

BEYOND THE AFFORDABLE CARE ACT'S PREMIUM TAX CREDIT: ENSURING ACCESS TO SAFETY NET PROGRAMS

*Mary Leto Pareja**

I.	INTRODUCTION	242
II.	THE ACA IN GENERAL	247
	<i>A. EXPANDING ACCESS TO COVERAGE</i>	249
	1. <i>MEDICAID EXPANSION</i>	249
	2. <i>EMPLOYER MANDATE</i>	250
	3. <i>THE INDIVIDUAL MANDATE AND PROHIBITION ON MEDICAL UNDERWRITING</i>	251
	4. <i>ONLINE EXCHANGES OR MARKETPLACES</i>	252
	<i>B. MAKING COVERAGE AFFORDABLE</i>	253
	<i>C. HOW THE PREMIUM TAX CREDIT OPERATES</i>	253
III.	MARRIED FILING SEPARATELY AS A DISFAVORED FILING STATUS	259
	<i>A. HISTORY OF JOINT INCOME TAX FILING</i>	259
	<i>B. FILING STATUS CHOICES FOR MARRIED PEOPLE</i>	262
	<i>C. TAX BENEFITS LOST WHEN USING MARRIED FILING SEPARATELY</i>	266
IV.	HOW CURRENT LAW IMPACTS REAL TAXPAYERS	269
	<i>A. LOSS OF PREMIUM TAX CREDIT GENERALLY</i>	269
	<i>B. REASONS FOR AVOIDING JOINT FILING</i>	274
	<i>C. WHAT A PREMIUM TAX CREDIT IRS AUDIT MIGHT LOOK LIKE</i>	276
	<i>D. CURRENT LAW IS INEQUITABLE</i>	278
V.	SUGGESTIONS FOR CHANGE	281
	<i>A. EXPAND THE PREMIUM TAX CREDIT EXCEPTION</i>	281
	<i>B. EXPAND THE EXCEPTION TO ENCOMPASS OTHER TAX CREDITS</i>	282
VI.	CONCLUSION	283

The United States took a gigantic step toward universal health care with the passage of the Affordable Care Act (“ACA”). Under the ACA,

* Assistant Professor of Law, University of New Mexico School of Law; Smith College, B.A., 1991; Georgetown University Law Center, J.D., 1996. The author is grateful to the ClassCrits VII conference participants, and especially Professor Lily Kahng of Seattle University School of Law, for their insightful and helpful comments. The author also wishes to thank Professors Robert Schwartz, Nathalie Martin, and Sergio Pareja of the University of New Mexico School of Law for helpful comments on earlier drafts. Opinions expressed in this article are solely those of the author, as are any mistakes or omissions.

nearly everyone is required to have coverage, and correspondingly, no one can be turned away. To ease the financial burden of the individual mandate, the ACA subsidizes coverage for lower-income people. The primary subsidy is a refundable tax credit called the Premium Tax Credit, first available in 2014.

To claim the credit, a person must file a tax return—but not just any return. The ACA requires married individuals to file jointly. For many, this is problematic if not downright dangerous. The tax code currently has some exceptions that allow married individuals to be treated as single, but those exceptions do not reach all people for whom filing jointly is dangerous or difficult. In recognition of this reality, the IRS published temporary regulations implementing an exception to the joint filing requirement for certain victims of domestic abuse or spousal abandonment.

This article urges the IRS to expand the exception to other categories of individuals who face serious hurdles to filing jointly, such as long-separated spouses. Couples in long-term separations tend to be low-income racial and ethnic minorities with children, exactly the target population for the Premium Tax Credit. This article makes concrete suggestions for reforms that would better protect vulnerable populations and lead to more equitable results.

Looking beyond the Premium Tax Credit, this article outlines other tax benefits that are lost when not filing jointly. The Premium Tax Credit is but one example of a more systemic problem. For example, the Earned Income Tax Credit, the single largest federal cash assistance program, is lost to a married taxpayer without a joint return. This article looks critically at why the tax code repeatedly requires joint filing to claim tax benefits and argues that the Premium Tax Credit exception should be extended to apply to other tax benefits. If we are truly concerned that a domestic violence victim cannot (or should not) file jointly with an abuser, then we should enable the victim to receive all the tax benefits that are so critical to our anti-poverty efforts.

I. INTRODUCTION

The United States took a gigantic step toward universal health care with the passage of the Affordable Care Act (“ACA”), also known colloquially as Obamacare.¹ Underpinning the ACA’s promise of expanded

¹ What is commonly referred to as the Affordable Care Act is actually the compilation of two different bills: The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. This article uses the term “ACA” to refer to the compilation of both acts. For an excellent overview of the unique legislative pedigree of the ACA, see Jonathan H. Adler and Michael F. Cannon, *Taxation Without Representation: The Illegal IRS Rule to Expand Tax Credits under the PPACA*, 23 HEALTH MATRIX 119, 124–27 (2013). The story of how the ACA became law certainly demonstrates wrinkles in the legislative process left untouched by Schoolhouse Rock!’s “I’m

access to health care coverage is the mandate that individuals maintain health coverage coupled with limitations on medical underwriting.² Nearly everyone is required to have coverage and contribute to the pooling of risk, and correspondingly, no one can be turned away or charged more due to their health.³ To ease the financial burden of the individual mandate, Congress expanded Medicaid and created subsidies for low- and middle-income people to purchase health insurance policies.⁴ The first subsidy occurs through limits on the amount of cost sharing a low-income person is expected to bear.⁵ The second subsidy occurs through a refundable tax credit called the Premium Tax Credit that was first available in 2014.⁶ Finally, to make the process easier to navigate, Congress mandated the creation of Amazon.com-style exchanges where individuals and small businesses can compare and purchase health care policies as well as apply for Medicaid.⁷

To claim the Premium Tax Credit, and thus to receive subsidized health coverage, a person must file a tax return—but not just any return. The ACA requires that married individuals file a joint return to receive a Premium Tax Credit.⁸ This is consistent with other provisions of the Internal Revenue Code (“Code”)⁹ that require joint filing to claim important tax benefits, like the Earned Income Tax Credit (“EITC”).¹⁰ Filing a joint return is problematic for many individuals, and for some it can be downright dangerous. Victims of domestic violence may find it especially hazardous to file a joint return with an abuser. Domestic violence is a huge problem in our society, both from a human rights perspective as well as an economic perspective. One in three women will experience physical domestic violence in her lifetime, one in four men will share that experience, and the annual economic cost of intimate partner violence is estimated to exceed \$8.3 billion.¹¹ Domestic violence can be exhibited in many different ways, such as through physical or sexual violence, emotional abuse (such as making the victim feel stupid or incompetent), or financial abuse (such as taking the

Just a Bill.” See *Schoolhouse Rock: America—I’m Just a Bill* (Disney Educ. Prods.), available at <http://www.youtube.com/watch?v=FFroMQIKIag> (uploaded Dec. 8, 2011).

² 42 U.S.C. §§ 5000A, 300gg, -3, -4 (2012).

³ *Id.*

⁴ 42 U.S.C. § 1396a (Supp. 2015); 26 U.S.C. § 36B (2012); 42 U.S.C. § 18071 (2012).

⁵ 42 U.S.C. § 18071 (2012).

⁶ 26 U.S.C. § 36B (2012).

⁷ 42 U.S.C. §§ 18031(b), (d) (2012).

⁸ 26 U.S.C. § 36B(c)(1)(C) (2012).

⁹ In this article, the word “Code” refers to the Internal Revenue Code of 1986, as amended.

¹⁰ 26 U.S.C. § 32 (Supp. 2014).

¹¹ *Domestic Violence Statistics*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE (Sept. 2014), http://www.ncadv.org/images/National_Domestic_Violence_Statistics.pdf.

victim's money or hiding the family's assets).¹² Filing a joint tax return is fraught with many of the dangers of domestic abuse. A victim may not know the full extent of the family's finances because of financial abuse and so is unable to accurately review the return. Even if the victim does know or suspect the return is not correct, she¹³ may have such little self-esteem left due to emotional abuse that she questions her own suspicions.¹⁴ Many victims opt for signing a return that they know or suspect is not correct in preference to the knowledge or fear that the perpetrator will punish her or her loved ones for failure to sign.

While the Code currently has some limited exceptions that allow some married individuals to be treated as single, those exceptions do not reach all people for whom filing jointly is dangerous or difficult.¹⁵ In recognition of this reality, in June 2012, the Internal Revenue Service ("IRS") stated that it would propose Premium Tax Credit regulations to address domestic abuse and "similar circumstances" that create an obstacle to filing a joint return and solicited public comments regarding how to implement such an exception.¹⁶ The IRS then issued guidance for tax year 2014 to implement an exception to the joint filing requirement for victims of domestic abuse.¹⁷ Finally, the IRS issued temporary and proposed regulations implementing an exception to the ACA's joint filing requirement not only for domestic violence victims but also for abandoned spouses.¹⁸ As laudable as the exception is, this article argues that it does not go far enough. To illustrate, it will be useful to consider the law's impact on individuals.

¹² *Forms of Abuse*, NATIONAL NETWORK TO END DOMESTIC VIOLENCE, <http://nnedv.org/resources/stats/gethelp/formsofabuse.html> (last visited Apr. 26, 2015).

¹³ This article refers to the victim as she only for convenience, because most victims are indeed female. This is in no way intended to minimize the impact of domestic violence perpetrated against men. See Camille Carey, *Domestic Violence Torts: Righting a Civil Wrong*, 62 KAN. L. REV. 695, n. 1 (2014).

¹⁴ *About Financial Abuse*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <http://nnedv.org/resources/ejresources/about-financial-abuse.html> (last visited Apr. 26, 2015).

¹⁵ 26 U.S.C. § 7703(a) (2012).

¹⁶ Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,385 (May 23, 2012) (preamble to final regulations).

¹⁷ I.R.S. Notice 2014-23, 2014-16 I.R.B. 942. Taxpayers must report their taxes on a fiscal year basis. 26 U.S.C. § 441 (2012). Most individuals are required to use the calendar year as their fiscal year. *Id.* Therefore, "tax year 2014" for an individual is the same as calendar year 2014. One potential source of confusion is the difference between the tax year and the tax filing season. The return for tax year 2014 for an individual is due on April 15, 2015, without extensions. The filing season for tax year 2014 occurs in 2015. Another potential source of confusion is the difference between a tax year and a fiscal year. Tax year 2014 for taxpayers using a non-calendar year fiscal year refers to the fiscal year that ends in 2014. Because this article discusses tax attributes that apply only to individuals, and because almost all individuals report taxes on a calendar year basis, the term "tax year 2014" and similar terms in this article refer to calendar year 2014.

¹⁸ Rules Regarding the Health Insurance Premium Tax Credit, 79 Fed. Reg. 43,622 (July 28, 2014) (issuing temporary regulations to be codified at 26 C.F.R. pt. 1); Rules Regarding the Health Insurance Premium Tax Credit, 79 Fed. Reg. 43,693 (July 28, 2014) (issuing proposed regulations to be codified at 26 C.F.R. pt. 1).

Imagine a woman named Olga. Olga is in her late 20s and moved to the United States from Eastern Europe to marry an American man she met online. Olga was very happy the first year of her marriage, but then she became pregnant and her husband lost his job.¹⁹ Her husband started belittling Olga, making decisions without her input, and hiding his under-the-table income from her. He also made her give her waitressing tips to him and put her on an allowance. When Olga tried to stand up for herself, his bad behavior would just worsen. The abuse escalated throughout her pregnancy, and he began physically pushing her after the baby was born. Soon after their marriage, Olga applied for an adjustment to permanent resident status based on being married to a U.S. citizen and received conditional permanent residence. It is nearing the end of the two-year conditional period, and she wants to apply to have the condition removed. However, she is worried that the immigration officer will ask about her tax history. Being new to the United States, she really does not understand the tax system well and, thus, did not understand the returns her husband prepared and told her to sign. Looking back, however, she is now worried that they were not correct. It is almost April 15, and she knows she should be filing a tax return, but her husband left in a rage last month and she has not heard from him since. The current tax system does not allow Olga to file a joint return; the consent of both spouses is needed for that and her husband is missing. She could file an extension, but she is worried that he will be angry at her for doing that and will hit her or the baby, and she would like to have the return filed before trying to remove the condition on her green card. She could file a married filing separate tax return, but again she is worried about her husband's reaction. She has been seeing a counselor, but is not yet ready to leave her abuser.²⁰ Olga's situation is difficult enough, and is further complicated by the fact that her tax filing choices may cause her to forfeit the Premium Tax Credit, the EITC, and other valuable tax benefits.

Imagine a woman named Theresa. She married in her 20s and has three children. Her marriage was never happy in large part because her husband has an outrageous temper and little self-control. She left him after ten years of marriage when he punched her oldest son in the face. Theresa

¹⁹ It is not uncommon for domestic abuse to start or escalate during pregnancy. Kathryn Robinson, *Pregnancy and Abuse: How to Stay Safe for Your 9 Months*, THE NATIONAL DOMESTIC ABUSE HOTLINE (July 23, 2013), available at <http://www.thehotline.org/2013/07/pregnancy-and-abuse-how-to-stay-safe-for-your-9-months/> (noting that common reasons for such abuse are that the abusive partner is resentful or jealous that the attention is shifting from them to the pregnancy, stressed at the thought of financially supporting a child, frustrated at the increased responsibilities, or angry that their partner's body is changing).

²⁰ It can take a long time and several attempts before a victim successfully leaves an abusive situation. See *Violence & Domestic Abuse—Myths and Facts*, THE WOMEN'S CENTER, <http://www.thewomenscenter.org/content.asp?contentid=537> (last visited Aug. 4, 2014); see also Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 COLO. LAW at 19 (1999).

and the children moved into a two bedroom apartment, and her father pays the rent most months. Theresa is still married to her husband and has no plans to divorce. She is fervently Catholic and believes that divorce is a sin.²¹ Theresa is not comfortable filing a joint return with her husband because they have maintained completely separate financial lives for years. In addition, she has no way of knowing whether or not her husband's tax information is accurate. However, if Theresa files a married filing separate return, she will forfeit the Premium Tax Credit and the EITC. Olga and Theresa are not drawn from the author's imagination. They are based on actual clients the author has worked with in a low income taxpayer clinic. Olga and Theresa's situations illustrate the perverse impact of the Premium Tax Credit's joint filing requirement and the limitations of the IRS's regulatory exception. While this article focuses on the individuals impacted directly by the Premium Tax Credit and the new exception, it is important to note that the inequities created by denying tax benefits to married people filing separately affect a much broader range of people.

This article examines some policy reasons for carving out an exception to the joint filing requirement and urges the IRS or Congress to expand the exception to include other categories of individuals who face serious hurdles to filing jointly, such as spouses who have long been separated but who have not gone to court for a legal separation—people like Theresa. Research indicates that, while about 80% of married couples who separate ultimately divorce within three years of the separation, an astounding 15% of separations result in long term estrangements, meaning separations of 10 years or more without reconciliation or divorce.²² Of most concern, couples in long-term separations are predominantly racial and ethnic minorities, have low family income and education, and have young children.²³ This is exactly the group of people who are the principal targets of programs like the Premium Tax Credit and the EITC.²⁴ Given this background, this article urges that the rules developed focus not on marital

²¹ Catholic teaching on divorce is not nearly as clear-cut as Theresa's belief indicates. While the catechism of the Catholic Church teaches that "[d]ivorce is a grave offense against the natural law," it also recognizes that "[i]f civil divorce remains the only possible way of ensuring certain legal rights, the care of the children, or the protection of inheritance, it can be tolerated and does not constitute a moral offense." Catholic Church, CATECHISM OF THE CATHOLIC CHURCH: REVISED IN ACCORDANCE WITH THE OFFICIAL LATIN TEXT PROMULGATED BY POPE JOHN PAUL II paras. 2383–84 (Libreria Editrice Vaticana 1997). Nevertheless, Theresa's view on divorce is not uncommon among the devout.

²² Dmitry Tumin, Siqi Han & Zhenchao Qian, *Estimates and Meanings of Marital Separation*, 77 JOURNAL OF MARRIAGE AND FAMILY 312 (Feb. 2015), available at <http://onlinelibrary.wiley.com/doi/10.1111/jomf.12149/full> (finding that marital separations often are an alternative to divorce for poor couples).

²³ *Id.*

²⁴ See generally Mary Leto Pareja, *Earned Income Tax Portability: Respecting the Autonomy of American Families*, 117 W. VA. L. REV. 1, 6–10 (2014) (discussing the political history and legislative purpose of the EITC).

status but on whether the spouses maintain separate households. This article also provides concrete suggestions for reformed rules.

Looking beyond the Premium Tax Credit, this article outlines other valuable tax benefits that are lost when joint filing is not a viable option. For example, the EITC, the single largest federal cash assistance program in the United States today,²⁵ is lost to a married taxpayer unless he or she files a joint return. This article looks critically at why the Code repeatedly requires joint filing to claim the most valuable tax benefits. This article then argues that the exception that was made for the Premium Tax Credit should be extended to apply to other tax benefits that require joint filing status. If we are truly concerned that a domestic violence victim, like Olga, cannot (or should not) file jointly with his or her abuser, then we should remove economic barriers to separate filing and enable the victim to receive not only the Premium Tax Credit but also the EITC and other tax benefits that are so critical to our anti-poverty efforts.

II. THE ACA IN GENERAL

The ACA represents a stark departure from the public health policy of the American past. Prior to the 1920s, Americans typically paid cash for treatment and health care was inexpensive because medical knowledge and technology was not very advanced.²⁶ Some limited forms of health insurance started to develop in the 1920s as medical technology advanced and the demand for hospital care rose.²⁷ Employer-sponsored health care became popular during World War II as a way for employers to boost employees' economic well-being without running afoul of the World War II era wage control rules and in response to demands for health care benefits made by newly-powerful workers unions.²⁸ Since then, health insurance for the non-elderly has continued to be primarily employment based, leaving the

²⁵ In 2010, the federal government spent \$54.7 billion on the EITC, almost 30% of the entire outlay for all public assistance and related programs combined (\$183.1 billion including the EITC). U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, 313, tbl. 474, available at <http://www.census.gov/prod/2011pubs/12statab/fedgov.pdf>. The second-largest needs-based cash assistance program in 2010 was the supplemental security income program at \$43.9 billion. In comparison, TANF (welfare) payments were only \$21.9 billion in 2010. The federal government spent \$95 billion in 2010 on food and nutrition assistance programs, including food stamps. *Id.*

²⁶ Alex Blumberg and Adam Davidson, *Accidents of History Created U.S. Health System*, NAT'L PUB. RADIO (Oct. 22, 2009), <http://www.npr.org/templates/story/story.php?storyId=114045132>.

²⁷ *Id.* An early player in the health insurance market was Blue Cross. *Id.*

²⁸ Ezekiel J. Emanuel and Ron Wyden, *Why Tie Health Insurance to a Job?*, WALL ST. J. (Dec. 10, 2008), <http://online.wsj.com/news/articles/SB122887085038593345>; BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY STOLTZFUS JOST & ROBERT L. SCHWARTZ, HEALTH LAW 302 (3d ed., 2015).

unemployed unprotected.²⁹ Also left out were employees of smaller companies, which frequently were unable to provide coverage because of cost or administrative obstacles.³⁰ Even the passage of the Employee Retirement Income Security Act of 1974 (“ERISA”), which fundamentally altered employment-sponsored benefit plans, left health care virtually untouched. In fact, ERISA created a health care black hole by preempting state efforts to regulate self-funded plans while not putting into place any federal rules.³¹ Only with the advent of the ACA has the federal government seriously attempted to methodically address health coverage for the non-elderly.

With the passage of the ACA, the era of health and financial insecurity due to lack of health insurance is beginning to fade into history. The ACA utilizes a uniquely American approach to expanding health care coverage. Rather than opting for a more socialized path to expanded coverage, such as having government provide health care directly or having government be the sole or primary payer of health care expenses, the ACA continues the American tradition of placing private insurance companies at the heart of the health care financing system.³²

The Supreme Court described the aim of the ACA as “to increase the number of Americans covered by health insurance and decrease the cost of

²⁹ Paul Fronstin, Emp. Benefits Research Inst., *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2011 Current Population Survey 4* (Sept. 2011), available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_09-2011_No362_Uninsured1.pdf.

³⁰ *Id.* at 11.

³¹ Hinda Ripps Chaikind, *CRS Report for Congress: ERISA Regulation of Health Plans: Fact Sheet* (Mar. 6, 2003), <http://www.allhealth.org/briefingmaterials/erisaregulationofhealthplans-114.pdf>. Employer-sponsored health coverage funded through insurance, rather than being self-funded by the sponsor, is subject to the very limited ERISA rules and health insurance regulations imposed by the state. *Id.*

³² Compare The Commonwealth Fund, *The United States Health Care System, 2014 in 2014 INT’L PROFILES OF HEALTH CARE SYS.* 153–62 (The Commonwealth Fund January 2015) (the primary U.S. health system where private sector providers are paid for services via private sector insurance companies), with Ruth Thorlby & Sandeepa Arora, *The English Health Care System, 2014 in 2014 INT’L PROFILES OF HEALTH CARE SYS.* 43–52 (The Commonwealth Fund January 2015) (the health system of England where the vast majority of providers are employed directly by the governmental National Health Service (a system similar to the U.S. Veteran’s Health Administration)), and Isabelle Durand-Zaleski, *The French Health Care System, 2014 in 2014 INT’L PROFILES OF HEALTH CARE SYS.* 53–62, (The Commonwealth Fund January 2015), http://www.commonwealthfund.org/~media/files/publications/fund-report/2015/jan/1802_mossialos_intl_profiles_2014_v7.pdf?la=en (the health system of France where private sector providers are reimbursed directly by the government (a system similar to U.S. Medicare)). While Medicare, Medicaid, and Tricare are important public health care payers in the United States, most Americans continue to be covered by employer-sponsored health plans. *Health Insurance Coverage of the Total Population*, THE HENRY J. KAISER FAMILY FOUND, <http://kff.org/other/state-indicator/total-population/> (last visited Apr. 26, 2015). In 2013, private insurance, most frequently through group employer-based plans, covered 54% of the population, government programs covered 33% of the population, and 13% of the population was uninsured. *Id.*

health care.”³³ Expanding the availability of health care coverage is not the only goal of the ACA.³⁴ The ACA also seeks to improve the quality and efficiency of the health care system (by, for example, rating hospitals’ performance with respect to quality of care) and to reform health coverage plans to ensure meaningful coverage (by, for example, mandating a certain minimum level of benefits).³⁵ Nevertheless, the primary goal of the ACA is to dramatically expand health care coverage. A corollary goal is to put coverage within reach of the average American by making coverage more affordable.

A. Expanding Access to Coverage

I. Medicaid Expansion

The ACA expands access to health care coverage in several important ways, many of which have already been attacked in the courts. It is important to understand the structure of the ACA before examining any particular element in depth. The ACA provides incentives for the states to expand eligibility for Medicaid coverage to include all adults under age 65 with incomes up to 133% of poverty.³⁶ Children with income 133% of poverty or less already were eligible for Medicaid prior to the passage of the ACA.³⁷ The ACA made the Medicaid expansion mandatory for all states and provides 100% funding from the federal government for the first three years, gradually lowering each year to 90% by 2020.³⁸ The sanction for not implementing the expansion was the loss of all federal funding for Medicaid, not just the funding for the expansion.³⁹ However, the Supreme Court found that the threat of withdrawing all Medicaid funding violates the United States Constitution and struck down that part of the ACA.⁴⁰ The Court explained that the federal government can use incentives under its Spending Clause authority to entice the states to enact programs, but only if the states voluntarily and knowingly accept the terms of the program.⁴¹ The ACA Medicaid expansion was deemed too dramatic a transformation of the

³³ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2580 (2012) [hereinafter *NFIB*].

³⁴ For an excellent overview of the different goals of the ACA and the specific provisions that promote those goals, see Wilton B. Hyman, *An Explanation of the Patient Protection and Affordable Care Act*, 38 OHIO N.U. L. REV. 579 (2012).

³⁵ 42 U.S.C. § 1395ww(o) (Supp. 2015), 42 U.S.C. §§ 18022(a)(1), (b)(1) (Supp. 2014).

³⁶ 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2012).

³⁷ *Medicaid Expansion & What It Means for You*, HEALTHCARE.GOV, <https://www.healthcare.gov/what-if-my-state-is-not-expanding-medicaid/> (last visited Feb. 12, 2015).

³⁸ 42 U.S.C. § 1396d(y)(1) (2012).

³⁹ 42 U.S.C. § 1396c (2012), *invalidated by NFIB*, 132 S. Ct. at 2566 (2012).

⁴⁰ *NFIB*, 132 S. Ct. at 2608 (2012).

⁴¹ *NFIB*, 132 S. Ct. at 2602 (2012).

program to qualify as a mere amendment of an existing program, and the threat of loss of all funding was deemed to cross the line dividing encouragement and coercion.⁴² The Court went on to find that the provision withdrawing federal Medicaid funding was severable from the Act as whole, meaning that a state that does not accept the Medicaid expansion may continue to operate under the prior Medicaid rules, effectively making the Medicaid expansion voluntary.⁴³

This ruling creates a strange side effect. The Premium Tax Credit is only available to taxpayers with household incomes between 100% and 400% of poverty. Thus, counterintuitively, a taxpayer with income at 100% of federal poverty may receive subsidized health care coverage but a taxpayer with income under 100% of federal poverty may not.⁴⁴ The poorer taxpayer also may not be eligible for Medicaid, yet is subject to the individual mandate.⁴⁵ Not all states have accepted the Medicaid expansion.⁴⁶ However, in those states which have accepted the Medicaid expansion, more people have access to coverage through that program.⁴⁷

2. *Employer Mandate*

To further expand the availability of coverage, the ACA also mandates that larger employers provide health care coverage to their

⁴² *Id.* at 2603–04.

⁴³ *Id.*

⁴⁴ *Medicaid Expansion & What It Means for You*, HEALTHCARE.GOV, <https://www.healthcare.gov/what-if-my-state-is-not-expanding-medicaid/> (last visited Feb. 12, 2015).

⁴⁵ *Id.*

⁴⁶ As of February 11, 2015, 29 states had already expanded Medicaid or were planning on doing so (Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and West Virginia), five states were considering expanding Medicaid (Alaska, Montana, Tennessee, Utah, and Wyoming), and seventeen had decided to not expand Medicaid (Alabama, Florida, Georgia, Idaho, Kansas, Louisiana, Maine, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Virginia, and Wisconsin). The Advisory Board Company, *Where the States Stand on Medicaid Expansion*, THE ADVISORY BD. COMP. (Feb. 11, 2015), <http://www.advisory.com/daily-briefing/resources/primers/medicaidmap>. There is no deadline for a state to accept the Medicaid expansion so some states may later change their positions.

⁴⁷ A recent Commonwealth Fund survey found that the non-elderly adult uninsured rate fell nationwide from 20% to 15% after the ACA's first open enrollment period. Among those living below the poverty line, the uninsured rate fell a dramatic 11% (from 28% to 17%) in states that expanded Medicaid versus a paltry 2% drop in states without a Medicaid expansion. Sara R. Collins, Petra W. Rasmussen & Michelle M. Doty, *Gaining Ground: Americans' Health Insurance Coverage and Access to Care After the ACA's First Open Enrollment Period*, COMMONWEALTH FUND (July 2014), http://www.commonwealthfund.org/~media/files/publications/issue-brief/2014/jul/1760_collins_gaining_ground_tracking_survey.pdf.

employees or face potential penalties (commonly called the “employer mandate”).⁴⁸ This provision applies only to employers who had an average of 50 full time employees in the prior year.⁴⁹ The penalty is assessed only if one of an employer’s full-time employees enrolls in a plan through an exchange and receives a Premium Tax Credit or is eligible for reduced cost sharing.⁵⁰ Currently being litigated is the issue whether Premium Tax Credits are available in states that have not established their own exchanges, relying instead on the federal government to establish and maintain exchanges for them.⁵¹ The result of the litigation is important to the employer mandate because if a person living in a state that has not established its own exchange is not eligible for a Premium Tax Credit or reduced cost sharing because their only option is a federally-facilitated exchange, then that person’s employer also may escape the penalty for not offering health coverage to that employee, effectively gutting the employer mandate.⁵² While most provisions of the ACA are already in effect, the effective date of the employer mandate, originally scheduled for 2014, has been delayed to 2015 or 2016, depending on the size of the employer.⁵³ There has been much speculation regarding how employers will respond to this new requirement, with some fearing large scale job loss or the conversion of the work force to part time status.⁵⁴

3. *The Individual Mandate and Prohibition on Medical Underwriting*

The ACA also extends access to coverage for people with medical conditions that previously prevented them from obtaining coverage or that qualified them only for coverage with an insurmountably high price tag, one of the more politically popular features of the law. The ACA prohibits insurers from denying coverage for people based on preexisting conditions, from excluding coverage for preexisting conditions, and from charging sick people more for their coverage.⁵⁵ In exchange, to prevent people from buying insurance only once they become ill (called adverse selection), the ACA

⁴⁸ 26 U.S.C. §§ 4980H(a), (c)(2) (2012).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See infra* note 94.

⁵² 26 U.S.C. §§ 4980H(a), (c)(2) (2012).

⁵³ I.R.S. Notice 2013-45, 2013-31 I.R.B. 116 (providing that no employer shared responsibility payments will be due in 2014); Shared Responsibility for Employers Regarding Health Care, 79 Fed. Reg. 8544, 8574 (Feb. 12, 2014) (providing that employer shared responsibility payments will not be due until 2015 for employers with between 50 and 100 full time employees).

⁵⁴ *See* Annie Lowrey and Jonathan Weisman, *Health Care Law Projected to Cut the Labor Force*, N.Y. TIMES Feb. 5, 2014, at A1, available at <http://www.nytimes.com/2014/02/05/us/politics/budget-office-revises-estimates-of-health-care-enrollment.html>.

⁵⁵ 42 U.S.C. § 300gg, gg-3, gg-4 (2012).

requires most people in the United States to have some minimum level of health care coverage (commonly called the “individual mandate”).⁵⁶

4. *Online Exchanges or Marketplaces*

To make it easier for individuals and small businesses to shop for and purchase health coverage, the ACA required each state to set up an online exchange (also called a marketplace) with standardized features;⁵⁷ if a state failed (or refused) to set up an exchange, the federal government was tasked with creating and operating an exchange on behalf of that state.⁵⁸ To date, only 17 states have established their own exchanges,⁵⁹ seven states have established an exchange in partnership with the federal government,⁶⁰ and 27 states have federally-facilitated exchanges.⁶¹

⁵⁶ 26 U.S.C. § 5000A (2012). The individual mandate has been upheld by the Supreme Court as a constitutional exercise of the federal government’s taxation authority. *NFIB*, 132 S. Ct. at 2571.

⁵⁷ 42 U.S.C. § 18031(b), (d) (2012).

⁵⁸ 42 U.S.C. § 18041(c) (2012). Regulations issued by the IRS treat all exchanges as “state exchanges” for purposes of various provisions of the ACA, including the Premium Tax Credit. 26 C.F.R. § 1.36B-1(k); Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012). The IRS regulations cross reference regulations of the Department of Health and Human Services that define “exchange” as including federally-facilitated exchanges. 45 C.F.R. § 155.20. This is the primary issue in the *King* and *Halbig* cases discussed in *infra* note 94.

⁵⁹ Those states are California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Kentucky, Maryland, Massachusetts, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *State Health Insurance Marketplace Types*, 2015, THE HENRY J. KAISER FAMILY FOUND., <http://kff.org/health-reform/state-indicator/health-insurance-exchanges/> (last visited June 16, 2015). This list includes three states that have federally-supported state-based marketplaces (Oregon, New Mexico, and Nevada). *Id.*

⁶⁰ Those states are Arkansas, Delaware, Illinois, Iowa, Michigan, New Hampshire, and West Virginia. *Id.* A partnership exchange is one in which the state provides some defined services in connection with an exchange operated by the federal government. See CENTERS FOR MEDICARE AND MEDICAID SERVICES, GENERAL GUIDANCE ON FEDERALLY-FACILITATED EXCHANGES (May 16, 2012), available at <https://www.cms.gov/CCHO/Resources/Fact-Sheets-and-FAQs/Downloads/ffe-guidance-05-16-2012.pdf>.

⁶¹ Those states are Alabama, Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nebraska, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming. *State Health Insurance Marketplace Types*, 2015, *supra* note 59. Not all of these states are completely uninvolved, however. For example, Mississippi and Utah run a state exchange for small businesses (called a SHOP exchange) while allowing the federal government to run the individual exchange. In addition, seven states (Kansas, Maine, Montana, Nebraska, Ohio, South Dakota, and Virginia) will provide some services in connection with the exchanges, but not enough to rise to a partnership exchange. *Id.*

B. Making Coverage Affordable

The ACA takes several steps to help people afford what for many is the significant new expense of health care coverage. First, those who are newly eligible for Medicaid as the result of the expansion will receive quality coverage with low to no cost sharing or premiums.⁶² Second, the ACA implements limits on cost sharing (deductibles, coinsurance, and copayments) that a lower-income or middle-income individual will face.⁶³ Third, the federal government created a new refundable income tax credit called the Premium Tax Credit to help offset the cost of health coverage for lower-income and middle-income taxpayers.⁶⁴ The Premium Tax Credit is a significant part of the overall ACA strategy. Indeed, 85% of people who enrolled in an exchange plan during the first open enrollment period for coverage in 2014 qualified for advance payments of the Premium Tax Credit.⁶⁵ Without the Premium Tax Credit, premium cost likely would keep coverage out of reach for many Americans.

C. How the Premium Tax Credit Operates

The Premium Tax Credit is a subsidy designed to help low-income to middle-income taxpayers afford to buy health insurance on an exchange. Generally speaking, a person is eligible for a Premium Tax Credit if he or she has household income between 100% and 400% of poverty, purchases health insurance on an ACA exchange, and is not otherwise eligible for or actually covered by a qualifying employer or public health plan.⁶⁶ The

⁶² See *supra* Part II.A.1.

⁶³ 42 U.S.C. § 18071 (2012); HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,826 (Feb. 27, 2015). Cost sharing reductions can apply for individuals with household income between 100% and 250% of poverty, on a sliding scale basis. To receive the cost sharing reductions, the taxpayer is required to enroll in a silver plan. Special, more generous, rules apply to Native Americans. *Id.* See *supra* Part II.C. regarding the classification of health insurance policies by precious metals.

⁶⁴ The new Premium Tax Credit is codified at Code § 36B. 26 U.S.C. § 36B (2012).

⁶⁵ OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING AND EVALUATION, DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH INSURANCE MARKETPLACE: SUMMARY ENROLLMENT REPORT FOR THE INITIAL ANNUAL OPEN ENROLLMENT PERIOD 9 (May 1, 2014), available at http://aspe.hhs.gov/health/reports/2014/MarketPlaceEnrollment/Apr2014/ib_2014apr_enrollment.pdf.

⁶⁶ 26 U.S.C. § 36B (2012). The federal poverty figures are published by the Department of Health and Human Services in the Federal Register at the start of every year. 26 U.S.C. § 36B(d)(3) (2012). The figures that apply for a year are the most-recently published figures as of the beginning of the open enrollment period for that year. *Id.* The open enrollment period for 2015 began October 15, 2014. 45 C.F.R. § 155.410(e). Thus, the poverty figures that apply for 2015 are the figures published at the start of 2014. For 2015, the poverty line for a single individual not living in Alaska or Hawaii is \$11,670; each additional family member adds \$4,060 to the poverty line. Annual Update of HHS Poverty Guidelines, 79 Fed. Reg. 3, 593 (Jan. 22, 2014). Thus, for 2015, between 100% and 400% of poverty for a

eligibility rules are discussed in more detail below. The amount of the credit varies depending on the cost of plans in the person's location as well as the person's household income and family size.⁶⁷ Similar to the EITC, the Premium Tax Credit is a refundable tax credit.⁶⁸ This will reduce the taxpayer's tax liability (as shown on the return) to as low as zero, and if there is credit left over, the taxpayer will receive that left over credit amount as a refund.⁶⁹ The Premium Tax Credit is calculated on a month-by-month basis; a person will receive a credit amount for each month that he or she is eligible.⁷⁰

The Premium Tax Credit may be claimed retroactively on a tax return; the credit for any month in 2014 would be claimed on a 2014 tax return, normally filed before April 15, 2015.⁷¹ The Premium Tax Credit also may be paid on an advanced basis.⁷² If the advance credit is elected, the estimated amount of the credit is calculated by the health insurance exchange through which the person obtained the coverage and payments are made directly to the insurance company covering the individual.⁷³ Advance credit payments are reconciled on the tax return for the year of the payments, meaning advance payments made during 2014 were reconciled on the tax return for 2014, normally filed before April 15, 2015.⁷⁴ If the actual amount of the credit on the tax return is lower than the advance payments made during the year, the taxpayer will have to pay back the difference, subject to certain caps.⁷⁵ There is no cap for a taxpayer above 400% of poverty.⁷⁶ For taxpayers below 400% of poverty, the maximum repayment ranges from \$300 to \$2,500 depending on filing status and income level.⁷⁷ If the actual amount of the credit on the tax return is higher than the advance payments made during the year, the taxpayer will be able to use that excess amount as a refundable credit.⁷⁸

While advance credit payments may make health insurance accessible by solving a cash flow problem, they do create the risk that the taxpayer will have a nasty surprise come tax time. This risk can be mitigated by opting to receive only some of the expected credit amount on an advanced

single person means between \$11,670 and \$46,680. The poverty line is higher in Alaska and Hawaii. *Id.*

⁶⁷ 26 U.S.C. § 36B(b)(2) (2012).

⁶⁸ 26 U.S.C. §§ 36B(b)(2), 6401 (2012).

⁶⁹ *Questions and Answers on the Premium Tax Credit*, INTERNAL REVENUE SERVICE, <http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-the-Premium-Tax-Credit> (last visited Apr. 26, 2015).

⁷⁰ 26 U.S.C. § 36B(b) (2012).

⁷¹ 26 U.S.C. § 36B(a) (2012).

⁷² 42 U.S.C. § 18082 (2012).

⁷³ *Id.*

⁷⁴ 26 U.S.C. § 36B(f) (2012).

⁷⁵ *Id.* See also *Questions and Answers*, *supra* note 69.

⁷⁶ 26 U.S.C. § 36(B)(f) (2012).

⁷⁷ *Id.*

⁷⁸ *Questions and Answers*, *supra* note 69.

basis.⁷⁹ The risk also can be mitigated by the taxpayer diligently reporting to the exchange every month changes to his or her household income or family size which in turn will adjust the advance credit payments made to the insurance company. In the author's experience working with low income taxpayers through a low income taxpayer clinic, this sort of diligence is likely to be the exception rather than the rule. Persons living in poverty typically have much more urgent matters that occupy their attention and time, such as finding food for the next meal (especially at the end of the month when the food stampshave long been exhausted), juggling bills to find the money to keep the lights or the heat on, or figuring out how to get the kids to and from school and mom and dad to and from work when the family car finally gave up the ghost.

The amount of the Premium Tax Credit is calculated based on the taxpayer's household income and family size as well as the cost for a benchmark plan (or the cost for the actual plan selected, if lower).⁸⁰ The benchmark plan is the second-lowest cost "silver" plan that can cover the taxpayer's entire household.⁸¹ The ACA exchanges categorize plans by "metal colors"; plans are classified, from least generous to most generous, as bronze, silver, gold, and platinum. A silver plan has a benefit structure (amount of copayments, coinsurance, and deductibles) more generous than a bronze plan but not as generous as a gold or platinum plan.⁸² The cost for the benchmark plan is the cost to the taxpayer if he or she were to actually enroll in the benchmark plan.⁸³ Thus, the cost of the benchmark plan will vary depending on the taxpayer's location, family size, and the ages of the enrollees.⁸⁴ The credit amount is the premium amount for the benchmark plan less the expected taxpayer contribution toward the premium. The taxpayer's contribution varies depending on the taxpayer's household income and ranges from 2% of income to 9.5% of income.⁸⁵ It is important to

⁷⁹ *Premium Tax Credit*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/premium-tax-credit/> (last visited July 29, 2014).

⁸⁰ 26 U.S.C. § 36B(b) (2012).

⁸¹ This could be a combination of plans if the family is unable to be covered by a single plan, for example because a child is away at college or because of the relationships between the family members. 26 C.F.R. § 1.36B-3(f)(3).

⁸² *See generally Your Insurance Choices in a Marketplace: FAQ*, WEBMD.COM, <http://www.webmd.com/health-insurance/insurance-marketplace/marketplace-insurance-choices> (last visited July 29, 2014).

⁸³ 26 U.S.C. § 36B(b)(3)(C) (2012).

⁸⁴ The ACA permits insurers to charge higher premiums to older insureds; an older insured may be charged up to three times more than a younger insured. 42 U.S.C. § 300gg(a)(1) (2012). Any age-based adjustment in premiums will be taken into account under the benchmark plan for calculating the Premium Tax Credit. 26 C.F.R. § 1.36B-3(e). The benchmark plan, however, will not take into account a premium adjustment for tobacco use; the ACA allows insurers to charge tobacco users up to 1.5 times the premium it would charge a non-user. *Id.*; 42 U.S.C. § 300gg(a)(1) (2012).

⁸⁵ 26 U.S.C. §§ 36B(b)(2), (3)(A) (2012). The calculation of the taxpayer's required contribution is fairly complicated, although online calculators can help taxpayers (and their advisors) estimate the likely contribution amount. *See, e.g., Health Insurance*

note that, although the credit amount is based on the cost for the benchmark plan, the taxpayer is free to enroll in a lower cost or higher cost plan.⁸⁶

There are several eligibility criteria for claiming a Premium Tax Credit: (1) the taxpayer⁸⁷ must have “household income” between 100% and 400% of the poverty line,⁸⁸ (2) the taxpayer cannot be eligible to be claimed as the dependent of any other person;⁸⁹ (3) the taxpayer must file a joint return if considered married within the meaning of Code § 7703;⁹⁰ (4) the taxpayer must not be eligible for government-sponsored coverage such as Medicare, Medicaid, CHIP, or TRICARE;⁹¹ (5) the taxpayer must not be eligible for an employer-sponsored plan that is affordable and provides minimum value;⁹² (6) neither the taxpayer nor any member of the taxpayer’s “household” can be actually enrolled in an employer-sponsored plan, whether or not the plan is considered affordable or to provide minimum value;⁹³ and (7) the taxpayer, taxpayer’s spouse, or taxpayer’s dependent must have purchased coverage through an exchange and paid the premium

Marketplace Calculator, THE HENRY J. KAISER FAMILY FOUND., <http://kff.org/interactive/subsidy-calculator/> (last visited Aug. 7, 2014).

⁸⁶ 26 U.S.C. § 36B(b)(3)(B) (2012); CTR ON BUDGET AND POLICY PRIORITIES, PREMIUM TAX CREDITS: ANSWERS TO FREQUENTLY ASKED QUESTIONS, *available at* <http://www.cbpp.org/files/QA-on-Premium-Credits.pdf> (July 2013).

⁸⁷ The term taxpayer is used because the claimant must file a federal tax return to receive a Premium Tax Credit and it is the term used in the statute. However, the term includes individuals who may not pay any federal income taxes, either because they have income too low to trigger the income tax or because their income tax liability is fully reduced by available credits, such as the EITC or the Child Tax Credit.

⁸⁸ 26 U.S.C. § 36B(c)(1)(A) (2012). As discussed *supra* in note 66, for 2015, between 100% and 400% of poverty for a single person means between \$11,670 and \$46,680 with higher amounts in Alaska and Hawaii. Annual Update of HHS Poverty Guidelines, 79 Fed. Reg. 3,593 (Jan. 22, 2014).

⁸⁹ 26 U.S.C. § 36B(c)(1)(D) (2012). Notice that this is different than actually being claimed as a dependent of another taxpayer, despite the language in the FAQs posted on the IRS’s website. The IRS’s website states that the claimant “cannot be claimed as a dependent by another person.” *Questions and Answers*, *supra* note 69. This is contrary to the plain language of the statute and likely represents an oversight rather than a conscious interpretation choice.

⁹⁰ 26 U.S.C. § 36B(c)(1)(C) (2012). This is the requirement at the heart of this article and is discussed throughout.

⁹¹ 26 U.S.C. §§ 36B(c)(2)(B), 5000A(f)(1)(A) (2012). This applies on a month-by-month basis and is based on eligibility for the plan, not enrollment in the plan. Thus, if a person meets all the eligibility requirements for a Premium Tax Credit in January, but becomes eligible for Medicaid starting in February, the person will receive a Premium Tax Credit only for January, even if the person does not actually enroll in Medicaid. *Id.*

⁹² 26 U.S.C. § 36B(c)(2)(C) (2012). A plan is considered “affordable” if the employee’s share of the premium for self-only coverage is 9.5% or less of the employee’s “household income.” 26 U.S.C. § 36B(c)(2)(C)(i) (2012). A plan is considered to provide minimum value if it covers at least 60% of the total allowed costs of benefits under the plan. 26 U.S.C. § 36B(c)(2)(C)(ii) (2012).

⁹³ 26 U.S.C. § 36B(c)(2)(C)(iii) (2012).

for the coverage.⁹⁴ There are special rules that apply to non-citizens that are beyond the scope of this article.

Because the taxpayer's "family" and "household income" are so important to eligibility for the credit as well as the calculation of the amount of the credit, it is worth looking closely at how those two concepts are defined. The "family" consists of all the individuals for whom a taxpayer is allowed to claim a "personal exemption amount" under Code § 151 for the taxable year.⁹⁵ Code § 151 allows taxpayers to deduct from income a "personal exemption amount" for themselves, their spouse if filing jointly, and for eligible dependents claimed on the return.⁹⁶ Thus, "family" for ACA purposes really refers to the tax unit and not a more common-sense understanding of family.⁹⁷ The rules for who can be claimed as a dependent are not as simple as one would hope.⁹⁸ However, generally speaking, the following broad categories of people potentially qualify as dependents of a taxpayer, if they meet other requirements: (1) the taxpayer's descendants, siblings, and sibling's descendants (nieces and nephews, grand-nieces and grand-nephews, etc.) provided the dependent is unmarried, lives with the taxpayer the majority of the year, is under age 19, or a full-time student and under age 24, or any age but permanently disabled, and does not provide most of their own support;⁹⁹ (2) almost anyone that lives with the taxpayer as part of the household for the entire year as well as the taxpayer's descendants, siblings, nieces and nephews (but not grand-nieces or grand-

⁹⁴ 26 U.S.C. § 36B(c)(2)(A) (2012). The statute requires that the individual be enrolled "through an Exchange established by the State . . ." *Id.* The IRS has interpreted this to include exchanges established by the federal government on behalf of states that declined to establish their own exchanges. 26 C.F.R. § 1.36B-1(k); Health Insurance Premium Tax Credit, 77 Fed. Reg. 30,377, 30,378 (May 23, 2012) (the preamble explains the IRS's reasoning for adopting this rule). This interpretation has generated intense controversy and is currently being reviewed by the U.S. Supreme Court. In *King v. Burwell*, the Fourth Circuit unanimously upheld the IRS's interpretation as a permissible exercise of the IRS's discretion to interpret ambiguous statutes. *King v. Burwell*, No. 14-1158 (4th Cir. July 22, 2014) (slip op). The U.S. Supreme Court granted cert to the plaintiffs in the *King* case, oral arguments occurred on March 4, 2015, and a decision is expected in late June 2015. Docket, *King v. Burwell*, No. 14-114 (S. Ct.), available at <http://www.supremecourt.gov/search.aspx?filename=/docketfiles/14-114.htm> (last visited Jan. 16, 2015).

⁹⁵ The term "exemption" is a confusing misnomer, given that the amount of the "personal exemption" is actually a below-the-line deduction from adjusted gross income. 26 U.S.C. § 151 (2012).

⁹⁶ This is a simplification of the spousal exemption rules. If the taxpayers are filing jointly, they each get a personal exemption as taxpayers. 26 U.S.C. § 151(b) (2012). If they are not filing jointly, a taxpayer may claim a personal exemption for his or her spouse if the spouse had no gross income and was not the dependent of another taxpayer. *Id.*

⁹⁷ See generally Tessa R. Davis, *Taxing Modern Families: Mapping the Families of Tax*, 22 VA. J. SOC. POL'Y & L. 179 (2014) (discussing the different broad conceptions of family in the Code and how those conceptions compare to family law conceptions of family).

⁹⁸ See generally Pareja, *supra* note 24, at 11–28 (discussing the mechanics of the rules for claiming dependents on a tax return).

⁹⁹ 26 U.S.C. § 152(c) (2012). These dependents are called "qualifying children" even though they are not necessarily children or the taxpayer's biological children. *Id.*

nephews), direct ancestors, and aunts and uncles (but not their descendants), provided the dependent makes under the personal exemption amount for the year (for 2014, \$3,950)¹⁰⁰ and provided that the taxpayer provides more than half of the dependent's support.¹⁰¹ This is merely a broad summary of the rules; there are many wrinkles and exceptions that have been left out in the interest of brevity. Thus, for ACA purposes, a "family" is a taxpayer, the taxpayer's spouse, and the taxpayer's dependents as described above. There are exceptions and special rules for non-citizens that are beyond the scope of this article.

Correspondingly, "household income" is the income of the "family"—or tax unit—described above, with an important exception.¹⁰² The income of a family member (i.e., a spouse or tax dependent) is ignored if the family member is not "required to file a return of tax imposed by [Code] section 1 for the taxable year."¹⁰³ Code § 1 is the section that imposes the income tax; it does not contain any rules regarding the requirement to file a return. The rules regarding when there is a requirement to file a return to report taxes imposed under Code § 1 are contained in Code § 6012. Code § 6012 exempts an individual from the obligation to file a return to report the tax applicable under Code § 1 if the individual's income is not more than the personal exemption amount (\$3,950 for 2014) plus the applicable standard deduction amount (in 2014, ranging from \$6,200 for single taxpayers to \$12,400 for joint taxpayers to \$17,200 for blind and over age 65 taxpayers filing jointly).¹⁰⁴ In other words, for ACA purposes, a family member's income (including a spouse) would not count toward household income if it is under the applicable threshold, ranging from \$10,150 to \$21,150

¹⁰⁰ Rev. Proc. 2013-35, 2013-47 I.R.B. 537, 42 (Nov. 18, 2013).

¹⁰¹ 26 U.S.C. § 152(d) (2012). These dependents are called "qualifying relatives" even though the potential dependent does not actually need to be related to the taxpayer. *Id.*

¹⁰² Income is actually "modified adjusted gross income." 26 U.S.C. § 36B(d)(2) (2012). Modified adjusted gross income begins with the person's adjusted gross income. *Id.* Adjusted gross income is a tax term of art. It is the taxpayer's gross income as reported on his or her return less certain "above-the-line" deductions, such as the deduction for alimony paid, the deduction for certain tuition payments, and the deduction for one-half of self-employment taxes. 26 U.S.C. § 62 (Supp. 2014). The adjusted gross income is modified by adding back in any amounts excluded under the foreign income exclusion of Code § 911, and any tax-exempt interest, and any portion of Social Security benefits excluded under Code § 86. 26 U.S.C. § 36B(d)(2)(B) (2012). There are clear inequities in using this definition to measure an individual's ability to afford health care. For example, completely excluded from this definition of income is inherited wealth. Thus, for example, an individual who has no earned income (meaning they do not work), and who has investment income between \$11,670 and \$46,680 (or between 100% and 400% of poverty in 2015 as explained in *supra* note 66) has income qualifying him or her for a Premium Tax Credit even if the individual also receives thousands or even millions of dollars from a family trust.

¹⁰³ 26 U.S.C. § 36B(d)(2)(A)(ii)(II) (2012).

¹⁰⁴ I.R.S. Notice 2013-35, 2013-47 I.R.B. 537; *see also* IRS, PUBLICATION 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION (2014) at 24–26, *available at* <http://www.irs.gov/pub/irs-pdf/p501.pdf>.

depending on the circumstances.¹⁰⁵ An individual may be required to file a tax return for other reasons, even though he or she is exempt from filing a return under the Code § 6012 rules. For example, if a person has over \$400 of income from self-employment, he or she must file a return to report employment taxes.¹⁰⁶ Additionally, there are many situations where a person will want to file a return even if they are not required to; for example, to receive a refund of over withholding or a refundable tax credit like the EITC. In such cases, that person's income should not be counted toward household income for ACA purposes.

III. MARRIED FILING SEPARATELY AS A DISFAVORED FILING STATUS

A. History of Joint Income Tax Filing

As discussed above, the Premium Tax Credit is denied to married taxpayers filing a separate return. Similar rules apply to the EITC and other tax benefits. To understand the possible reasons why Congress repeatedly passes tax laws that deny tax benefits to married taxpayers filing separate returns, it is useful to look at the history of joint filing. As with current law, the original 1913 income tax allowed married couples to freely elect between joint filing and separate filing.¹⁰⁷ Also as with current law, if separate returns were filed, each spouse reported only income which he or she was considered to own.¹⁰⁸ However, unlike current law, there was no separate rate schedule for joint returns. Married individuals filing a joint return would aggregate their income and apply the rate schedule.¹⁰⁹ Married couples able to split their income between two separate returns saved taxes over filing a joint return because more of their income could be taxed at lower brackets.¹¹⁰ For example, taxable income up to \$20,000 was taxed at 1% while income between \$20,000 and \$50,000 was taxed at 2%.¹¹¹ A married couple with \$40,000 of income earned (or owned) all by one spouse reported the entire \$40,000 on a single tax return and was taxed at approximately \$600

¹⁰⁵ *Id.*

¹⁰⁶ 26 U.S.C. § 6017 (2012).

¹⁰⁷ Miss Coyle, Joint Returns of Income of Husbands and Wives (Apr. 15, 1941) (Staff memo, Division of Tax Research, Treasury Department), available at <http://www.taxhistory.org/civilization/Documents/marriage/hst28695/28695-1.htm>.

¹⁰⁸ Dennis J. Ventry, Jr., *Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459, 1464 (2011).

¹⁰⁹ Coyle, *supra* note 107.

¹¹⁰ There were additional tax savings due to the way the exemption amounts were calculated, but that is a separate issue. Ventry, *supra* note 108, at 1467.

¹¹¹ U.S. Federal Individual Income Tax Rates History 1862-2013, TAX FOUNDATION, <http://taxfoundation.org/article/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets> (last visited July 30, 2014) [hereinafter Tax Rates History] (Nominal and Inflation-Adjusted Brackets).

(ignoring exemptions).¹¹² If a married couple each earned (or owned) \$20,000, they had the same joint income but could report \$20,000 on two separate returns, generating a tax of approximately \$400 (\$200 on each return).¹¹³

For people living in community property states¹¹⁴ the states' community property laws split ownership of income between the spouses, thus allowing each spouse to file a separate return and save federal taxes.¹¹⁵ The inequity became extreme during World War I when the United States adopted sharply progressive rates to finance the war,¹¹⁶ and was made even worse when rates became even more progressive during World War II.¹¹⁷ The community property scheme generally was advantageous to taxpayers because (1) most families had only one income earner¹¹⁸ and (2) our tax rates are progressive. For example, in a community property state, a married man making \$100,000 a year who had a non-working spouse could report only \$50,000 on his separate return and the wife also could report \$50,000 on her separate return. However, because the tax rates were progressive and the same rate schedule applied to joint and separate returns, the single \$100,000 return would result in more tax due than two separate \$50,000 returns. Largely due to two Supreme Court decisions, *Poe v. Seaborn*¹¹⁹ and *Lucas v. Earl*,¹²⁰ even though the IRS attacked most forms of income splitting, such as intra-family gifts, it respected the income splitting inherent in state community property regimes, giving those states a tax advantage for married couples.¹²¹ Policy makers viewed this use of separate returns to legally avoid

¹¹² Tax rates are applied in order and build upon each other. Thus, the first bracket produces a tax of \$200 (\$20,000 * 1%), and the second bracket produces a tax of \$400 (\$40,000 - \$20,000 * 2%). The total tax is \$600 (\$200 + \$400).

¹¹³ Each return is taxed only at the first bracket, and thus, each return produces a tax of \$200.

¹¹⁴ Currently, nine states have community property schemes of property ownership: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Alaska allows couples to elect property to be classified as community property. Ronald A. Giller, Lisa K. Gamer & Adam L. Sheps, *Yours, Mine, Ours, and Theirs: The Role of Spousal Guaranties and Consents in the Franchise Relationship*, 33 *FRANCHISE L.J.* 71, 78 n.19 (2013).

¹¹⁵ Ventry, *supra* note 108, at 1471; *see also*, Lily Kahng, *One is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 *HASTINGS L.J.* 651, 654 (2010) (explaining the Supreme Court's reasoning in *Poe v. Seaborn* that "community property income vested in the marital unit, not with the individual spouse who earned it, and that, therefore, half of it belonged to each spouse.").

¹¹⁶ Ventry, *supra* note 108, at 1468–69. Rates are considered progressive when lower levels of income are subject to a lower rate of tax than higher levels of income.

¹¹⁷ Tax Rates History, *supra* note 111 (tax rates applicable starting in 1941).

¹¹⁸ Ventry, *supra* note 108, at 1467 (noting an average female rate of labor participation of 9% in 1920).

¹¹⁹ *Poe v. Seaborn*, 282 U.S. 101 (1930).

¹²⁰ *Lucas v. Earl*, 281 U.S. 111 (1930).

¹²¹ Ventry, *supra* note 108, at 1479.

taxes with a great deal of suspicion.¹²² Thomas Adams, chair of the Treasury's Tax Advisory Board, went so far as to deem it a "major evil."¹²³

In 1948, Congress decided to equalize the treatment of community and non-community property states and adopted the income-splitting joint return.¹²⁴ Under this legislation, all married couples, whether in community property states or not, could file jointly and their income, regardless of actual ownership, was deemed owned half by each spouse.¹²⁵ The single rate was then applied to each half and both taxes were reported on the single joint return.¹²⁶ This allowed married couples in non-community property states to replicate on a joint return what couples in community property states could achieve prior to 1948 with separate returns. In 1955, as part of a complete rewrite of the tax code, Congress adopted a separate rate table for married couples filing jointly, but the brackets were exactly double the brackets that applied to married couples filing separately.¹²⁷ Thus, the income splitting effect was exactly the same as with the tax calculation procedure adopted in 1948.

While the 1948 joint return created a measure of parity between community property and non-community property states, new issues and concerns arose. In particular, concern soon grew that single taxpayers were being treated unfairly relative to their married counterparts. In 1951, Congress adopted the head of household filing status to address the unfairness concern with respect to sympathetic single people—those supporting families.¹²⁸ By the late 1960s, Congress was ready to address the inequities in the tax rates for all single people. Thus, starting in 1971, Congress enacted a new rate bracket for singles that was more generous than the rate brackets applicable to married couples.¹²⁹ In 1977, the brackets were reformed once again. The married filing separate brackets continued to be half the brackets applicable to married filing joint taxpayers, and single taxpayers continued to be treated more generously than married filing

¹²² Ventry, *supra* note 108, at 1470.

¹²³ Thomas S. Adams, *Fundamental Problems of Federal Income Taxation*, 35 Q.J. ECON. 527, 534 (1921).

¹²⁴ Ventry, *supra* note 108, at 1518. *See also* Kahng, *supra* note 115, at 660 (noting the adoption of the joint return was a matter of political expediency rather than the result of reasoned tax policy analysis).

¹²⁵ Revenue Act of 1948, Pub. L. 80-471, 62 Stat. 114. *See also* California Law Review, *Joint Income Tax Returns under the Revenue Act of 1948*, 36 CAL. L. REV. 289 (1948), available at <http://scholarship.law.berkeley.edu/californialawreview/vol36/iss2/6>.

¹²⁶ Tax Rates History, *supra* note 111 (tax rates applicable in 1949).

¹²⁷ Internal Revenue Code of 1954, Pub. L. 83-591, 68A Stat. 3; Tax Rates History, *supra* note 111 (tax rates applicable in 1955).

¹²⁸ Kahng, *supra* note 115, at 655; *see also* Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 611 (2010).

¹²⁹ Tax Reform Act of 1969, Pub. L. 91-172, 83 Stat. 487; Tax Rates History, *supra* note 111 (tax rates applicable in 1971). Income of a single taxpayer between \$4,000 and \$44,000 was taxed at a lower rate than the same income on a married filing separate return.

separate taxpayers.¹³⁰ Starting with the Tax Reform Act of 1986,¹³¹ the difference between single brackets and married filing separate brackets has been lessened, but the disparity continues even up to our current brackets.¹³²

Concern over the proper tax treatment of married couples has permeated tax policy debates for a century. Congress has amended the tax code multiple times to make changes to the rate structures in an attempt to create equity between different groups of taxpayers but has never offered a consistent explanation for the resulting relative distribution of marriage penalties and bonuses in the Code.¹³³ Consistent throughout the years, though, is a concern that married couples not use separate returns to produce a better tax result than would be generally available on a joint return.

B. Filing Status Choices for Married People

Most academic commentary has focused on whether a couple pays more tax as a married couple or as a cohabiting couple, with some interest in comparing the treatment of single people relative to married taxpayers.¹³⁴ Comparing the tax difference between being single or married, focusing just on tax rates, couples with a single wage earner (or very unequal earnings) generally are better off being married (and filing jointly) than being single.¹³⁵ Conversely, couples with two relatively equal wage earners frequently are

¹³⁰ Revenue Act of 1978, Pub. L. 95-600, 92 Stat. 2763. Not only did rates in the middle of the bracket continue to be lower for single returns than for married filing separate returns, for the first time, the income levels at which the rates apply diverged, with the result that single taxpayers could shelter more income at lower rate brackets than taxpayers using married filing separate status. Thus, for example, in 1978 a single taxpayer with \$2,000 of income paid no taxes because income up to \$2,200 was taxed in the 0% bracket. A married taxpayer filing separately with \$2,000 of income owed \$56 of tax because only the first \$1,600 of income was in the 0% bracket. *Id.*

¹³¹ Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085.

¹³² 26 U.S.C. § 1 (Supp. 2014); Rev. Proc. 2014-61, 2014-47 I.R.B. 860 (Nov. 17, 2014). The first two brackets (10% and 15%) follow the doubling rule, single is the same as married filing separate and married filing separate is half of married filing joint. After that, however, there is a divergence, and single taxpayers can shield more income at the lower rate brackets than married taxpayers filing separately.

¹³³ See Lawrence Zelenak, *For Better and Worse: The Differing Income Tax Treatments of Marriage at Different Income Levels*, 93 N.C.L. REV. 783, 789 (2015).

¹³⁴ See, e.g., Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L.REV. 1389 (1975); James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 Conn. L. Rev. 1409 (2010); and Kahng, *supra* note 115.

¹³⁵ For example, under the 2014 brackets, a married couple with a single wage earner who has \$100,000 of taxable income will have lower taxes on a joint return than they would were they taxed separately. The married couple with a joint return would be in the 25% marginal tax bracket (the bracket at which the last dollar of income is taxed) and would owe \$16,857.50 of tax on a joint return, whereas the wage earner with a separate return would be in the 28% marginal tax bracket and would owe \$21,293.25 of tax on a separate return (the non-earning partner would owe \$0 in taxes). These calculations ignore the potential effect of deductions and credits.

better off single than married, a phenomenon colloquially known as the “marriage penalty tax.” Less attention (almost none) has been paid to whether married taxpayers generally better off filing jointly or separately. There is no advantage or disadvantage built into the tax rates for couples with two relatively equal wage earners (or couples in community property states where income is divided equally as a matter of law). However, for the couple with a single wage earner (or very unequal incomes), joint filing is definitely to their advantage because of the progressive nature of our rate brackets. Only in uncommon situations would a married couple be better off filing separately due solely to rates.¹³⁶ Thus, the filing choices available to married individuals are critically important to understanding the implications of denying tax benefits to married couples filing separate returns.

There are four filing statuses that are possible for federal income tax returns: single, head of household, married filing jointly, and married filing separately.¹³⁷ Married people must consider carefully the filing status they will use when they file a federal income tax return. The first step in the analysis is to determine whether or not the taxpayer is married for purposes of the Code, a question that is not as straightforward as one might hope.¹³⁸ Section 7703(a) of the Code provides a definition of marriage that in some respects departs from a common understanding of what it means to be married. First, the determination of whether an individual is married or not is made as of the last day of the tax year.¹³⁹ Thus, individuals who marry during the year are considered married for the year and individuals who divorce

¹³⁶ For example, if a low-earning spouse has high medical expense deductions, he or she might be better off filing separately if those deductions would not be allowed due to the adjusted gross income floor were the couple to file jointly. Another example is when a low-earning spouse has significant capital gain or dividend income; that passive income might be taxed a lower rate if the lower-earning spouse files separately. See Alden Wicker, *Tax Time: Should a Married Couple Ever File Separately?*, LEARNVEST.COM (Feb. 26, 2014), <http://www.learnvest.com/knowledge-center/when-should-a-married-couple-file-alone/2/>.

¹³⁷ Qualifying widows or widowers are eligible to be treated as if they were married filing jointly. 26 U.S.C. § 1(a) (Supp. 2014).

¹³⁸ The analysis becomes much more complex when one or both the spouses are nonresident aliens. A resident (or nonresident) of the United States for tax purposes is not defined solely by immigration laws. A person can be a U.S. resident for tax purposes (1) if he or she is a lawful permanent resident under the U.S. immigration laws or (2) if he or she meets a substantial presence test designed to determine whether the person was physically present in the United States (authorized or not) for a substantial amount of time during the tax year. 26 U.S.C. § 7701(b) (Supp. 2014). See also *Blankson v. Commissioner*, No. 10845-00S, Tax Ct. Summary LEXIS 12 (Feb. 14, 2003). Notice that an undocumented person can be considered a resident alien for tax purposes. A thorough discussion of this topic is beyond the scope of this article. However, for an excellent discussion of the issues involved, see Francine J. Lipman, *Taxing Undocumented Immigrants: Separate, Unequal, and Without Representation*, 59 TAX LAW. 813 (2006).

¹³⁹ 26 U.S.C. § 7703(a)(1) (2012). There is an exception when a spouse dies during the tax year, in which case the determination is made as of the time of death. *Id.* In other words, if the spouses were married at death, they are married for that tax year.

during the year are considered unmarried for the year.¹⁴⁰ Second, individuals who are legally separated under a decree of divorce or separate maintenance are not considered married.¹⁴¹ Notice that under both rules, the marriage determination applies equally to both of the spouses; they are both either married or unmarried under these rules. The Code § 7703(a) definition of marital status applies only to Code §§ 1, 2, 3, and 5 and when it is specifically referenced elsewhere in the Code.¹⁴²

Taxpayers who are considered married under Code § 7703 are never allowed to elect single filing status.¹⁴³ Taxpayers who are considered married are always permitted to elect joint filing status, even if they live apart.¹⁴⁴ However, filing jointly is an affirmative election that must be made with the consent of both parties.¹⁴⁵ Taxpayers who are considered married and who do not elect to file jointly may file as married filing separately.¹⁴⁶ Notice that if one spouse does not consent to joint filing and instead files as married filing separately, the other spouse is unable to elect joint filing status and also is unable to file as single.¹⁴⁷ The other spouse may file as head of household if he or she qualifies, but otherwise, he or she must also file as married filing separately.¹⁴⁸ If the taxpayers are considered unmarried under Code § 7703(a), then either may file as single.¹⁴⁹

There is one other possible option that could enable a married person (in the conventional sense) to file a return separate from his or her spouse and preserve the Premium Tax Credit, the EITC, and other tax benefits. Code § 7703(b) contains a special rule that allows a person considered married under Code § 7703(a) to nevertheless be considered unmarried and use head of household filing status.¹⁵⁰ This special rule applies if (1) the spouses lived apart for the last six months of the year,¹⁵¹ (2) the taxpayer shared a home for more than one-half of the tax year with his or her son,

¹⁴⁰ *Id.*

¹⁴¹ 26 U.S.C. § 7703(a)(2) (2012). This is determined by reference to state law, but not all state court orders constitute a decree of divorce or a decree of separate maintenance. *See, e.g., Frazier v. Comm’r*, 638 F.2d 63 (8th Cir. 1981) (holding that an order of support and protection issued by a state court was not a legal separation under Code § 152).

¹⁴² 26 U.S.C. § 7703(a) (2012).

¹⁴³ 26 U.S.C. § 1(c) (Supp. 2014) (the tax rates applicable to the single filing status apply “to every individual (other than a surviving spouse as defined in section 2(a) or the head of a household as defined in § 2(b)) who is not a married individual (as defined in § 7703) . . .”).

¹⁴⁴ 26 U.S.C. § 1(a) (Supp. 2014) (the tax rates applicable to the married filing joint filing status apply to “every married individual (as defined in § 7703) who makes a single return jointly with his spouse under section 6013 . . .”).

¹⁴⁵ The Code provides that spouses “may” file a joint return. 26 U.S.C. § 6013(a) (2012).

¹⁴⁶ 26 U.S.C. § 1(d) (Supp. 2014).

¹⁴⁷ 26 U.S.C. § 1 (Supp. 2014).

¹⁴⁸ *Id.*

¹⁴⁹ 26 U.S.C. § 1(c) (Supp. 2014).

¹⁵⁰ 26 U.S.C. §§ 7703(b), 1(b) (2012).

¹⁵¹ 26 U.S.C. § 7703(b) (2012).

daughter, stepson, stepdaughter, or eligible foster child,¹⁵² (3) the taxpayer is entitled to a deduction for the child under Code § 151 or would be but for the fact that the taxpayer waived his or her right in favor of the noncustodial parent,¹⁵³ and (4) the taxpayer paid over one-half of the cost of maintaining the home during the year.¹⁵⁴ Notice that these rules are slightly different than the normal head of household rules applicable to unmarried people or taxpayers considered unmarried; the category of dependents that must live in the home is much more restrictive for the married person head of household rules than for the regular head of household rules.¹⁵⁵ Married persons must have a child, stepchild, or foster child living with them for whom they are entitled to a dependent exemption amount (or would be so entitled except for the fact that they shifted that exemption amount to the noncustodial parent under Code § 152(e)).¹⁵⁶ By contrast, unmarried persons may qualify for head of household based on any dependent for whom they are entitled to an exemption amount, including grandchildren, parents, grandparents, siblings, nieces and nephews, and aunts or uncles.¹⁵⁷

This special married head of household rule applies separately to each taxpayer. Each spouse may qualify as an unmarried head of household under the special rule, although each would have to qualify on the basis of different children due to the requirement that the child live with the taxpayer more than one-half of the year. For example, this could happen if the spouses live apart at least the last six months of the year and, after the separation, mom and dad each have a qualifying child living with them either because they have split custody of their shared children or each has their own children from a prior relationship. Alternatively (and commonly), the custodial parent will qualify under the special rule as an unmarried head of household and the noncustodial parent will still be considered married under the Code. The noncustodial parent, in this case, must file as married filing separately and lose the Premium Tax Credit, the EITC, and other tax benefits.

¹⁵² The term “eligible foster child” means “an individual who is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction.” 26 U.S.C. § 152(f)(1)(C) (2012).

¹⁵³ A custodial parent is entitled to claim a child as a dependent on his or her tax return by virtue of the fact that the custodial parent lives longer during the year with the child than a noncustodial parent. However, the Code allows a custodial parent to waive his or her right to the dependent exemption amount and the Child Tax Credit in favor of the noncustodial parent by signing IRS Form 8332. 26 U.S.C. § 152 (2012). Note that the custodial parent may not shift to a noncustodial parent the right to use the child to qualify for head of household filing status or for claiming an EITC. *Id.*; see Robert G. Nassau, *How to Split the Tax Baby: What Would Solomon Do?*, 61 SYRACUSE L. REV. 83, 101 (2010); see also Pareja, *supra* note 24, at 17–18, 28–30.

¹⁵⁴ 26 U.S.C. § 2(b)(1) (2012).

¹⁵⁵ 26 U.S.C. §§ 2(b), 7703(b) (2012).

¹⁵⁶ 26 U.S.C. § 7703(b) (2012).

¹⁵⁷ 26 U.S.C. § 2(b) (2012).

What should be clear from this discussion is that a married person's filing status is directly affected by actions and decisions of the other spouse. If one spouse refuses to file a joint return, the other spouse is precluded from filing a joint return on his or her own volition.

C. Tax Benefits Lost When Using Married Filing Separately

What are the consequences of wanting to or being forced to file a married filing separate return? Taxpayers who file as married filing separately are prohibited from taking advantage of some very significant tax benefits. The Premium Tax Credit is only the latest tax benefit denied to married taxpayers not filing a joint return.¹⁵⁸ They also are prohibited from taking (1) the credit for child and dependent care expenses,¹⁵⁹ (2) the EITC,¹⁶⁰ (3) the exclusion or credit for adoption expenses,¹⁶¹ (4) the American Opportunity Credit (for educational expenses),¹⁶² (5) the Lifetime Learning Credit (for educational expenses),¹⁶³ (6) the deduction for student loan interest,¹⁶⁴ (7) the deduction for tuition and fees,¹⁶⁵ (8) the exclusion from income for interest on qualified U.S. savings bonds used for higher

¹⁵⁸ 26 U.S.C. § 36B(c)(1)(C) (2012) (“If the taxpayer is married (within the meaning of section 7703) at the close of the taxable year, the taxpayer shall be treated as an applicable taxpayer only if the taxpayer and the taxpayer’s spouse file a joint return for the taxable year.”).

¹⁵⁹ 26 U.S.C. § 21(e)(2) (2012) (“If the taxpayer is married at the close of the taxable year, the credit shall be allowed . . . only if the taxpayer and his spouse file a joint return for the taxable year.”); 26 U.S.C. §§ 21(e)(3)–(4) (2012) (explaining exceptions for married persons who are legally separated and for a married person who qualifies for the special married head of household rules but only if the child that qualifies the taxpayer for head of household status is the same child that qualifies the taxpayer for the child and dependent care expense credit); 26 U.S.C. § 21(e)(5) (2012) (noting custodial parents cannot shift to noncustodial parents the right to use a child for purposes of claiming the child and dependent care expense credit).

¹⁶⁰ 26 U.S.C. § 32(d) (Supp. 2014) (“In the case of an individual who is married (within the meaning of section 7703), this section shall apply only if a joint return is filed for the taxable year under section 6013.”).

¹⁶¹ 26 U.S.C. § 23(f)(1) (Supp. 2013) (“Rules similar to the rules of paragraphs (2), (3), and (4) of section 21(e) [the child and dependent care expense credit] shall apply for purposes of this section.”).

¹⁶² 26 U.S.C. § 25A (Supp. 2014) (“If the taxpayer is a married individual (within the meaning of section 7703), this section shall apply only if the taxpayer and the taxpayer’s spouse file a joint return for the taxable year.”). The American Opportunity Credit was previously known as the Hope Scholarship Credit.

¹⁶³ *Id.*

¹⁶⁴ 26 U.S.C. § 221(e)(2) (Supp. 2014) (“If the taxpayer is married at the close of the taxable year, the deduction shall be allowed under subsection (a) only if the taxpayer and the taxpayer’s spouse file a joint return for the taxable year”); 26 U.S.C. § 221(e)(3) (Supp. 2014) (“Marital status is determined in accordance with section 7703.”).

¹⁶⁵ 26 U.S.C. § 222(d)(4) (Supp. 2014) (“If the taxpayer is a married individual (within the meaning of section 7703), this section shall apply only if the taxpayer and the taxpayer’s spouse file a joint return for the taxable year.”).

education expenses,¹⁶⁶ and (9) the credit for the elderly or disabled, if the spouses lived together at any point during the year.¹⁶⁷ In addition, a greater percentage (up to 85%) of Social Security benefits is includable in income when filing as married filing separately.¹⁶⁸ In addition, the exemption amount is halved for figuring the alternative minimum tax,¹⁶⁹ the maximum exclusion amount under an employer's dependent care assistance plan,¹⁷⁰ and the capital loss deduction limit,¹⁷¹ presumably on the assumption that the other spouse is entitled to claim the other half. The phase-out triggers are halved for claiming the Child Tax Credit,¹⁷² the retirement savings contributions credit,¹⁷³ the deduction for "personal exemptions,"¹⁷⁴ and

¹⁶⁶ 26 U.S.C. § 135(d)(3) (2012) ("If the taxpayer is a married individual (within the meaning of section 7703), this section shall apply only if the taxpayer and his spouse file a joint return for the taxable year.").

¹⁶⁷ 26 U.S.C. § 22(e)(1) (2012) ("Except in the case of a husband and wife who live apart at all times during the taxable year, if the taxpayer is married at the close of the taxable year, the credit provided by this section shall be allowed only if the taxpayer and his spouse file a joint return for the taxable year."); 26 U.S.C. § 22(e)(2) (2012) ("Marital status shall be determined under section 7703.").

¹⁶⁸ 26 U.S.C. §§ 86(c)(1)(C), (c)(2)(C) (2012) (providing that Social Security benefits and Railroad Retirement Benefits are included in income if they exceed a certain threshold, calculated in part by reference to a "base amount" or an "adjusted base amount" and specifying that the "base amount" and "adjusted base amount" is lowered to zero for a "taxpayer who is married as of the close of the taxable year (within the meaning of section 7703) but does not file a joint return for such year [if the taxpayer] does not live apart from his spouse at all times during the taxable year.").

¹⁶⁹ 26 U.S.C. § 55(d)(1)(C) (Supp. 2014) (the "exemption amount means 50 percent of the dollar amount applicable under subparagraph (A) [for joint returns] in the case of a married individual who files a separate return.").

¹⁷⁰ 26 U.S.C. § 129(a)(2)(A) (2012) ("The amount which may be excluded under paragraph (1) for dependent care assistance with respect to dependent care services provided during a taxable year shall not exceed \$5,000 (\$2,500 in the case of a separate return by a married individual"); 26 U.S.C. § 129(a)(2)(C) (2012) ("For purposes of this paragraph, marital status shall be determined under the rules of paragraphs (3) and (4) of section 21(e)."); 26 U.S.C. §§ 21(e)(3), (e)(4) (2012) (noting exceptions for married persons who are legally separated and for a married person who qualifies for the special married head of household rules (but only if the child that qualifies the taxpayer for head of household status is the same child that qualifies the taxpayer for the child and dependent care expense credit)).

¹⁷¹ 26 U.S.C. § 1211(b) (2012) ("In the case of a taxpayer other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus (if such losses exceed such gains) the lower of (1) \$3,000 (\$1,500 in the case of a married individual filing a separate return), or (2) the excess of such losses over such gains.").

¹⁷² 26 U.S.C. § 24(b)(1) (Supp. 2014) ("The amount of the credit allowable under subsection (a) shall be reduced (but not below zero) by \$50 for each \$1,000 (or fraction thereof) by which the taxpayer's modified adjusted gross income exceeds the threshold amount."); 26 U.S.C. § 24(b)(2) (Supp. 2014) ("[T]he term 'threshold amount' means (A) \$110,000 in the case of a joint return, (B) \$75,000 in the case of an individual who is not married, and (C) \$55,000 in the case of a married individual filing a separate return. For purposes of this paragraph, marital status shall be determined under section 7703.").

¹⁷³ 26 U.S.C. § 25B (Supp. 2015) (providing a refundable credit for low-income taxpayers who contribute to a qualified retirement plan equal to a percentage (that varies based on adjusted gross income) of up to \$2,000 of their contributions; taxpayers filing a joint

itemized deductions,¹⁷⁵ presumably because the other spouse will be subject to similar phase-out rules. More egregiously, the income cap beyond which a taxpayer is ineligible to contribute to a Roth IRA is almost zeroed out for married filing separate taxpayers that have lived together at any point during the year (for married filing separate taxpayers who lived apart the entire year, the phase-out triggers are lowered, but not to half the triggers for married filing joint taxpayers).¹⁷⁶ Starting in 2013, there was an increase in the Medicare payroll tax for higher-income taxpayers (the “additional Medicare tax”)¹⁷⁷ and an additional surtax on unearned income of higher-income taxpayers (the “unearned income Medicare contribution tax”).¹⁷⁸ The income triggers above which these taxes apply are halved for married filing separate taxpayers as compared to married filing joint taxpayers.¹⁷⁹

return are eligible for the full credit; taxpayers filing as head of household are eligible for 75% of the credit amount; all other taxpayers, including those filing as married filing separately, are eligible for 50% of the credit amount).

¹⁷⁴ 26 U.S.C. § 151(d)(3)(B) (2012) (“In the case of a married individual filing a separate return, the preceding sentence shall be applied by substituting ‘\$1,250’ for ‘\$2,500.’”).

¹⁷⁵ 26 U.S.C. § 68 (Supp. 2013). Itemized deductions (other than medical expenses, investment interest, and casualty or theft losses) are gradually phased out for taxpayers whose adjusted gross income exceeds certain thresholds. The threshold is highest for taxpayers filing a joint return or who are surviving spouses. *Id.* The threshold is reduced for a “head of household (as defined in section 2(b)),” reduced further for an “individual who is not married and who is not a surviving spouse or head of household,” and is cut in half “in the case of a married individual filing a separate return.” 26 U.S.C. § 68(b)(1) (Supp. 2013). “For purposes of this paragraph, marital status shall be determined under section 7703.” *Id.*

¹⁷⁶ 26 U.S.C. § 408A(c) (2008) (2012). A taxpayer can contribute up to the maximum amount to a Roth IRA if his or her modified adjusted gross income is less than a threshold amount. The maximum contribution amount phases out and ultimately falls to zero at a particular level of modified adjusted gross income. *Id.* In 2014, a married couple filing jointly had a phase out range of \$181,000 to \$191,000. I.R.S. Notice 2013-73; 2013-49 I.R.B. 598 (Dec. 2, 2013) (provides inflation adjusted amounts for 2014). A taxpayer using married filing separately has a phase out range of \$114,000 to \$129,000 (fairly generous as it is 60-70% of the phase out range for married filing jointly taxpayers). *Id.* However, these generous limits apply only if the married taxpayers did not live together at any point during the tax year. 26 U.S.C. § 408A (2012) (incorporating Code § 219(g)(4) for determining marital status); 26 U.S.C. § 219(g)(4) (Supp. 2014) (defining individuals who file separate returns and who “live apart at all times” during the year as unmarried). If wife or husband moved out on January 2, the phase out range drops to unconscionable levels, indicating an intent to penalize. Such a taxpayer is ineligible to make any contribution to a Roth IRA if his or her modified adjusted gross income is more than \$10,000. 26 U.S.C. § 408A(c) (2012). If the taxpayer makes under \$10,000, their maximum contribution still is mathematically incapable of ever being as high as the maximum normally allowed by law. *Id.*

¹⁷⁷ 26 U.S.C. § 1401(b)(2) (Supp. 2014) (applying the additional tax to self-employment income); 26 U.S.C. § 3101(b)(2) (Supp. 2014) (applying the additional tax to wages).

¹⁷⁸ 26 U.S.C. § 1411 (2012).

¹⁷⁹ 26 U.S.C. § 1401(b)(2)(A)(ii) (Supp. 2014) (“in the case of a married taxpayer (as defined in section 7703) filing a separate return, ½ of the dollar amount determined under clause (i)”); 26 U.S.C. § 1301(b)(2)(B) (Supp. 2014) (“in the case of a married taxpayer (as defined in section 7703) filing a separate return, ½ of the dollar amount determined under

This paper does not purport to exhaustively list or analyze all the different ways that married filing separate taxpayers are treated differently (and most often worse) than married filing joint taxpayers.¹⁸⁰ Some of the differences listed above seem to be sensible policy approaches—it makes sense to divide most tax attributes in half, allowing each spouse to take advantage of their own half on a separate return. These approaches make sense, at least to the extent that the spouses share a household and a married taxpayer filing a separate return is treated no worse than a taxpayer filing a single return. But some of the differences listed above, in particular the outright denial of tax credits and deductions, appear merely punitive.

IV. HOW CURRENT LAW IMPACTS REAL TAXPAYERS

A. *Loss of Premium Tax Credit Generally*

Imagine for a moment that the IRS had not issued the notice and temporary regulations extending an exception from the joint filing requirement for victims of domestic abuse and spousal abandonment. If a taxpayer is married, he or she must file a joint return to be eligible for the Premium Tax Credit.¹⁸¹ A taxpayer is considered married if he or she is considered married under Code § 7703, as discussed above in Part III.B. Thus, if the taxpayer is divorced or legally separated during the year, he or she is considered unmarried and should have no problem claiming the credit on a single or head of household return.¹⁸² If the taxpayer has not divorced or legally separated during the year, the only other possibility for filing a return without the participation of the spouse while preserving the Premium Tax Credit, EITC, and other tax benefits is if the taxpayer qualifies under the special married head of household rules. If the taxpayer has not lived with his or her spouse during the last six months of the year, and if the taxpayer pays more than one-half of the cost of maintaining a home, and if the taxpayer has a dependent child living in the home for more than six months during the year, then the taxpayer is eligible to be considered unmarried, can use head of household filing status (but not single filing status) and should be eligible for the Premium Tax Credit.¹⁸³ The other spouse likely is still considered married and must file as married filing separately, losing the

subparagraph (A)"); 26 U.S.C. § 1411(b)(2) (2012) (“in the case of a married taxpayer (as defined in section 7703) filing a separate return, ½ of the dollar amount determined under paragraph (1).”).

¹⁸⁰ For example, the Code disallows an above-the-line deduction for expenses of a qualified performing artist who files separately from his or her spouse unless the spouses happen to live apart for the entire year. 26 U.S.C. § 62(b)(3) (Supp. 2014).

¹⁸¹ 26 U.S.C. § 36B(c)(1)(C) (2012).

¹⁸² 26 U.S.C. § 7703 (2012).

¹⁸³ *Id.*

Premium Tax Credit (unless he or she has a different dependent child who has lived with him or her more than six months of the year).¹⁸⁴

Olga, one of the women introduced at the beginning of this article, would not qualify under these rules to use the head of household filing status. This is because she did not live apart from her husband the last six months of the tax year; her husband disappeared only a month ago. Theresa also would not qualify to use the head of household filing status. Because her father helps her with the rent most months, she probably will not be able to show that she pays more than half the cost of maintaining her home.

Olga and Theresa are not unusual. There are multiple ways in which a married taxpayer may fail to qualify as unmarried and thus lose the benefit of the Premium Tax Credit. The spouses must move apart prior to July 1 and stay apart the final six months of the year. If the spouses delay moving out by one day, the Premium Tax Credit is forfeited. Realize, too, that a taxpayer must be prepared to prove the date of the move if he or she is audited.¹⁸⁵ If the spouses have a trial reunion in October, that could jeopardize the health insurance coverage for the family.¹⁸⁶

If the taxpayer does not have children (or the right kind of children – remember that only children, stepchildren, or foster children count, not grandchildren or nieces and nephews or in-laws), then until there is an actual divorce or legal separation, the only choice is between joint filing or losing the Premium Tax Credit. Even if the taxpayer has the right kind of children, but they happen to not live with him or her more than six months of the year (perhaps they were with grandma because mom and dad were fighting), then the taxpayer does not qualify for the married head of household rules, is considered married, and must choose between a joint return and getting the Premium Tax Credit or a separate return and sacrificing the credit.

If the taxpayer lived apart from his or her spouse the last half of the year, has the right kind of children, and the children lived with him or her more than six months of the year, but the taxpayer is not considered to have paid over one-half of the cost of maintaining the home during the year, the taxpayer ends up with the same stark choice between a joint return with the credit or a separate return without the credit. This could happen many different ways. The Treasury regulations under the Code § 2(e) head of household requirements, which are exactly the same as the married head of household requirements with respect to the household maintenance rules, explain that “[t]he cost of maintaining a household shall be the expenses incurred for the mutual benefit of the occupants” and instruct taxpayers to

¹⁸⁴ *Id.*

¹⁸⁵ The author recalls being a cash-starved law student and presumes that most low-income taxpayers (the ones to whom the Premium Tax Credit is targeted) do not use professional movers or other easily traceable services, probably relying instead on the friend of a friend with a pickup truck and a crew of buddies who will help for pizza and beer.

¹⁸⁶ The other spouse must not be a “member of [the] household” during the last six months of the year, a factual question subject to some nuance. 26 U.S.C. § 7703(b)(3) (2012).

“include property taxes, mortgage interest, rent, utility charges, upkeep and repairs, property insurance, and food consumed on the premises” but to exclude “the cost of clothing, education, medical treatment, vacations, life insurance, and transportation.”¹⁸⁷ It is useful to think of the distinction between expenses for maintaining a household (such as rent) and expenses for maintaining a person (such as clothing). IRS Publications 17 and 501 each provides a worksheet for determining whether or not this test is satisfied.

In addition to distinguishing between household and personal expenses, the taxpayer must identify the source of the money used to pay the household expenses.¹⁸⁸ The taxpayer must be the source for the funds used to pay more than half of the expenses of maintaining the household.¹⁸⁹ If other household members (or people or entities outside the household) are considered the source of the funds used to pay the household expenses, then those expenses cannot be credited toward the taxpayer. This can be very tricky and proof issues loom large. For example, earned income and investment income earned by a household member which is actually used to pay rent or utilities or some other item of household maintenance would count against the taxpayer.¹⁹⁰ Similarly, non-needs-based Social Security benefits paid on behalf of a dependent (such as survivor's benefits) count against the taxpayer if the amounts are actually spent on household maintenance items.¹⁹¹ The source of needs-based support payments provided by a state, such as SNAP (food stamps), TANF (welfare), or housing subsidies is considered to be the state, not the taxpayer.¹⁹² Similarly, foster care payments by a placement agency are considered provided by the agency, not the taxpayer.¹⁹³ Thus, a taxpayer who uses TANF payments to pay the rent is not considered to have paid that portion of the cost of maintaining the home (the state paid that portion).¹⁹⁴ However, a taxpayer who uses her own Social Security disability payments to pay the rent is considered to have paid that portion of the cost of maintaining the home.¹⁹⁵ Few households keep their household accounts with the level of detail that these rules seem to contemplate. Low-income taxpayers who have their head of household filing status challenged on audit often find that providing sufficient supporting documentation is nearly impossible due to the

¹⁸⁷ 26 C.F.R. § 1.2-2(d) (2015).

¹⁸⁸ IRS Pub. 17 at 23 (2013).

¹⁸⁹ *Id.*

¹⁹⁰ *See Dick v. United States*, 218 F. Supp. 839 (E.D. Wis. 1963) (analyzing whether such amounts are considered a dependent providing his or her own support under Code § 152); *see also* IRS Pub. 17 at 34 (2013).

¹⁹¹ *See Id.*; *see also* Rev. Rul. 57-344, 1957-2 C.B. 112.

¹⁹² IRS Pub. 501 at 9 (2013); *see also* IRS Pub. 17, *supra* note 188, at 34; *Lutter v. Comm'r*, 514 F.2d 1095 (1975); Rev. Rul. 71-468, 1971-2 C.B. 115.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

complexity of the rules, the passage of time, the cash nature of many of the transactions, and the often transient living situations of the taxpayers.

As should be clear, it is very easy for a low-income taxpayer to fail these head of household rules, either because of the receipt of income from other sources or because it is so common for taxpayers in poverty or on the edge of poverty to live in extended families to make ends meet. The author worked with one matriarch that lived in a home that included multiple extended family members. All of the adults worked low-wage jobs and all contributed to the household expenses, but none of them contributed more than half of the household expenses. The matriarch was still married, but had been living apart from her husband for years in a “poor man’s divorce.”¹⁹⁶ Her husband would not file jointly with her, and she really did not want to file jointly with him. Nor did she qualify under the head of household rules. Thus, she had to file her returns as married filing separately, losing a much-needed EITC. Today, she also would lose access to subsidized health insurance. To be clear, this article is not arguing (necessarily) that the head of household rules should be loosened; it is reasonable to extend head of household status to only one household member, and the current rules are a decent (if complex) way to determine who should be accorded that status. What this article objects to is tying eligibility for head of household status to the receipt of the Premium Tax Credit, the EITC, and other important tax benefits. That simply makes little policy sense.

The IRS’s exception alleviates the problem somewhat, but the relief is very limited. To qualify for the domestic abuse or abandoned spouse exception, a victim must (1) be living apart from the spouse when the return is filed and (2) be unable to file a joint return because of the abuse or abandonment.¹⁹⁷ Abandonment is determined based on all facts and circumstances and exists if “the taxpayer is unable to locate his or her spouse after reasonable diligence.”¹⁹⁸ Domestic abuse is defined fairly broadly as including “physical, psychological, sexual, or emotional abuse, including efforts to control, isolate, humiliate, and intimidate, or to undermine the victim’s ability to reason independently” and is determined based on all facts and circumstances.¹⁹⁹ The exception can only be claimed for three consecutive years.²⁰⁰

Olga probably does not qualify for the domestic abuse exception. Her husband has only been gone one month and all his personal effects are still in the house; thus she likely is considered to still be living with her spouse. She might qualify for the spousal abandonment exception if an absence of one month can be considered abandonment. However, she must

¹⁹⁶ Tumin, *supra* note 22.

¹⁹⁷ Final and temporary regulations, 79 Fed. Reg. 43,622 (July 28, 2014) (to be codified at 26 C.F.R. § 1.36B-2T(b)(2)).

¹⁹⁸ *Id.* § 1.36B-2T(b)(2)(iv).

¹⁹⁹ *Id.* § 1.36B-2T(b)(2)(iii).

²⁰⁰ *Id.* § 1.36B-2T(b)(2)(v).

exercise “reasonable diligence” to find him, and finding him might put her in danger. Theresa may not qualify for the exception either. There was domestic abuse, but it is less than clear that she is “unable” to file jointly at this point in time due to the abuse. Nor is she an abandoned spouse. Even if Theresa does qualify for the exception, she can only do so for three years and then the exception is lost. Because of her strongly-held religious beliefs, it is unlikely that she will obtain a divorce or legal separation within that time. As many as 15% of separated couples remain separated for 10 years or more, and most of these long-term separations are low-income racial and ethnic minorities with children.²⁰¹ Understand that even if Olga or Theresa qualifies for the limited exception, it works only to protect the Premium Tax Credit. Both women would still lose any EITC, adoption credit, or the myriad of other tax benefits that require joint filing.

A curious (or skeptical) person might question where the IRS derives the authority to create the domestic abuse exception for the Premium Tax Credit.²⁰² The IRS did not delineate its authority when it issued the proposed or temporary regulations. A thorough analysis of this issue is beyond the scope of this article. However, some general principles are useful to consider. Code § 7805 provides a general grant of interpretive authority:

Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alternation of law in relation to internal revenue.²⁰³

Thus, the IRS has general authority to issue regulations if they are “needful” for “enforcement.” In addition, the Code provides a specific grant of regulatory authority with respect to the Premium Tax Credit. Code

²⁰¹ Tumin, *supra* note 22.

²⁰² The IRS's interpretation that extends the Premium Tax Credit to enrollees in federally-facilitated exchanges is currently being reviewed by the Supreme Court. *See supra* note 94. Professor Andy Grewal has written a series of blog posts about other instances where IRS regulations appear contrary to the text of the ACA. Andy Grewal, *Another “Glitch” with the ACA Tax Credit?*, YALE J. ON REG. NOTICE AND COMMENT (Mar. 30, 2015), <http://www.yalejreg.com/blog/another-glitch-with-the-aca-tax-credit-by-andy-grewal>; Andy Grewal, *Unlawful Aliens and ACA Tax Credits*, YALE J. ON REG. NOTICE AND COMMENT (Mar. 31, 2015), <http://www.yalejreg.com/blog/unlawful-aliens-and-aca-tax-credits-by-andy-grewal>; Andy Grewal, *Another Illegal Expansion of the ACA Tax Credit*, YALE J. ON REG. NOTICE AND COMMENT (Apr 6, 2015), <http://www.yalejreg.com/blog/another-illegal-expansion-of-the-aca-tax-credit-by-andy-grewal>; Andy Grewal, *Employer Consequences of the Illegal ACA Tax Credit Expansion*, YALE J. ON REG. NOTICE AND COMMENT (Apr. 7, 2015), <http://www.yalejreg.com/blog/employer-consequences-of-the-illegal-aca-tax-credit-expansion-by-andy-grewal>.

²⁰³ 26 U.S.C. § 7805(a) (2012).

§ 36B(g) provides, “The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section”²⁰⁴ The Code created a general rule requiring married couples to file jointly; however, as discussed in this article and as recognized by the IRS, filing jointly is an impossibility for some taxpayers and dangerous for others. Thus, there is an inherent conflict in the statute. It seems highly unlikely that Congress intended to deny subsidized health care to individuals who find it impossible to file a joint return due to spousal abandonment or domestic violence. Thus, the author posits that the IRS permissibly used its grant of regulatory authority to resolve this conflict.

B. Reasons for Avoiding Joint Filing

What is so bad about joint filing? Why might someone want to avoid it? Understand that the economic benefit from income splitting on a joint return is not very great in many low-income households, either because both partners must work to make ends meet or because the couple already is in the lowest tax brackets. The marriage penalties and bonuses that exist at lower income levels arise primarily from the structures of the various tax credits aimed at children and families, such as the EITC.²⁰⁵ However, there is no “bonus” or “penalty” built into the rates as between married filing jointly taxpayers and married filing separately taxpayers; the married filing separate brackets are exactly half the married filing joint brackets.²⁰⁶ Once a couple is married, the rates themselves do not incentivize joint or separate filing. Significantly, however, filing a joint return results in joint and several liability of the spouses for the tax assessed as a result of that return.²⁰⁷ Thus, the IRS can collect the amount due from either or both of the spouses and is under no obligation to evenly or proportionately collect the taxes. Significantly, this is true not only for the amount shown as due on the return but also for any deficiencies found after an audit or penalties that are assessed.²⁰⁸ Thus, a married person assumes risk when filing a joint return—risk that the other spouse is a tax cheat.

²⁰⁴ 26 U.S.C. § 36B(g) (2012).

²⁰⁵ Zelenak, *supra* note 133, at 795.

²⁰⁶ 26 U.S.C. § 1 (Supp. 2014).

²⁰⁷ 26 U.S.C. § 6013(d) (2012). The inquiry focuses on whether there was intent to file a return, rather than on whether the return was signed or unsigned. *Krock v. Comm’r, T.C. Memo 1983-551*. Thus, in a situation where one spouse forges the signature of the other spouse and where there is no tacit consent to the filing of the return (a relatively common occurrence in domestic abuse situations), the IRS does not consider the non-signing spouse to have “filed” a return and there is no joint and several liability. I.R.M. 25.15.1.2.4 (updated July 30, 2014), available at http://www.irs.gov/irm/part25/irm_25-015-001.html#d0e207. Additionally, where a spouse signs a return under duress, there is no intent to file a joint return and no joint and several liability. 26 C.F.R. § 1.6013-4(d) (2014).

²⁰⁸ NAT’L TAXPAYER ADVOCATE, INTERNAL REVENUE SERVICE, 2013 ANNUAL REPORT TO CONGRESS, VOL. 1, MOST LITIGATED ISSUE NUMBER 10: RELIEF FROM JOINT AND SEVERAL LIABILITY UNDER IRC § 6015 408, 408 (2013), available at <http://www.irs.gov>.

The Code allows for relief from joint and several liability through what is termed “innocent spouse” relief.²⁰⁹ However, obtaining innocent spouse relief can be a long and difficult process and it can be difficult to prevail without legal counsel.²¹⁰ Additionally, the non-requesting spouse has a right to participate in the process and is given an opportunity to respond to the allegations in the request.²¹¹ If the case ultimately is appealed to the Tax Court, the other spouse has a right to certain information and may intervene in the proceedings.²¹² While both the IRS and the Tax Court have procedures to protect domestic violence victims, the prospect of facing their abuser is often enough for a victim to forego requesting innocent spouse relief. This can be the case even for victims who have already escaped the situation and are divorced. The author worked with a client in a low income taxpayer clinic who refused to request innocent spouse relief for fear that her ex-husband would retaliate by further poisoning her relationship with their grown children.²¹³

Joint filing also requires cooperation between the spouses. For victims of domestic violence, this could be downright dangerous and, if there is a protective order in place, contact might be prohibited. Low-income individuals rarely have the resources to arrange for third party intermediaries to handle the information exchanges and joint decision making that joint filing requires. Despite these very legitimate reasons a taxpayer might have for preferring a separate return, married couples (especially married couples with children) face a very large incentive to file as married filing jointly in order to claim significant tax benefits like the EITC and now the Premium Tax Credit.²¹⁴

taxpayeradvocate.irs.gov/userfiles/file/2013FullReport/Relief-from-Joint-and-Severalliability-for-Spouses-Under-IRC-6015.pdf [hereinafter 2013 NTA INNOCENT SPOUSE STUDY].

²⁰⁹ 26 U.S.C. § 6015 (2012).

²¹⁰ 2013 NTA INNOCENT SPOUSE STUDY, *supra* note 208; Michelle Lyon Drumb, *Decoupling Taxes and Marriage: Beyond Innocence and Income Splitting*, 4 COLUM. J. TAX L. 94, 100 (2012) (“The innocent spouse relief process is time-consuming, inefficient, and results in inconsistent outcomes. It is not uncommon for a taxpayer to spend several years and untold resources trying to obtain the legal relief he or she seeks. The majority of initial requests for innocent spouse relief are denied, meaning the taxpayer must pursue an administrative appeal and often judicial review of the claim.”).

²¹¹ 26 U.S.C. § 6015(h)(2) (2012).

²¹² 26 U.S.C. § 6015(e)(4) (2012).

²¹³ This particular client was able to settle most of her tax debt through an offer in compromise. However, not all victims have assets and income low enough to qualify for this relief, and a successful offer in compromise requires a taxpayer to forego tax refunds through the year in which an offer is accepted. IRS Form 656-B (rev. 1-2015) at 1.

²¹⁴ Drumb, *supra* note 210, at 103 (“Married taxpayers must accept the risks of joint and several liability or else sacrifice eligibility for the refundable earned income credit; choosing the latter may mean the taxpayers forsake thousands of dollars to help support their household.”); Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755, 806 (2005) (“The EITC is granted to individual taxpayers, but there is a requirement that married individuals file joint returns. The effect of these rules is an enormous

C. *What a Premium Tax Credit IRS Audit Might Look Like*

Naturally, there are multiple areas of noncompliance that the IRS might try to ferret out through an audit, such as confirming household income or non-eligibility for other coverage. In addition, the IRS may question whether a married person who filed as head of household qualified for that status. Head of household audits are necessarily complex, as they require an examination of all of the household's expenses as well as the household's income by source. This would present a challenge to anyone, but is especially challenging for poor people with limited resources. The IRS's audit of dependent status will affect any claimed Premium Tax Credit. A good source for understanding what Premium Tax Credit audits might look like is EITC audits. Based on current EITC and head of household audits, Premium Tax Credit audits are likely to be poorly designed to achieve correct results.²¹⁵

Low-income taxpayers often find it difficult to defend themselves in an audit process they frequently do not understand and find difficult to navigate.²¹⁶ A taxpayer facing an EITC audit faces an array of costs. If the person hires professional help, they must forego other important uses for the money, like a visit to the doctor, fresh produce, or school supplies for their children. The person often must take time off work or find child care in order to visit the attorney's office, or go to the bank to ask for statements, or go to a state office to get records regarding assistance payments received.²¹⁷

Even with the burdens that EITC audits impose on families already burdened by poverty, society may deem that an acceptable price to be paid for accuracy. However, there is strong evidence that the IRS's audit process does not produce more accurate results. While the majority of taxpayers respond to IRS correspondence asking for EITC documentation, approximately 70% of taxpayers do not respond at all or respond "inadequately".²¹⁸ This indicates that taxpayers want to produce the

marriage penalty on the working poor because the phase-out often eliminates the EITC when both spouses' incomes are included on their joint return.").

²¹⁵ See Leslie Book, *The IRS's EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351 (2002) (discussing the unique barriers that low-income taxpayers face when dealing with the IRS audit and appeal process).

²¹⁶ See Jonathan P. Schneller, Adam S. Chilton, & Joshua L. Boehm, *The Earned Income Tax Credit, Low-Income Workers, and the Legal Aid Community*, 3 COLUM. J. TAX L. 176, 178 (2012) (noting that the "system is uniquely challenging to low-income taxpayers who may lack the skills to navigate the tax return and audit process").

²¹⁷ NAT'L TAXPAYER ADVOCATE, INTERNAL REVENUE SERVICE, 2007 ANNUAL REPORT TO CONGRESS, VOL. 2, IRS EARNED INCOME CREDIT AUDITS—A CHALLENGE TO TAXPAYERS 94, 106 (2007), available at http://www.irs.gov/pub/tas/arc_2007_vol_2.pdf [hereinafter 2007 NTA EITC AUDIT STUDY] (20.9% of survey respondents reported taking time off work to gather requested documentation).

²¹⁸ 2007 NTA EITC AUDIT STUDY, *supra* note 217, at 95 (over 90% of taxpayers contacted the IRS about the audit); Book, *supra* note 215, at 390–91.

documentation needed, but have trouble understanding the request.²¹⁹ This matches the author's experience helping low income taxpayers defend their EITC claims before the IRS.²²⁰

Studies by the National Taxpayer Advocate's office have found that a meaningful percentage of EITC denials are erroneous. The National Taxpayer Advocate reported in her 2004 Annual Report to Congress that EITCs that were initially denied on audit were restored 45% of the time when the taxpayer was assisted by the Taxpayer Advocate Service through the audit reconsideration process.²²¹ In her 2007 Annual Report to Congress, the National Taxpayer Advocate noted that represented taxpayers are almost twice as likely to retain their EITC during the audit process compared to unrepresented taxpayers and that over 40% of all represented taxpayers retained their full EITC after an audit compared with less than one in four unrepresented taxpayers who kept their full EITC.²²² It seems clear that access to representation dramatically affects the likelihood that a taxpayer's EITC will be fully allowed. In other words, many taxpayers who lose their EITC audits may actually be entitled to the EITC but simply are failing at the audit process.²²³ This imposes enormous costs on the taxpayers as well as the government and society in general.

The participation of the exchanges in calculating advance Premium Tax Credit amounts may alleviate some of the problems that plague EITC audits. Applying in advance for a credit through an exchange resembles the precertification programs of other non-tax delivered social welfare programs, like TANF and SNAP, where error rates are lower than with the self-

²¹⁹ Schneller, et al., *supra* note 216, at 178.

²²⁰ See Pareja, *supra* note 24, at note 238.

²²¹ NAT'L TAXPAYER ADVOCATE, INTERNAL REVENUE SERVICE, 2004 ANNUAL REPORT TO CONGRESS, VOL. 2, EARNED INCOME TAX CREDIT (EITC) AUDIT RECONSIDERATION STUDY 9 (2004), available at <http://www.irs.gov/pub/tas/nta2004arcvol2interactive.pdf> [hereinafter 2004 NTA AUDIT RECONSIDERATION STUDY].

²²² 2007 NTA EITC AUDIT STUDY, *supra* note 217, at 95.

²²³ This dynamic also appears in later stages of EITC controversies. The National Taxpayer Advocate examined the number of EITC claims granted during Tax Court settlements and through audit reconsiderations and determined the numbers are inconsistent with initial audits designed to obtain accurate results. 2004 NTA AUDIT RECONSIDERATION STUDY, *supra* note 221, at i ("The study empirically demonstrates that 43% of taxpayers who sought reconsideration of audits that disallowed the EITC in whole or in part received additional EITC as a result of the audit reconsideration. Where the taxpayer received additional EITC, he or she received, on average, 94% of the EITC amount claimed on the original return."); see also NAT'L TAXPAYER ADVOCATE, INTERNAL REVENUE SERVICE, 2012 ANNUAL REPORT TO CONGRESS, VOL. 2, STUDY OF TAX COURT CASES IN WHICH THE IRS CONCEDED THE TAXPAYER WAS ENTITLED TO EARNED INCOME TAX CREDIT (EITC) 71, 74 (2012), available at [http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/Research-Studies-Study-of-Tax-Court-Cases-in-Which-the-IRS-Conceded-the-Taxpayer-was-Entitled-to-Earned-Income-Tax-Credit-\(EITC\).pdf](http://www.taxpayeradvocate.irs.gov/userfiles/file/Full-Report/Research-Studies-Study-of-Tax-Court-Cases-in-Which-the-IRS-Conceded-the-Taxpayer-was-Entitled-to-Earned-Income-Tax-Credit-(EITC).pdf) [hereinafter 2012 NTA STUDY OF TAX COURT CASES] (noting that in cases where the IRS concedes the EITC during Tax Court litigation there was ample opportunity for that result to be settled upon in audit and arguing this indicates the EITC audit process is flawed).

reporting mechanism of the EITC.²²⁴ However, the Premium Tax Credit does not have full precertification. The initial calculation of the Premium Tax Credit by the exchange is only an estimate, and taxpayers have to pay back any difference between the advance estimate and the final credit amounts, subject to some limitations.²²⁵ There will inevitably be issues that were not addressed adequately or at all in advance by the exchanges.²²⁶ It would be foolish to believe that the IRS's Premium Tax Credit audits will be substantially fairer or more accurate than its current EITC audits.

D. Current Law Is Inequitable

Although there is no legislative history directly on point, it seems relatively clear that the reason the ACA requires married couples to file jointly to receive the Premium Tax Credit is to avoid gaming of the system. Indeed, if the statute were amended to remove the prohibition on filing separately, without any additional limitations, a married couple could file separately and receive a larger credit than would be possible with joint filing. Recall that the amount of the credit is based largely on household income, household income is in turn based on family size, and family size is determined by the number of personal exemption amounts allowed on the taxpayer's return. Typically, one spouse is not entitled to claim the other spouse as a dependent.²²⁷ Thus, husband and wife could each file a separate return and each return would show one personal exemption amount (assuming no other dependents).²²⁸ Accordingly, the family size for each would be one person and the household income for each spouse would be based solely on each individual's income. Because lower incomes generally generate higher credit amounts, this "income splitting" on a married filing separate return would normally result in the married couple receiving a greater benefit than they would have received if they had filed jointly.²²⁹

²²⁴ Schneller, et al., *supra* note 216, at 179.

²²⁵ See *supra* note 75 and accompanying text.

²²⁶ One recent study looked at likely income changes during 2014 and estimated that 50% of subsidy-eligible households would have an average repayment obligation of \$794. CYNTHIA COX, ANTHONY DAMICO, GARY CLAXTON, ROSA MA, & LARRY LEVITT, THE HENRY J. KAISER FAMILY FOUND., REPAYMENTS AND REFUNDS: ESTIMATING THE EFFECTS OF 2014 PREMIUM TAX CREDIT RECONCILIATION (2015), available at <http://files.kff.org/attachment/issue-brief-repayments-and-refunds-estimating-the-effects-of-2014-premium-tax-credit-reconciliation>.

²²⁷ But see *supra* note 96.

²²⁸ For convenience, this article uses the term husband and wife to refer to the spouses in a marriage. However, the same principles apply for a same-sex couple who is considered married for purposes of the Code.

²²⁹ This strategy could also result in a lower credit amount. If one of the household incomes falls below 100% of poverty level, then that spouse would be ineligible for the credit. If that spouse lives in a state that has not expanded Medicaid, then that spouse is in probably the worst position possible under the ACA.

The real question is, why is this result concerning? Why should married couples be prohibited from maximizing their credits? The author believes the answer lies in the concepts of household and tax fairness. Back in 1913, society was concerned that it was “unfair” that married couples in community property states could file separate returns and generate a lower tax bill than similarly-situated married couples in common law property states.²³⁰ Such a result violates our conception of horizontal equity—that similarly-situated taxpayers should bear similar tax burdens.²³¹ Comparing households, the result seemed unfair because it was inequitable.²³²

Tax scholars have long debated whether it is appropriate to use the marital unit as the taxable unit.²³³ However, with respect to the Premium Tax Credit specifically, it is very appropriate to compare households to determine fairness. Health insurance typically is available and purchased on a household basis. Both employer-sponsored plans and private policies are typically offered on a self-only or family basis. Family plans typically cover the employee or policyholder as well that person’s spouse and children. “Children” sometimes is defined broadly, but not typically in a manner exactly congruent with tax dependents. In recent decades, there has been movement toward offering coverage to domestic partners, even though domestic partners are not typically part of the same tax household. The ACA specifically expanded the conception of the health insurance family by requiring a child under age 26 be considered an eligible dependent under a parent’s plan even if that child is not a tax dependent (because, for example, the child lives on his or her own and provide most of his or her own support).²³⁴ Because health insurance is household based, an appropriate inquiry to determine whether the Premium Tax Credit rules satisfy horizontal equity is whether similarly-situated households can produce similar outcomes.

The problem is that marriage frequently is no longer a reliable substitute for household, if it ever was, yet the Premium Tax Credit rules assume that it is. In 1913, marriage was a highly reliable indication that the husband and wife shared a household. Today, however, unmarried people

²³⁰ See *supra* Part III.A.

²³¹ See John E. Donaldson, *The Future of Transfer Taxation, Repeal, Restructuring and Refinement or Replacement*, 50 WASH. & LEE L. REV. 539, 545 (1993) (defining horizontal equity).

²³² See generally Bittker, *supra* note 134.

²³³ See, e.g., Kahn, *supra* note 115, at 661 (critiquing the assumption that married couples are always an appropriate unit on which to base horizontal equity comparisons because that assumption presupposes economic sharing by married couples that does not always exist); see also Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993) (concluding that because some married couples do not act as a single economic unit and some non-married couples do, the more appropriate taxable unit is the individual); see also Infanti, *supra* note 128 (rejecting the “privileging of the traditional family in our federal tax laws.”).

²³⁴ 42 U.S.C. § 300gg-14 (2012). This requirement only applies if the plan offers dependent coverage.

commonly cohabit, forming a household without being married.²³⁵ Allowing unmarried, cohabiting couples to reap a higher benefit than married couples seriously violates horizontal equity; such “marriage penalties” are of great concern to politicians and can deeply undermine the public’s support of the tax system as a whole. An unmarried cohabiting couple can, and indeed must, file separate returns and would have separate household incomes and qualify for separate Premium Tax Credits. Because their incomes are split onto two returns, rather than being stacked, they are likely to qualify for better Premium Tax Credits. For example, using the subsidy calculator on the Henry J. Kaiser Family Foundation’s website, a cohabiting couple where each partner makes \$20,000 will each likely qualify for a plan with a premium of \$2,535 (\$5,070 for the household), and each will qualify for a Premium Tax Credit of \$1,514 (\$3,028 for the household), meaning they will only personally owe premiums of \$1,021 (\$2,042 for the household).²³⁶ If the exact same couple marries and files a joint return, the household premium amount does not change (but stays at \$5,070 for the household), yet the household Premium Tax Credit drops to \$1,759 (a loss of \$1,269) and the household out-of-pocket cost for premiums rises to \$3,312 (an increase of \$1,270).²³⁷ Because married couples are forced onto a single, joint return, they cannot replicate this result. Cohabiting couples clearly are households in an economic sense, yet are not treated as such by the Premium Tax Credit rules (or, indeed, by any other provision of the Code). The differing treatment of cohabiting couples and married couples violates horizontal equity principles.

Another way that marriage can fail to be an accurate predictor of household status is that it is entirely possible, if not likely, to be married but to be in an economically separate household. This is the case with Theresa, one of the examples set forth in the introduction.²³⁸ In her work in a low-income taxpayer clinic, the author has encountered multiple examples of this phenomenon. Couples stay married, even though living apart, for a variety of reasons. Some cite the cost of getting a divorce as an impediment. Some fear that the estranged-spouse will retaliate physically. Some worry about custody battles. Some fear adverse immigration consequences. Some have strong religious beliefs that prohibit divorce. The circumstances of a single person most closely resemble the circumstances of a married but separated person. Yet, because of the requirement to file jointly, the married but separated

²³⁵ Zelenak, *supra* note 133, at 793–94.

²³⁶ See *Health Insurance Marketplace Calculator*, *supra* note 85. These were the current numbers as of the writing of this article in 2014. The numbers will be different in later years, but the principle should hold true.

²³⁷ Marrying and filing a joint return could benefit the couple if one or both of the partners has separate income below 100% of poverty level, if their joint income is above 100% of the poverty line, and if they live in a state that has not expanded Medicaid. This is because individuals who are below the poverty line are ineligible for Medicaid in non-expansion states, but also are ineligible for subsidized coverage on a marketplace plan.

²³⁸ See *supra* Part I.

individual must choose between the economic independence of separate filing or qualifying for a Premium Tax Credit. If the married but separated person chooses against joint filing, then he or she forfeits the Premium Tax Credit. Single individuals are not forced to make such decisions and do not face the same risk of forfeiture.

V. SUGGESTIONS FOR CHANGE

A. *Expand the Premium Tax Credit Exception*

As discussed above, the IRS has carved out a limited exception to the joint filing requirement. Specifically, an abandoned spouse or victim of domestic abuse may file separately and still qualify for the Premium Tax Credit. The reason for the exception seems to be based more on administrative efficiency than equity, however. Specifically, when formulating the exception, the IRS asked for comments regarding situations where taxpayers “received advance credit payments but face challenges in being able to file a joint return.”²³⁹ While administrative efficiency is important, equity also is important, and achievement of the policy goal, access to affordable health care should be the driving motivation behind an agency’s exercise of administrative discretion. In other words, the agency should be free to adopt rules that are administratively efficient, but should give preference to approaches that combine efficiency with equity and efficacy.

With respect to the Premium Tax Credit, there are other approaches that are reasonably efficient and do a better job at promoting the policy goals of the ACA: expanding coverage and making coverage affordable. Because the prohibition against joint filing appears motivated by a desire to prevent a single household from receiving a greater credit than intended, the IRS should develop exceptions based on the indicia of being a household. If the spouses maintain a single household, then it could be reasonable to require joint filing and the sharing of a single credit; if they are not a household, it is fairer to allow separate filing. Consistent with the focus on households, it would be more equitable to develop rules that require cohabiting couples to share a credit, similar to married couples. One clear indicium of being in a single household is residence. If the spouses live together, that indicates a household. If not, it indicates they are not a household. Another indicium is whether or not the spouses are covered by the same plan. If they are, that would indicate they are a household, even if they live separately. If they are covered by separate plans purchased on the marketplace (i.e., not through employment), that would indicate separate households. If one is covered through an employer-sponsored plan that offers family coverage, but the

²³⁹ Notice of Proposed Rulemaking and Notice of Public Hearing, 76 Fed. Reg. 50,931, 50,938 (Aug. 17, 2011).

other is covered by a marketplace plan, that also indicates separate households. Other indicia of a single household are joint bank accounts or credit cards and joint ownership of cars. Ideally, Congress would rewrite the Code's rules to provide more equitable treatment to functionally equivalent households. Absent congressional action, however, the IRS should consider ways in which it can exercise its administrative discretion to achieve the same result.

If we keep the presumption that married couples are a household, the IRS should develop rules that allocate a single credit between spouses that choose to file separately. While that would be less equitable than allowing full credits to each spouse, it is a vast improvement over the current-law's complete forfeiture of the credit. Such a rule has the benefit of being more administratively practical. The IRS already has adopted rules to allocate between parents credit amounts and advance credit payments made for children where one parent covers the child but the other parent is entitled to claim the child as a dependent.²⁴⁰ Similarly, there are allocation rules for married couples who divorce or legally separate during the year.²⁴¹ These rules could easily be adapted to accommodate married individuals who file separately without the need for additional prying questions regarding the individuals' personal circumstances.

B. Expand the Exception to Encompass Other Tax Credits

The principles behind allowing a Premium Tax Credit to individuals who are unable to file jointly due to domestic abuse or spousal abandonment apply equally to other tax credits, like the EITC, the adoption credit, and educational credits. Denying these credits in these most extreme of situations has long seemed mean-spirited. The lowest-income taxpayers typically use their EITC refunds for everyday necessities like paying rent and utilities or buying clothes or food.²⁴² EITC refunds also are commonly used for other urgent needs, like car repairs or replacing broken appliances.²⁴³ When the National Taxpayer Advocate looked at Tax Court cases involving the reversal of a previously-denied EITC, she found that “[f]or more than half the taxpayers, the claimed EITC represented more than a quarter of their adjusted gross incomes.”²⁴⁴ There simply is no justification for denying these other credits to individuals who find it impossible or dangerous to file jointly.

²⁴⁰ Rules Regarding the Health Insurance Premium Tax Credit, *supra* note 18 (issuing temporary regulations to be codified at 26 C.F.R. pt. 1).

²⁴¹ *Id.*

²⁴² Megan Newman, *The Income-Tax Gap: The Hybrid Nature of the Earned Income Tax Credit Leads to its Exclusion from Due Process Protection*, 64 TAX LAW. 719, 725 (2011).

²⁴³ *Id.*

²⁴⁴ 2012 NTA STUDY OF TAX COURT CASES, *supra* note 223, at 74.

VI. CONCLUSION

The potential promise of the ACA is significant—nothing less than ensuring that all (or most) Americans have health care coverage that will enable them to access the care they need to maintain good health and to treat health problems, all while avoiding financial catastrophe in the event of a major health incident. This promise is based on legal reforms that are interdependent: if one fails, the others are likely to fail as well. First, the ACA makes coverage vastly more widely available by mandating that employers offer coverage or pay a penalty, by expanding Medicaid, and by setting up insurance exchanges. Second, the ACA mandates that all individuals maintain coverage or pay a penalty, effectively requiring everyone to participate in the pooling of risk and preventing adverse selection, but balancing that requirement with a promise that individuals cannot be turned down for coverage based on their health status. Finally, the ACA seeks to make such coverage affordable by mandating community rating (eliminating premium differentials based on health), by expanding Medicaid eligibility, by limiting the amount of cost sharing a low-income person is expected to bear, and by implementing a subsidy (the Premium Tax Credit) for low-income individuals purchasing health insurance.

When crafting the Premium Tax Credit, Congress decided to deny the Premium Tax Credit to taxpayers who elect to file as married filing separately. One imagines this was done to prevent some perceived injustice or “gaming of the system” whereby a married person filing a separate return would receive a benefit greater than he or she would receive if filing a joint return with a spouse. Indeed, this article demonstrates that, without the restriction, a married couple filing separate returns can generate higher credit amounts than a married couple filing a joint return. This is a legitimate concern. However, this result is exactly analogous to the result that a cohabiting couple can produce on their separate returns. If the rules were to focus on economic households rather than marital status, the results would be more defensible. The author suspects that denying tax benefits to married filing separately taxpayers has become something of a knee-jerk reaction of Congress—an implicit bias that dates back a century and that reflects a judgment as to the “kinds of people” who might use a separate filing status.

Regardless of congressional intent in passing the rule, it is abundantly clear that the no-married-filing-separately rule adversely affects many different kinds of taxpayers who choose married filing separately status (or would choose it) for a variety of legitimate reasons. One category of adversely affected taxpayer is domestic violence victims; another category is abandoned spouses. The IRS has issued proposed and temporary regulations that provide a limited exception to the joint filing requirement for these categories of taxpayers.

The author applauds the IRS's efforts to protect these taxpayers from losing the Premium Tax Credit, but the regulations do not go nearly far

enough. Domestic violence victims, among others, lose a host of tax benefits when they elect to file their tax returns using the married filing separately filing status. Perhaps the most consequential tax benefit lost is the EITC, which is the most significant federal needs-based cash assistance program in the United States today. Because the IRS is doing the hard work necessary to develop a workable and fair exception to joint filing status for victims of domestic abuse and spousal abandonment in the context of the Premium Tax Credit, the exception should be extended to prevent other tax benefits from being lost solely because of the use of married filing separately filing status. The author also urges the IRS to think expansively about the categories of people who legitimately elect married filing separately filing status and expand protection to them as well.