unquestionably may compel free exercise to the same degree as a fine, imprisonment, or taxes.[239] The *Yoder* Court maintained that the claim must be grounded in the religious belief for it to be afforded constitutional protection.[240] The Court in *Yoder* proffered that even a neutral, generally applicable law may fall to such a religious free exercise challenge; although the burden may be indirect, the infringement is substantial.[241] The 1981 Court holding in *Thomas v. Review Board*[242] supports the requirement of a state justification to a religious liberty infringement by demonstrating that the governmental program was the least restrictive means to achieve the state interest.[243]

Borrowing from the *Bowen* Court's reasoning, that a government regulation exposing a fundamental religious belief to disparate treatment is subject to strict scrutiny, an additional assertion can be made that the marriage penalty infringes on the religiously-motivated married couple, where a central religious tenet is burdened unequivocally over that of

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[238]*See* Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

[239]*Id.* at 404 (citing American Communications Ass'n v. Douds, 339 U.S. 382 (1950)).

[240]Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). *See also* Thomas v. Review Bd., 450 U.S. 707, 714 (1981) (finding that employee who was a Jehovah's Witness terminated his employment because of a sincere religious belief). The Court acknowledges the difficulty in determining what type of religious belief mandates constitutional protection, noting that the concept of ordered liberty precludes an individual from creating standards where "society as a whole has important interests." *Yoder*, 406 U.S. at 215-16. In finding that the regulation being contested by respondent was neutral on its face, the state requirement of mandatory school attendance to the age of sixteen nonetheless offended the requirement for government neutrality by unduly burdening free exercise of religion. *Id.* at 220.

[241]*Yoder*, 406 U.S. at 220. *See also Thomas*, 450 U.S. at 717-18.

[242]450 U.S. 707 (1981). The *Thomas* Court reviewed an unemployment compensation claim, where the claimant, a Jehovah's Witness, terminated his employment, asserting his religious beliefs forbade him from working in producing military armaments. *Id.* The Court held that the State's denial of unemployment benefits violated his First Amendment free exercise rights. *Id.* at 720.

[243]*Id.* at 718.

unmarried couples.[244] Applying the principles of *Thomas* and *Sherbert*, the infringement against these couples requires "protection against unequal treatment."[245] The infringement must be viewed in comparison with legislative intent and inequality issues, especially in light of RFRA's requirement that courts employ strict scrutiny even when the burden on religion is only incidental.[246]

Notwithstanding the impact of RFRA's strict scrutiny requirement, congressional discussion on RFRA noted that insubstantial government burdens on religious activities may still be brought under the less demanding constitutional standard of *Smith*.[247] Nevertheless, even under *Smith*, a challenge to the marriage penalty involves a "hybrid" situation such that strict scrutiny would be appropriate.[248] The fundamental constitutional right to marriage, together with a religiously-motivated couple's free exercise rights, may offer a sufficient basis to subject the government to a compelling interest standard.

The Court in *Murdock v. Pennsylvania*,[249] upholding a religious organization's free exercise rights in distribution of religious literature without a license tax, noted that "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment."[250] The Court averred that a state could not impose such a tax on the enjoyment of a constitutional right.[251] The lower courts have also noted that the "benefit" of a lower tax

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[244]*See* Bowen v. Roy, 476 U.S. 707, 709 (1981). For further discussion on *Bowen*'s holding, see *supra* note 206 and accompanying text.

[245]*Id.*

[246]*See supra* note 233 and accompanying text (discussing RFRA and its intent).

[247]*See* 139 CONG. REC. H8713, 8714 (daily ed. Nov. 3, 1993) (statement of Rep. Brooks).

[248]*See supra* notes 223-24 and accompanying text (explaining the "hybrid" situation espoused in *Smith*).

[249]319 U.S. 105 (1943). *Murdock* involved Jehovah's Witnesses who were distributing religious literature and practicing "old time evangelism," and were subsequently convicted of violating a city ordinance that prohibited canvasing or soliciting without a license. *Id.* at 106-107.

[250]*Id.* at 112.

[251]*Id.* at 113.

is available to those taxpayers who refrain from marriage.[252] It is not a far reach to equate a tax break with a "benefit" for similarly situated taxpayers, as opposed to those faced with the marriage penalty. In this regard, the Court in *Hobbie v. Unemployment Appeals Commission*[253] noted that a state's denial of a benefit due to a religiously mandated belief, which puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs, that denial must be subjected to strict scrutiny and can be justified only by proof of a compelling state interest."[254]

Likewise, the Supreme Court in *McDaniel v. Paty*,[255] a case where a Baptist minister was barred by a state statute from serving as a delegate at a constitutional convention, held the statute to be violative of the Free Exercise Clause.[256] Chief Justice Burger, writing for the plurality, noted that "[g]overnmental imposition of such a choice [of abandonment of the minister's profession] puts the same kind of burden upon the free exercise of religion as would a fine."[257] While concurring in the judgment, but disagreeing with the majority's choice of constitutional burden, Justice White contended that the State's provisions were best argued as infringements against the Equal Protection Clause.[258] The Justice stated that although Petitioner McDaniel's right to free exercise was encroached upon by the statute, his observance of religious beliefs was not deterred, since the Petitioner felt no necessity to abandon his ministry or disavow his religious

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[252]*See, e.g.*, Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976) (noting that tax schedules impose a greater tax burden on particular married couples than if they remained single); Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978), *cert. denied*, 439 U.S. 1046 (1978) (stating that married individuals may choose to remain single to escape the higher marriage tax).

[253]480 U.S. 136 (1987) (holding that a state's refusal to award unemployment compensation benefits to employee violated the Free Exercise Clause, where employee was a practitioner of the Seventh-day Adventist Church, and was terminated from her job because she refused to work on her Sabbath).

[254]*Id.*

[255]435 U.S. 618 (1978).

[256]*Id.* at 619.

[257]*Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

[258]*Id.* at 642-43 (White, J., concurring).

beliefs.[259] Justice White noted that a legitimate state interest may only "be achieved by a means that does not unfairly or unnecessarily burden" the individual's important interest in a political opportunity and, consequently, concluded that the State did not provide sufficient justification for the prohibition.[260]

Under the Equal Protection Clause of the Fourteenth Amendment to the Constitution,[261] the current Tax Code exhibits an unfair bias against religiously-motivated married couples because no tax parity exists with equally situated unmarried cohabitating couples.[262] Irrespective of RFRA, the *Smith* holding asserted that a generally applicable tax is not subject to a First Amendment free exercise "strict scrutiny" review.[263] Although the Tax Code as a law is arguably "generally applicable" to all married taxpayers alike, the exemption of the sizable class of equally-situated unmarried couples from the same tax category effectively makes this claim a fiction. In reality, the tax law is no longer "generally" applicable, but rather creates a loophole that exempts one taxpayer household while burdening another equivalent taxpayer household simply because of the household's "label." Recognizing that a possibility such as this may exist, the *Hialeah* Court noted that a neutral law may be analyzed from an equal protection context.[264] The tax thus becomes directly targeted towards the religiously-motivated married couple, i.e., the couple that cannot choose to escape via the loophole of cohabitation outside of marriage. Therefore, fundamental First Amendment rights and the right to marry clearly become implicated where the marriage is religiously-motivated.[265]

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[259]*Id.* at 643.

[260]*Id.*

[261]U.S. CONST. amend. XIV. The Amendment expounds that "[n]o State shall . . . deny to any person with its jurisdiction the equal protection of the law." *Id.*

[262]*See supra* note 200-01 and accompanying text (noting that unmarried cohabitants are exempt from marriage penalty taxes).

[263]Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990).

[264]*See* Church of Lukumi Babalue Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2230 (1993) (referring to the use of equal protection in helping to determine the "object" of the neutral law).

[265]The previous court cases addressing equal protection challenges dismissed the claims as being reasonably related to constitutional objectives under the Fifth Amendment Due Process Clause. *See generally* Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978), *cert.*

B. WITH MARITAL STATUS NO LONGER FAVORED, RELIGION IS ONE OF THE FEW REMAINING REASONS FOR INDIVIDUALS TO MARRY

In the past, marriage was considered a favored status, with the married couple receiving benefits solely because of their classification. Such favored treatment may have justified some additional tax burden, however, benefits that previously favored marriage are presently becoming available to couples whether or not they marry.[266] Thus, a contradiction exists where benefits once conferred on the basis of marital status becomes available regardless of the status. The marriage penalty has become an added discouragement to marriage while little else remains to encourage it. Religion is one of the few remaining practical reasons for couples to enter into marriage.[267]

Such contradictions in applying current tax law and the creation of a tax advantage to the class of unmarried cohabitants is exemplified by the debasing of traditional advantages and benefits previously availed only to married couples. Notable is the trend of municipalities to provide benefits, such as health and life insurance, medical care, rights of survivorship, and pensions, among others, to "non-traditional" unmarried cohabitating households.[268] Besides municipalities, such broad benefit programs are

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denied, 439 U.S. 1046 (1978). The constitutional objectives of a generally applicable law may be valid; this Comment argues that the Tax Code, in relation to the married taxpayer classification, is not, in effect, "generally applicable."

[266]*See, e.g.*, *infra* note 268 and accompanying text (referencing benefits available to unmarried cohabitants). Additionally, Congress continues to propose and impose greater tax liabilities on married couples based on their marital status. For example, social security benefits, taxes on unemployment benefits, medical and moving expense deductions, capital loss offsets, and offsets of losses from rental properties, among others, provide reduced benefits to married couples than if they were single and filing separately. Robinson & Wenig, *supra* note 17, at 838-41 nn.288-98.

[267]*See supra* notes 160-88 and accompanying text (discussing requirements of a religiously-motivated marriage).

[268]*See* Bowman & Cornish, *supra* note 201, at 1180-91. As of 1992, twelve United States cities had passed domestic partnership ordinances, which included "West Hollywood, Los Angeles, San Francisco, and Lagun Beach, California; Washington D.C.; Takoma Park, Maryland; Ann Arbor, Michigan; Minneapolis, Minnesota; Ithaca, New York; Seattle, Washington; Madison, Wisconsin;" and, by executive order, New York City. *Id.*

In 1993, New York City's Mayor Dinkins issued an executive order to allow "unmarried domestic partners" to register their relationships with the city, making the couples eligible for certain benefits previously available only to married couples. *Today's New Update*, N.Y.L.J., Jan. 8, 1993, at 1. Additionally, city employee domestic partners

being considered by state legislatures and the federal government for civil service employees.[269] Ultimately, in such cases, the traditional married couple bearing the increased tax burden in effect subsidizes the benefits for the unmarried cohabitating couple. The religiously-motivated married couple bears the constitutional brunt of the burden as well.

Past justifications for the inequities of the marriage penalty run counter to contemporary trends. The "economies of scale" argument has been generally debunked due to the large percentage of unmarried persons who

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were made eligible to obtain unpaid child-care and bereavement leave. *Id.* The executive order applied included unmarried heterosexual or same-sex cohabitants. *Id.* While the benefits are supported by taxpayer funding (with the majority of taxes being collected from married taxpayers, *see supra* note 199), the unmarried couples enjoy being financially unfettered by the marriage penalty.

See also Gay Teachers Ass'n v. Board of Educ., 183 A.D.2d 478 (N.Y. App. Div. 1992). In *Gay Teachers Association*, gay and lesbian teachers, school workers, and their domestic partners sued the New York City Board of Education for health benefits, charging the school's benefit policy was discriminatory on the basis of marital status and sexual orientation. *Id.* at 478. In the still-pending case, the court held that plaintiffs had a valid cause of action, and denied the defendant's motion to dismiss. *Id.*

[269]*See, e.g.*, OR. REV. STAT. § 656.226 (1993). The Oregon Statute, which provides benefits to cohabitants in cases of accidental injury, states in relevant part:

> In case an unmarried man and an unmarried woman have cohabitated in this state as husband and wife for over one year prior to the date of an accidental injury received by one or the other as a subject worker, and children are living as a result of that relation, the surviving cohabitant and the children are entitled to compensation under this chapter the same as if the man and woman had been legally married.

Id. New York followed this trend in 1994, when then-Governor Mario Cuomo signed an executive order to provide benefits to state government employees. Telephone Interview with Priscilla Feinberg, Governor's Office, in Albany, N.Y. (Jan. 10, 1995). A non-published memorandum, referred to as the "Memo of Understanding Between the Governor's Office of Employee Relations and [the Union] Council 82," afforded the "expansion of the current New York state health insurance plan [and] dependent eligibility . . . to included eligibility for the domestic partners of Council 82 state employees . . . ." *Id.* Such a domestic partner relationship is defined as one where the partners must be at least 18 years of age, unmarried, and not related by blood or marriage; must reside together; and be involved in a committed, lifetime relationship. *Id. See also* Bowman & Cornish, *supra* note 201, at 1191 n.134 (stating that the New York and Illinois state legislatures considered domestic partnership bills).

share households without being subjected to a penalty.[270] In addition, the "generally applicable" tax law has targeted the religiously-motivated marriage, a specific group who, by religious belief, cannot choose to cohabitate without marriage. Moreover, as the benefits that were once available solely to the married couple continue to fall, the inequities increase even more.[271]

Previous cases have unquestionably demonstrated that the marriage penalty precipitated divorce for at least some individuals.[272] The number of couples who choose to remain unmarried because of the penalty can only be surmised. At the same time, the courts have invariably recognized the importance of marriage to society, and have upheld as fundamental the right

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[270]*See supra* note 76 and accompanying text (explaining the economies of scale theory). As a recent survey indicates, the number of cohabitating couples has sharply increased, while the number of married couples has sharply declined over the past two decades. Larry Bumpass & James Sweet, *The Role of Cohabitation in Declining Rates of Marriage*, 1991 J. MARRIAGE & FAM. 913, 914; Larry Bumpass & James Sweet, National Estimates of Cohabitation: Cohort Levels and Union Stability 7 (June 1989) (unpublished manuscript, Center for Demography and Ecology, University of Wisconsin). Statistical data shows, for example, that among the females surveyed, the percentage of women cohabitating before age 25 showed an increase of 34%, while the percentage of those who had married by age 25 had declined 21%, from 82 to 61% overall. *Id.* at 7-8. As professors Robinson and Wenig noted, the "increasing financial necessity for two-earner couples, and the changed demography of marriage revealed in recent census reports provide support for [the] statement: the socioeconomic assumptions relied on by tax theoreticians to justify the differentiation of taxpayers into the existing [marital-based tax categories] is incorrect." Robinson & Wenig, *supra* note 17, at 851.

[271]*See supra* note 268 and accompanying text (citing state and municipal benefits becoming available to unmarried cohabitants).

[272]*See, e.g.*, Druker v. Commissioner, 77 T.C. 867 (1981) (finding that married couple divorced to be exempt from the marriage penalty); Boyter v. Commissioner, 74 T.C. 989 (1980) (citing married couple's scheme of divorcing and remarrying to escape the marriage penalty). Professors Robinson & Wenig add that the I.R.S., "while disapproving of divorces in contemplation of remarriage . . . , has put its stamp of approval on divorces in contemplation of cohabitation [without marriage] . . . ." Robinson & Wenig, *supra* note 17, at 841 n.293.

of marriage.[273] The rising divorce rate and the break-up of the family have been linked by commentators to the decline of American society.[274]

Politicians, commentators, and the public alike are increasingly calling for a return to "family values," the coined phrase that was prominent in the 1992 presidential campaign.[275] Capitalizing on public concerns, the family values emphasis has frequently been promoted by both political parties as a way to turn back the tide of social decline. As one commentator noted, this awareness is becoming "an emerging consensus across political lines that the fragmenting of the family is the principal cause of declining child well-being."[276] President Clinton linked basic family values and religious freedom in his Religious Freedom Day Proclamation, stating:

> Today, as we face a crisis of conscience in our families and communities, . . . today, more than ever, we see the fundamental wisdom of our country's forefathers. For at the heart of this most precious right [of religious liberty] is a challenge to use the spiritual freedom we have been afforded to examine the values . . . of human nature . . . . For as many issues as there are that divide us in this society, there remain values that all of

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[273]*See* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding of Supreme Court recognizes the central position that marriage maintains in society); Skinner v. Oklahoma, 316 U.S. 535, 451 (1942) (noting the importance of marriage as one of man's basic civil rights, where "[m]arriage and procreation are fundamental to the very existence and survival of the race."); Griswold v. Connecticut, 381 U.S. 479 (1965) (marriage recognized as a penumbral constitutional right emanating from the Bill of Rights); Loving v. Virginia, 388 U.S. 1, (1967) (observing that marriage as fundamental to society's existence and survival); Boddie v. Connecticut, 401 U.S. 371 (1971) (marriage recognized as involving interests of basic importance to society); Zablocki v. Redhail, 434 U.S. 374 (1978) (stating that right to marry is fundamental). *See also supra* notes 101-07 and accompanying text (confirming the fundamental right to marry while leaving taxation issues to the legislature).

[274]*See, e.g.*, JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE, xxi (1990). In a study of the affects of divorce in society, the authors observe that divorce has "ripple effects that touch . . . our entire society," where the radical change caused by divorce "silently alter[s] the social fabric of the entire society." *Id.*

[275]*See, e.g.*, Ellen Goodman, *Right Tune But Lyrics Need Work*, REC., Sept. 23, 1994, at B7. Goodman, a columnist for the Boston Globe, notes that in September 1994, both former Vice President Dan Quayle and President Bill Clinton, at different speaking engagements, voiced a harmonious concern for children being raised by single parents, as a cause of the decline in a child's well-being and the failure of parental relationships. *Id.*

[276]*Id.* (quoting David Blankenhorn of the Institute for American Values).

> us share. We believe in respecting the bond between parents and children. We believe in honoring the worth of honest labor. We believe in treating each other generously and with kindness . . . .[277]

Additionally, the political parties have become aware of the marriage penalty as being disruptive to the traditional hegemony of the familial unit. For example, the Republican election-year strategy of September 27, 1994, incorporated a "Contract With America" that, among others, calls for elimination of the marriage penalty.[278] Whether such rhetoric will continue and effectuate a change in the Tax Code remains to be seen.[279]

VII. CONCLUSION

Historical tax policies of providing income tax-splitting and the various attempts to rectify the subsequent tax plan deficiencies have been ineffective in creating a truly marriage-neutral system. The marriage penalty, which burdens only one type of household (rather than strictly the "ability to pay" concept of a progressive tax system) becomes a contradiction to the horizontally-equal and progressive taxation system favored by government. A discriminating policy that targets the married household without equal taxation on equally-situated unmarried couples is regressive in nature. Additionally, the concept of horizontal equity is degraded when comparing economically equally-situated married and "non-traditional" unmarried households.

Arguments against the marriage penalty which were in earlier court challenges continue to be held invalid in more recent cases.[280] The reasoning supporting past court decisions warrants a re-examination, in light of the changed societal concept of the household unit. The unequal taxation

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[277]*Religious Freedom Day 1994*, Proclamation No. 6646, 59 Fed. Reg. 2925 (1994).

[278]The *Contract With America, A Program for Accountability*, ¶5 calls for "[t]ax cuts for families." Relevant legislation as part of the Contract is contained in § 23 Credit to Reduce the Marriage Penalty, and § 23 Reduction of Marriage Penalty. H.L.C. (Sept. 23, 1994).

[279]As the *Druker* court noted in 1982, "[w]hether policy considerations warrant a further narrowing of the gap between the schedules applied to married and unmarried persons is for Congress to determine in light of all the relevant legislative considerations." Druker v. Commissioner, 697 F.2d 46, 50 (2d Cir. 1982).

[280]*See, e.g.*, Rinier v. United States, 92-2 U.S.T.C. (CCH) ¶50 (D.N.J. 1992) (relying on historical court precedent for its holding).

subjected upon the married household versus the "new class" of unmarried households is directly discriminatory. Since religion may eliminate a couple's choice to cohabitate without marriage, the inequitable marriage penalty becomes an infringement on the couple's constitutional right to freely practice their religion, a burden that is not insignificant, in the number of religiously-motivated married couples. Even if such a burden is adjudged to be incidental, RFRA dictates a strict scrutiny analysis.[281]

The discriminatory tax policies also are an infringement on a married couple's entitlement to equal protection, again, in light of the growing "new class" of non-penalized unmarried households. Where previous court decisions have decided against this constitutional assertion on the grounds that the secular couple is not directly prevented from marrying, the religiously-motivated married couple as a class is again subjected to an unequally directed burden.

Following both RFRA and the hybrid argument of *Smith*, courts should subject current tax policies regarding the marriage penalty to the most exacting judicial review.[282] While previous court decisions have subjected the marriage penalty challenges on equal protection grounds to a rational basis test, the strict scrutiny test should pertain to the religiously-motivated marriage, with the requirement that the government show a compelling interest with the least onerous means restriction.[283]

Historical and current Tax Codes do not provide for parity among like-situated taxpayers. Congress's attempts to amend the Tax Code, however, have consistently avoided revisions that eliminate the marriage penalty.[284] Many proposals have been advanced to create a more equitable system of taxation. One such proposal would provide for a "third category" tax schedule for married couples, allowing a married person the option to file

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[281]*See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[282]*See supra* note 218 and accompanying text (holding that generally applicable laws infringing in an individuals free exercise rights are subject to strict scrutiny).

[283]*See supra* notes 236-38 and accompanying text. The court needs to consider valid tax proposals that alleviate the penalty, rather than deferring to the legislature to determine the substance of a "less restrictive means." *See, e.g., supra* note 108.

[284]*See, e.g.*, Rinier v. United States, 92-2 U.S.T.C. (CCH) ¶50 (D.N.J. 1992) (inferring that Congress approves of the marriage penalty because it has not eliminated it from the Tax Code).

separately and use the rates as the "single persons" schedule.[285] Proponents observe that this option would eliminate the marriage penalty while at the same time preserving income-splitting. Another proposal frequently supported by commentators provides for a separate, individual filing system for all individuals, regardless of marital status.[286] Contending that this system would provide the most equitable, broadly-based method, income-splitting would be eliminated, and the marriage bonus for one-earner married couples would no longer exist.[287] Notwithstanding this, the system would more evenly reflect contemporary societal trends of the typical two-income couple.

Another system that bears consideration would be one where taxation is based upon "household units," comprised of married or unmarried couples. Such a system would be somewhat more "marriage neutral" by broadening the economies of scale argument to include all individuals who cohabitate. Without further modifications to the Tax Code, the marriage penalty itself would still remain between the single individual and the married couple, but the disparity between unmarried and married cohabitants would be eliminated. To protect the rights of the religiously-motivated married couple, Tax Code revisions would be necessary to eliminate the penalty. This type of tax system may be somewhat more difficult to administer than the present tax system. Nevertheless, a household unit-based system taxing individuals under the same household address would provide a more

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[285]Professor Gann has suggested such a system would be less disruptive to the current income tax system and would not take away any existing economic benefits available to married taxpayers. *See* Gann II, *supra* note 37, at 67-68. Although not being completely "marriage neutral," as some marriage bonus would remain for one-income married couples, the system would preserve horizontal equity to a greater extent than if income-splitting were eliminated entirely.

[286]Gann I, *supra* note 3, at 485. *See also* Winn & Winn, *supra* note 30, at 869, 882 (supporting a mandatory separate tax filing system for married individuals), Robinson & Wenig, *supra* note 17, at 852-53 (calling for a tax neutral system purged of marital status distinctions).

[287]Professor Gann's preference is for a mandatory "marriage neutral" separate tax filing system, to be used by all individuals. *See* Gann I, *supra* note 3, at 485. Gann contends that such a system abolishing both marriage penalties and bonuses would be equitable and efficient to manage and would eliminate unequal tax treatment between one and two-income married couples. *Id.* at 485-86.

equitable tax parity.[288] At the same time, income-splitting would be retained for the one-income married couple.

The Tax Code should be a reflection of the value that society and the government place on the traditional family unit and the institution of marriage. The traditional family unit continues to provide a functional, stable system for raising children and maintaining social order and is consistently supported by the Government and the Courts.[289] Although the Executive and Congressional Branches have joined the bandwagon by lauding "family values," current tax legislation demonstrate the opposite by the continued adverse treatment of married taxpayers.[290] As Professor Boris Bittker articulated, "we must restore the rewards of marriage. We must make marriage once again the sole legal institution for parental rights and responsibilities . . . . These measures should be supplemented by making the tax code favor marriage . . . or at least making it neutral . . . ."[291]

Professor Bittker theorizes that, with regard to an equitable tax system, "there can be no peace in this area, only an uneasy truce."[292] While a totally equitable taxation system may be impossible to achieve, the very least a tax system should do is not penalize and burden the substantial class of religiously-motivated married couples, while favoring a growing class of

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[288]Undoubtedly such a system would create new schemes to avoid any increased tax burdens; one can envision cohabitants "subdividing" a single dwelling unit to create the fiction of separate living quarters. However, the courts seem adept at thwarting such creativity. *See, e.g.*, Boyter v. Commissioner, 74 T.C. 989 (1980) (noting married couple's tactic of divorcing and remarrying to escape the marriage penalty).

[289]*See supra* notes 275-77 and accompanying text (noting support for marriage and traditional family units). Authors O'Donnell and Jones noted that the integrity of the marriage institution is "often a stated goal in marriage laws." O'DONNELL & JONES, THE LAW OF MARRIAGE AND MARITAL ALTERNATIVES 29 & n.5 (1982).

[290]*See supra* notes 53-64 and accompanying text (citing the adverse affects of the current Tax Code on married individuals). Commentators have joined in the criticism. As noted by one commentator, "[i]f the marriage penalty is meant to serve as an indirect adjustment to taxable income for the alleged benefits of communal living, it is blatantly anti-family . . . ." Michael J. McIntyre, *Fairness To Family Members Under Current Tax Reform Proposals*, 4 AM. J. TAX POL'Y 155, 168 (1985).

[291]Charles Murray, *The Coming White Underclass*, WALL ST. J., Oct. 29, 1993, at A14. Murray theorizes that the Tax Code's penalization of marriage and resultant favoring of non-marital familial relations encourages illegitimacy and a subsequent progeny of poverty, crime, welfare and homelessness. Murray concludes that the resulting emergence of an "illegitimate underclass" threatens American society. *Id.*

[292]Bittker, *supra* note 2, at 1443.

"secularly-motivated" unmarried cohabitants. Such an infringement conflicts with the constitutional rights of free exercise of religion and equal protection. An equal taxation system must strive to maintain doctrines of fairness and neutrality while promoting important societal philosophies that the government concludes to be in the nation's best interest. Current tax policies need to be amended to remove the specific targeting and burdening of religiously-motivated marriages, and eliminate the marriage penalty from the Tax Code.