

COMMENTS

PARSING MARRIAGE PENALTIES: THE IRRATIONALITY OF TAX AND GOVERNMENT BENEFIT MARRIAGE PENALTY JURISPRUDENCE

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INTRODUCTION

Kelly and Bryan are in love. About two years ago, after dating for some time, they decided to move out of their respective parents' homes and in together. Since Kelly and Bryan are both employed and earn about the same amount of money, they determined that they could afford it. So, they co-signed a lease to an apartment, bought some furniture, and set up their utilities. They even opened a joint checking account to which they both contribute and from which they buy food, pay the monthly bills, and cover other daily incidental expenses. Now, they are thinking about getting married. However, what Kelly and Bryan may not realize is that as soon as they take marriage vows, their financial obligations may change. For, as soon as they legally wed, they could be subject to higher taxes on their incomes and could face termination of some government benefits that they may receive.¹

But what will have changed? Their love for one another will not have changed; their incomes will not have changed; their household expenses will not have changed. In a sense, their "marriage is reducible to a piece of paper—the marriage license."² Yet that piece of paper may somehow give the government the power to charge Kelly and Bryan more and pay them less.³

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¹ See *infra* Part III.

² Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 239 (2001).

³ In fact, economist Justin Wolfers has estimated that "[t]he average tax cost of marriage for a dual-income couple is \$1,500 annually." Jenny Anderson, *Economists in Love: Betsy*

To be sure, the financial penalties Kelly and Bryan may face are not imposed on every married couple. In fact, many couples may realize financial benefits by marrying due to the consolidation of household expenses and the sharing of other resources.⁴ However, in the United States, there remain some classes of couples, like Kelly and Bryan, that will be financially disadvantaged purely by virtue of taking marriage vows. In the tax context, this class can be defined as those couples comprised of two working partners who generate similar incomes. In the government benefit context,⁵ the class can be defined as those couples comprised of two partners who have a fairly low combined income.

Laws often distinguish between married and unmarried persons for various purposes. Unsurprisingly, these distinctions are often challenged in the court system as unconstitutional violations of equal protection and due process under the claim that one's marital status should not have a bearing on his or her rights, benefits, or obligations. However, while most cases address challenges to laws that disadvantage unmarried persons (because traditionally marital status distinctions have worked to discriminate against the unmarried), some address challenges to laws that burden married persons while distinctly advantaging unmarried persons.

This Comment focuses on the latter class of cases partly because they receive considerably less attention.⁶ It also concentrates on those cases because in upholding such burdens, courts use reasoning

Stevenson and Justin Wolfers, IT'S NOT YOU, IT'S THE DISHES (Mar. 10, 2011), <http://www.itsthedishes.com/2343/2011/03/economists-in-love-betsey-stevenson-and-justin-wolfers/>.

⁴ This, of course, is aside from the legal benefits that accompany a marital relationship. See *Legal and Economic Benefits of Marriage*, RELIGIOUS TOLERANCE, http://www.religioustolerance.org/mar_bene.htm (last updated July 4, 2011) (providing examples of legal and economic benefits conferred upon married couples in the United States).

⁵ It must be noted that government benefit programs can determine how benefits will be allocated very differently. Thus, defining a disadvantaged class of couples in the social security disability context may be very different from defining a disadvantaged class in the farmworkers' benefits context. Consequently, this definition may not be applicable or fully accurate with respect to all couples disadvantaged under all government benefit programs.

⁶ Cf. Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1 (2000) (arguing in favor of an amendment to Title VII to prohibit marital status discrimination); John C. Beattie, Note, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L. J. 1415 (1991) (discussing the role of state prohibitions against marital discrimination in protecting the rights of unmarried couples); Matthew J. Smith, Comment, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055 (1992) (suggesting that Congress should prohibit housing discrimination against unmarried couples).

that is unclear, irrational, and outdated. Finally, it examines these cases because marriage today is in a state of instability,⁷ and, as a policy matter, if the government and the courts wish to promote marriage, as they have traditionally done, it is curious that they unquestioningly support these laws.

Specifically, this Comment will explore two areas in which courts have been consistently unwilling to find equal protection and due process violations: tax law and the distribution of economic government benefits. After providing a brief introduction to the Equal Protection and Due Process Clauses, it will examine courts' rationales and constitutional analyses in these cases, which, at least at first glance, often appear inconsistent, shaky, and ad hoc. It will then compare and contrast these rationales and analyses with a subject area in which courts have struck down laws that discriminate based on marital status to the detriment of married persons. Finally, this Comment will offer four possible explanations for these disparate results and evaluate their validity. The possible explanations this Comment will examine include: (1) the natures of taxation and government benefit distribution; (2) the difficulty of applying the leading right-to-marry precedents; (3) courts' belief in and deference to the assumption that marriage does and should privatize dependency; and (4) the existence of many other benefits that advantage married couples compared to singles. Ultimately, this Comment will conclude that each of these possible explanations is flawed in some way and will offer a few potential alternative approaches courts could adopt.

I. EQUAL PROTECTION AND DUE PROCESS OVERVIEW

Section One of the Fourteenth Amendment provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁸ At the outset, it is important to recognize that the two clauses are distinct and thus may apply in different circumstances and employ different analyses.

⁷ See, e.g., Fineman, *supra* note 2, at 245, 246 (“Marriage does not have the same relevance as a societal institution as it did even fifty years ago [T]he traditional marital family has become a statistical minority of family units in our society.”); Elizabeth S. Scott, *Marriage, Cohabitation, and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 232 (2004) (“The number of couples who live together in informal unions has increased steadily over the past half-century, and mainstream society today is morally neutral toward this form of intimate association.”).

⁸ U.S. CONST. amend. XIV, § 1.

Most simply, substantive due process,⁹ as described by Professor Erwin Chemerinsky, “asks the question of whether the government’s deprivation of a person’s life, liberty or property is justified by a sufficient purpose.”¹⁰ In other words, substantive due process asks: Does the government have a good enough reason to interfere with an individual’s interests?¹¹

While substantive due process first arose in the context of economic liberties,¹² the Court has used and continues “to use substantive due process to safeguard rights that are not otherwise enumerated in the [C]onstitution.”¹³ In identifying which rights deserve protection, the Court has largely looked to tradition and the intent of the Framers.¹⁴ When the Court has recognized a right as being tradi-

⁹ Substantive due process can be contrasted with, and is distinct from, procedural due process, with which I am not concerned in this Comment.

¹⁰ Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999); see also Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 *U. DAYTON L. REV.* 313, 321 (1991) (“[S]ubstantive due process imposes limits on the legislative branch of government by prohibiting the legislature from passing arbitrary, capricious statutes which unduly interfere with individual rights.”).

¹¹ See Chemerinsky, *supra* note 10, at 1501 (“Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation [of life, liberty, or property.]”); Harv. L. Rev. Ass’n, *The Right to Join a Family: Traditional Marriage and the Alternatives*, 93 *HARV. L. REV.* 1248, 1256 (1980) (“Substantive due process methodology involves a balancing of the governmental and individual interests implicated.”).

¹² See *Lochner v. N.Y.*, 198 U.S. 45, 56–57 (1905) (holding that the right to purchase and sell labor is protected by the Fourteenth Amendment); see also Chemerinsky, *supra* note 10, at 1502 (“Substantive due process was used . . . in the first third of this century to aggressively protect economic liberties from government interference. *Lochner v. New York* is the quintessential case from that era.”). In that case, the Court found that an individual’s ability to make contracts is a fundamental right and that deprivations of this right must be analyzed using strict scrutiny. See *id.* at 1502–03 (“The Supreme Court held, to use modern language, that freedom of contract was a fundamental right under the liberty of the due process clause and used strict scrutiny to evaluate this law.”). However, many scholars trace the concept back much further. See, e.g., Levinson, *supra* note 10, at 318 (“The concept of substantive due process has strong historical roots dating back to the Magna Carta and Lockean tradition which first found its way into American jurisprudence in the 1870s.”).

¹³ Chemerinsky, *supra* note 10, at 1510.

¹⁴ See *id.* at 1513 (“Justice Scalia [in *Michael H. v. Gerald D.*] stated that when the Court considers whether to create rights under substantive due process, such rights should be established only if there is a tradition of protecting them . . .”); *id.* at 1515 (“In *Poe [v. Ullman]*, Harlan said that . . . courts can protect under such [substantive due process] rights so long as there is a tradition of such protection.”); *id.* at 1517 (“Justice White [in *Bowers v. Hardwick*] states rights should be protected under substantive due process only if they are enumerated in the text, clearly intended by the framers, or there is a tradition of protecting such rights.”); *id.* at 1520 (“In *Washington v. Glucksberg*, Chief Justice Rehnquist said courts should protect rights under the liberty of the due process clause only if they

tionally protected, it often deems that right to be “fundamental.”¹⁵ When such fundamental rights are implicated, the government must show that its law can survive strict scrutiny, i.e. that it is narrowly tailored to serve a compelling state interest.

However, not all rights are deemed fundamental and thus not all laws are subject to strict scrutiny under substantive due process. For example, in *Cruzan v. Missouri Department of Health* and *Planned Parenthood v. Casey*, the Court found that the plaintiffs only had “protected liberty interest[s],” and therefore “abandoned strict scrutiny in favor of a less protective balancing approach.”¹⁶ Additionally, in areas such as economic legislation, while “federal courts still have a legitimate role to play in making sure that individual interests have not been sacrificed in an arbitrary, capricious fashion,” review has been limited to a determination of whether the law is “rationally related to a legitimate state interest.”¹⁷ Thus, when determining whether the government has a sufficient purpose in depriving a person of life, liberty, or property, a court’s analysis will depend upon the nature of the interest involved, which in turn necessitates strict scrutiny, rational basis scrutiny, or an intermediate balancing approach.

are enumerated in the text, intended by the framers or there is a clear tradition of safeguarding such a right.”). However, other scholars observe that the Court has other ways of identifying such rights. See, e.g., Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63 (2006) (arguing that in addition to tradition, the Court has used theories of reasoned judgment and evolving national values to identify rights that may be protected by the Due Process Clause).

15 Fundamental rights recognized under the Due Process Clause include the right to privacy and the right of a parent to control the education of his or her child. For the right to privacy, see *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the right to privacy, whether founded under the Fourteenth Amendment’s concept of personal liberty or the Ninth Amendment’s reservation of rights of the people, is broad enough to include a woman’s decision to terminate her pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (describing how “[i]f the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion so fundamentally affecting a person as the decision whether to bear or beget a child”); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (holding that a statute forbidding the use of contraceptives violates a constitutional right to marital privacy). For parental rights, see *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 514 (1925) (striking down an act that would effectively deny parents the right to have their children educated at private parochial schools); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (describing how parents have the power to control the education of their own children and noting that there are “certain fundamental rights which must be respected”).

16 Conkle, *supra* note 14, at 74–75. This approach “triggered serious judicial review but not the strong presumptive invalidity of strict scrutiny.” *Id.* at 74.

17 *Levinson*, *supra* note 10, at 320–21. See also *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (“It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

Whereas substantive due process questions whether the government has a good enough reason to deprive an individual of life, liberty, or property, and thus compares and weighs both the government's and individual's interests, equal protection analysis focuses on classifications. It essentially asks whether a law treats groups of similarly situated people differently.¹⁸

In response to early inconsistency in the application of the Equal Protection Clause, the Court essentially created a "system of multi-tiered analysis and classification."¹⁹ Through cases such as *United States v. Carolene Products Co.*,²⁰ *Skinner v. Oklahoma*,²¹ *Korematsu v. United States*,²² *Griffin v. Illinois*,²³ *Craig v. Boren*,²⁴ and *United States Railroad Retirement Board v. Fritz*²⁵ the Court shaped what are known today as the three levels of scrutiny: rational basis, intermediate, and strict.²⁶ As with substantive due process, the amount of scrutiny given to the particular state action at issue depends on "the rights or persons affected."²⁷ A government action that distinguishes on the basis of a suspect classification (such as race) "call[s] for the most exacting judicial examination."²⁸ To survive an equal protection challenge it

18 However, as part of a Civil War Amendment, the Equal Protection Clause was initially only meant to protect "the fundamental rights of the newly freed slaves from hostile white-controlled government." John Marquez Lundin, *Making Equal Protection Analysis Make Sense*, 49 SYRACUSE L. REV. 1191, 1197 (1999). See also *Loving v. Virginia*, 388 U.S. 1, 10 (1967) ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); Lundin, *supra*, at 1202 (noting that the scope of fundamental rights under the Fourteenth Amendment has expanded to include political rights, like voting and jury service, as well as economic rights). Nevertheless, since its ratification, the Equal Protection Clause has been employed by and applied to countless other subject areas and people that have little or nothing to do with the rights of freed slaves, race relations, or even fundamental rights.

19 Lundin, *supra* note 18, at 1211.

20 304 U.S. 144, 153 (1938) (discussing rational basis).

21 316 U.S. 535, 541 (1942) (applying strict scrutiny to the classification in a state sterilization statute).

22 323 U.S. 214, 216 (1944) (noting that racial classifications are immediately suspect and that "courts must subject them to the most rigid scrutiny").

23 351 U.S. 12, 18 (1956) (holding that the Due Process Clause and Equal Protection Clause protect prisoners from invidious discrimination at all stages of criminal proceedings).

24 429 U.S. 190, 197 (1976) (reaffirming that statutory classifications based on sex are subject to scrutiny under the Equal Protection Clause).

25 449 U.S. 166, 174-79 (1980) (finding that the rational-basis standard is appropriate where social and economic legislation is challenged on equal protection grounds).

26 Obviously, these levels closely, if not identically, mirror the types of analyses the Court uses in substantive due process cases. These similarities and their implications will be discussed in further detail. See *infra* Part IV.

27 Lundin, *supra* note 18, at 1230. See also, Harv. L. Rev. Ass'n, *supra* note 11, at 1256 ("Traditional equal protection analysis . . . requires the application of one of several discrete tests to a statute, depending on the nature of the classification.").

28 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978).

must be “narrowly tailored to further a compelling government interest.”²⁹ If the government action categorizes on the basis of a “quasi-suspect” classification, such as gender or the marital status of a child’s parents, then it will be subject to intermediate scrutiny.³⁰ To survive an equal protection challenge it must be “substantially related to an important governmental objective.”³¹ All other government actions are subject to rational basis review. They must be upheld unless it is inconceivable that they could rationally relate to a legitimate government interest.³²

It is likely apparent that substantive due process and equal protection analyses can look very similar. Both use comparable or identical language (such as strict scrutiny, rational relation, fundamental rights, etc.) to describe the analyses being applied in particular cases. Both also look to and compare the interests of the government and the party involved. Given these similarities, it is unsurprising that challenges to government actions are often brought under both Clauses, that courts can be unclear about which Clause they are applying, and that discussions of both Clauses frequently overlap. As Part II will show, one area in which these things occur is marriage jurisprudence.

II. MARRIAGE AND THE FOURTEENTH AMENDMENT

Initially, cases that addressed marriage focused on the institution’s prominent role in society.³³ However, “[m]ajor decisions of the 1960[s] [and 1970s] reflected a growing concern with the protection of marriage from state intrusion.”³⁴ Although only one dealt with discrimination based on marital status, three cases in particular shaped the Court’s current approach to marriage. The cases are *Loving v. Virginia*,³⁵ *Eisenstadt v. Baird*,³⁶ and *Zablocki v. Redhail*.³⁷

Loving presented an equal protection challenge to Virginia’s miscegenation laws.³⁸ While the Court technically subjected the laws to

²⁹ Lundin, *supra* note 18, at 1230.

³⁰ *See id.*, at 1230–31.

³¹ *Id.* at 1231.

³² *Fritz*, 449 U.S. at 179 (“Where, as here, there are plausible reasons for Congress’[s] action, our inquiry is at an end.”).

³³ Harv. L. Rev. Ass’n, *supra* note 11, at 1248 (noting that “most [early] cases involving marriage turned on the importance of marriage to society”).

³⁴ *Id.* at 1249.

³⁵ 388 U.S. 1 (1967).

³⁶ 405 U.S. 438 (1972).

³⁷ 434 U.S. 374 (1978).

³⁸ *Loving*, 388 U.S. at 2.

strict scrutiny because they contained racial classifications,³⁹ which are inherently suspect, it also went one step further, holding that “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.”⁴⁰ This language suggests that even if the standard of review was a rational basis one, the statutes still could not be upheld.

While most of the Court’s equal protection analysis in *Loving* does not seem to contribute much to a discussion of the Clause’s application to marital status-based distinctions, the case is still important in this context for at least two reasons. First, *Loving* applied an equal protection analysis in the context of marital discrimination. Second, the Court added a few critical sentences to the end of its opinion in determining that the statutes also violated the Due Process Clause.⁴¹ The Court wrote that

[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of ‘basic civil rights of man,’ *fundamental* to our very existence and survival The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.⁴²

This language, while continuing to emphasize the invidiousness of racial classifications, would also become very important for future cases addressing marital-based distinctions because, by using terms such as “fundamental” and “basic civil rights” to describe marriage, it opened the door for arguments that government infringements on marriage should be required to survive strict scrutiny.⁴³ For these reasons, even though it did not explicitly address marital status, *Loving* remains a critical source of support for those who challenge various regulations affecting marriage.

Unlike *Loving*, *Baird*, which was heavily influenced by *Griswold v. Connecticut*,⁴⁴ directly addressed an equal protection challenge to dis-

³⁹ *Id.* at 9, 11.

⁴⁰ *Id.* at 11.

⁴¹ Notably, while these sentences appear in the Court’s discussion of the Due Process Clause, they are often cited in equal protection analyses as well. *See id.* at 12.

⁴² *Id.* (emphasis added).

⁴³ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (describing marriage as a basic civil right and fundamental freedom protected by the Fourteenth Amendment against invidious racial discrimination).

⁴⁴ 381 U.S. 479, 485–86 (1965) (establishing that couples have a constitutional right to marital privacy under the Due Process Clause and holding that a law forbidding the use of contraceptives was unconstitutional because it intruded on that right).

crimination based on marital status. The law in question permitted registered physicians and pharmacists to give married couples, but not unmarried individuals, access to contraceptives.⁴⁵ Before assessing the adequacy of the state's proffered objectives and the law's relation to them, the Court briefly explained and clarified the nature of the Equal Protection Clause. Justice William Brennan wrote that

the Fourteenth Amendment does not deny to State [sic] the power to treat different classes of persons in different ways The Equal Protection Clause of that amendment does, however, deny to State [sic] the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."⁴⁶

This language, coupled with the Court's description of the issue as "whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under" the laws in question, suggests that the Court applied only rational basis review in this case.⁴⁷ Ultimately, the Court held that "the . . . statute cannot be upheld" given the state's objectives⁴⁸ because those objectives could not be "reasonably . . . regarded as its purpose."⁴⁹

Relying on *Griswold*, the Court also held that "[i]f . . . the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible."⁵⁰ The Court reasoned that "whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike" because "the marital couple is *not* an independent entity . . . but an association of two *individuals* each with a separate intellectual and emotional makeup."⁵¹ Thus, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁵² By reclassifying a married

45 *Eisenstadt v. Baird*, 405 U.S. 438, 441 (1972).

46 *Id.* at 447 (internal citations omitted) (quoting *Reed v. Reed*, 404 U.S. 71, 75–76 (1971)).

47 *Id.*

48 *Id.* at 452 (rejecting two of the state's proffered objectives for the statute: "a deterrent to fornication" or "a health measure").

49 *Id.*

50 *Id.* at 443, 453.

51 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added).

52 *Id.* (emphasis added).

couple as two separate people instead of one single unit, the *Baird* Court showed that “married and unmarried persons . . . are similarly situated” and consequently cannot be treated differently, at least in matters of privacy, without violating the Equal Protection Clause.⁵³ While *Baird* dealt with a disadvantaging of unmarried couples, it is clear that this reclassification could be used in the reverse situation as well. That is, if, compared with an unmarried couple, a married couple as a unit is disadvantaged by a law, after *Baird* that couple could argue that they are merely two individuals and are thus similarly situated to and should be treated like the unmarried couple who fare better under the regulation at issue.

While *Loving* and *Baird* have significantly influenced the Court’s treatment of marriage-related issues, the most impactful case was decided six years after *Baird*. In *Zablocki v. Redhail*, the Court struck down a Wisconsin law that prohibited “a certain class of Wisconsin residents,” namely non-custodial parents with either child support obligations or children who were or may become public charges, from marrying.⁵⁴ In “looking to the nature of the classification and the individual interests affected,” the Court held that since “the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right . . . ‘critical examination’” of the law was required.⁵⁵ However, the Court clarified that

by reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry.⁵⁶

⁵³ *Id.* at 454–55.

⁵⁴ 434 U.S. 374, 376–77 (1978).

⁵⁵ *Id.* at 383. Notably, the *Zablocki* Court never actually used the words “strict scrutiny” to describe the test it was applying. However, immediately after describing its test as a “critical examination,” the Court cited a number of cases, including *Loving* and *Griswold*, that applied strict scrutiny. *See id.* at 383–86. In addition, and more importantly, later in the opinion, before examining the interests advanced by Wisconsin, the Court wrote that “[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Id.* at 388. This language is essentially the strict scrutiny test defined in other Equal Protection cases. *See supra* notes 28–29 and accompanying text. Therefore, it is sufficient to categorize the Court’s test as one of strict scrutiny.

⁵⁶ *Zablocki*, 434 U.S. at 386.

The language quoted above is critical for analyses of marital status-based regulations because it firmly established that: (1) the right to marry is a fundamental right; (2) when that right is directly, significantly, or substantially interfered with, heightened, if not strict, scrutiny must be applied; and (3) when that right is not significantly interfered with, a lower level of scrutiny is appropriate. However, while the case may have shown that an explicit prohibition on marriage for certain persons counts as a substantial interference, the meaning of *Zablocki's* language and its implications are far from settled. As Parts III and IV will show, the meanings of the second and third points in particular are still at issue today.

III. ANALYSES OF MARITAL STATUS DISTINCTIONS UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES

As in *Baird*, many parties who challenge laws on the basis of marital status discrimination claim that married couples are being unjustly favored over single individuals; in other words, they argue that unmarried individuals are unconstitutionally burdened. However, this Comment examines cases in which married couples bring suits claiming that *they* are burdened, that they are not receiving equal protection under the law as compared with unmarried citizens, and that their liberty interests are being unjustly infringed. While some violations have been found, in two specific and not entirely separate subject areas “constitutional attack has been” consistently “unavailing:” tax law and the distribution of government benefits.⁵⁷

A. Tax Law

When married couples challenge the marital status distinctions found in tax laws, they are challenging the constitutionality of what is known as the “marriage penalty—a curious feature of the tax system whereby the tax liability of a married couple may exceed that of a cohabitating unmarried couple.”⁵⁸ However, this penalty did not always exist.⁵⁹ In fact, the “present state of inequity in the tax law is actually

⁵⁷ See, e.g., *Druker v. Comm’r of Internal Revenue*, 697 F.2d 46, 49 (2d Cir. 1982) (explaining the failure of constitutional attacks on the marriage penalty).

⁵⁸ Wendy C. Gerzog, *The Marriage Penalty: The Working Couple’s Dilemma*, 47 *FORDHAM L. REV.* 27, 27 (1978).

⁵⁹ See Antoinette M. Pilzner, *Tax Liability Differences Between Married and Unmarried Couples: Do the Married Filing Statuses Violate Equal Protection?*, 40 *WAYNE L. REV.* 1337, 1338–39 (1994) (“As originally implemented, married individuals were taxed as separate taxpay-

a reversal of the positions of married and unmarried taxpayers under the original individual income tax, at which time married taxpayers were taxed separately under the same rate schedule as unmarried individuals.”⁶⁰ However, under the original system, two married couples who, combined, had the same income could potentially have different tax liabilities.⁶¹ This resulted in a “geographic disparity” between couples who resided in community property states and those who resided in common law states.⁶² Only in the former were married couples allowed to split their incomes.⁶³ Thus, to prevent all states from adopting a community property regime, “Congress amended the Code in 1948 to incorporate the income-splitting benefits of community property rules into the tax rates,” effectively substituting “the family for the individual as the unit of taxation.”⁶⁴

Yet, while this amendment allowed for equality between married taxpayers, it did not change the fact that married couples who filed joint returns still used the same tax schedules as unmarried persons.⁶⁵ Because married couples only “applied the rates to half of their total income and doubled the resulting tax . . . single taxpayers found themselves with tax liabilities as high as 141% of the joint liability of married couples with the same total income.”⁶⁶ Backlash from this result caused Congress to once again alter the tax system in 1969 so that the single taxpayer now had “no more than a 20% differential between his tax liability and that of a married couple with the same taxable income.”⁶⁷ This alteration created what is known today as the marriage penalty.⁶⁸

As a number of scholars have observed, “[m]arriage does not always give rise to a tax penalty; in some cases it results in a tax sav-

ers, thereby reporting only their respective incomes when determining their tax liability.”).

60 *Id.* at 1337.

61 *Id.* at 1339 (explaining how different rules under common law and community property states led to differential taxation of couples with the same income).

62 *Id.*

63 *Id.* (explaining that in community property states “married couples were allowed to evenly split their combined income,” but in common law states, “married couples . . . were not allowed to duplicate the income-splitting benefits”). Notably, the Supreme Court upheld the practice of income splitting. *See Johnson v. United States*, 422 F. Supp. 958, 965 (N.D. Ind. 1976) (citing *Poe v. Seaborn*, 282 U.S. 101 (1930)).

64 Pilzner, *supra* note 59, at 1339; Gerzog, *supra* note 58, at 30.

65 Pilzner, *supra* note 59, at 1339 (explaining that after the 1948 amendment “unmarried taxpayers and married taxpayers filing joint returns still used the same tax rate schedule”).

66 *Id.* at 1339–40.

67 Gerzog, *supra* note 58, at 30–31.

68 *See id.* at 31.

ings.”⁶⁹ The marriage penalty arises in situations, like Kelly’s and Bryan’s, in which both spouses work and generate income.⁷⁰ While the penalty begins to take effect “when each spouse contributes at least 20% of the couple’s total income,” it “is greatest when the incomes of the two spouses are equal.”⁷¹ Thus, if two individuals make roughly the same amount of money, the tax law increases their tax burden simply because they are married.⁷² Conversely, if they remained single, even if they cohabitated, their tax burdens would be lower.

The first case to challenge the constitutionality of the marriage penalty was *Johnson v. United States*.⁷³ The plaintiffs primarily relied on *Hoeper v. Tax Commission of Wisconsin*,⁷⁴ a Supreme Court case that struck down a Wisconsin law that computed a married couple’s tax burden based upon “the combined average taxable income” of both spouses regardless of whether the couple filed separate returns or a joint return.⁷⁵ The Supreme Court in *Hoeper* held that “any attempt by a state to measure the tax on one person’s property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment.”⁷⁶ The Court rejected the government’s arguments that the law was a regulation of marriage and was needed to prevent fraud and tax evasion.⁷⁷ When addressing the argument that married couples could be treated differently because they enjoyed more benefits than single taxpayers, the Court expressly stated that “[i]t can hardly be claimed that a mere difference in social relations so alters the taxable status of one receiving income as to justify a different measure for the tax.”⁷⁸ In other words, the Court held that one’s social status (married or single) cannot affect one’s tax status and cannot be determinative of the

69 *Id.* at 27.

70 *Id.* at 28.

71 *Id.*

72 Gerzog, *supra* note 58, at 28 (observing that tax burdens increase for spouses earning equal amounts of money “simply because they choose to maintain their incomes after marriage”).

73 422 F. Supp. 958 (N.D. Ind. 1976); Gerzog, *supra* note 58, at 37.

74 284 U.S. 206 (1931).

75 *Id.* at 213.

76 *Id.* at 215.

77 *See id.* at 216–17 (stating that rights guaranteed by the federal Constitution are superior to the “claimed necessity” behind exaction).

78 *Id.* at 217 (rejecting the argument that “a difference of treatment of married as compared with single persons . . . may be due to the greater and different privileges enjoyed by the former”). This language, though used much earlier, is quite similar to the Court’s in *Baird*, which held that a married couple is comprised of two separate individuals, thus making them similarly situated to non-married persons. *See supra* note 53 and accompanying text.

amount of taxes he or she pays. Thus, the law was struck down for making an arbitrary distinction, thereby rendering it unreasonable and a due process violation.⁷⁹

However, the *Johnson* court strongly distinguished its case from *Hoeper*. It did so by noting that “under Wisconsin’s statute [at issue in *Hoeper*], regardless of which type of return was selected, the tax was assessed on the couple’s aggregate income. The federal law [at issue here], on the other hand, contains no such compulsory income aggregation provision.”⁸⁰ Rather, married couples could file separate returns and have their tax burden assessed on their own individual income or file joint returns and have their burden assessed on their combined income.⁸¹ Of course, the court either disregarded or “failed to recognize that, although this option exists, the tax system does not permit married persons filing separately to use the lower rates provided for single individuals and that, therefore, the option may not be a meaningful alternative.”⁸² Nevertheless, the court found *Hoeper* inapposite due to the married individual’s ability to file a separate return.

In addition, while the *Johnson* court did recognize that marriage is a fundamental right, it also observed that “the federal government traditionally has had very broad classification powers in the taxation field,”⁸³ presumably indicating, contrary to *Hoeper*, that married and unmarried taxpayers can be treated differently for tax purposes. In determining the level of scrutiny, the court found that it “must take into account not only the importance attached to the right of marriage but also the inherently complex nature of legislative decisions

⁷⁹ *Hoeper*, 284 U.S. at 218 (“It is obvious that the act does not purport to regulate the status or relationships of any person, natural or artificial. Arbitrary and discriminatory provisions contained in it cannot be justified by calling them special regulations of the persons or relationships which are the object of the discrimination. The present case does not fall within the principle that where the legislature, in prohibiting a traffic or transaction as being against the policy of the state, makes a classification, reasonable in itself, its power so to do is not to be denied simply because some innocent article comes within the proscribed class . . . Taxing one person for the property of another is a different matter. There is no room for the suggestion that *qua* the appellant and those similarly situated the act is a reasonable regulation, rather than a tax law . . . The exaction is arbitrary, and is a denial of due process.”). Notably, the Court did not specify which level of scrutiny was being applied, but due to the emphasis on reasonableness, it can be inferred that rational basis review was employed.

⁸⁰ *Johnson v. United States*, 422 F. Supp. 958, 967–68 (N.D. Ind. 1976).

⁸¹ *See id.* at 968 (“If married persons each elect to file separate returns, each may do so, and the tax computed is based *solely upon each taxpayer’s own separate income.*”).

⁸² Gerzog, *supra* note 58, at 38.

⁸³ *Johnson*, 422 F. Supp. at 971.

in the field of taxation.”⁸⁴ Beyond this sentence however, the court did not make clear what level of scrutiny it was actually applying. However, its language suggests that it applied a form of strict scrutiny.⁸⁵ That is, the court ultimately held that because Congress had “legitimate legislative goals of reducing the differential between single and married taxpayers and of maintaining equal taxes for equal income married couples, it is obvious that the Government has a *compelling* interest to justify this legislation.”⁸⁶ Furthermore, the court found that “it is unclear that ‘less drastic means’ existed which would have achieved these same legislative goals.”⁸⁷ In other words, the court found that the law was narrowly tailored to achieve compelling interests, and therefore satisfied a strict scrutiny test.⁸⁸

Two years after *Johnson*, the United States Court of Claims addressed the marriage penalty in *Mapes v. United States*.⁸⁹ Unlike *Johnson*, this case was definitively decided under the Equal Protection Clause. Using recently-decided *Zablocki*, the court found that “application of strict scrutiny is appropriate only where the obstacle to marriage is a direct one, *i.e.*, one that operates to preclude marriage entirely for a certain class of people.”⁹⁰ Thus, because “[t]he additional tax liability suffered by two-income couples who cannot avail themselves of the rates for single persons is an *indirect* burden on the exercise of the right to marry,” presumably because it does not definitively and explicitly prohibit people from marrying, the court found that only rational basis review was appropriate.⁹¹ Applying many of the same considerations as the *Johnson* court, though using a lower standard, the *Mapes* court held that the federal tax law satisfied rational basis review.⁹² Interestingly though, the court declined to state why the law was rationally related to a legitimate state interest. Instead, the

84 *Id.*

85 *See* Gerzog, *supra* note 58, at 38 (observing that the *Johnson* court “found the strict scrutiny test appropriate to determine the law’s constitutionality,” although “the court effectively retreated from applying that standard”).

86 *Johnson*, 422 F. Supp. at 973 (emphasis added).

87 *Id.*

88 Interestingly, however, the court did not note under which clause this law was constitutional. That is, while it recognized that the plaintiffs brought the fundamental rights claim under the Due Process Clause, the court, when discussing levels of scrutiny, spoke of “the classification scheme” at issue in the case, which would indicate an equal protection analysis. *Id.* at 969, 971, 974.

89 576 F.2d 896, 897–98 (Ct. Cl. 1978).

90 *Id.* at 901.

91 *Id.* at 901–02 (emphasis added).

92 *Id.* at 904 (“[W]e are satisfied that the present provisions pass a minimum rationality test, and should be upheld as constitutional.”).

court focused on what was not *unreasonable* about the legislation (rather than why it was reasonable) and on the complexities of tax structure.⁹³

The last major case to address this issue was *Druker v. Commissioner of Internal Revenue*,⁹⁴ decided by the Second Circuit Court of Appeals. Despite the fact that the plaintiffs in this case had actually divorced to avoid the marriage penalty, the *Druker* court reaffirmed the finding of the *Mapes* court that the marriage penalty was only an indirect obstacle to marriage because it did not expressly prevent two people from marrying.⁹⁵ However, while this court also applied the Equal Protection Clause, unlike the *Mapes* court, the *Druker* court refrained from identifying which standard of scrutiny it was applying to the marriage penalty. Rather, the court explained the challenges faced by Congress in creating a fair and equitable tax law and simply concluded that “[t]here is nothing in the equal protection clause that required” Congress to avoid the marriage penalty.⁹⁶ Only after reaching this conclusion did the court add that the objectives sought by Congress’s 1969 amendment to the tax law “were clearly compelling,” and therefore “the tax rate schedules . . . can survive even the ‘rigorous scrutiny’ reserved by *Zablocki* for measures which ‘significantly interfere’ with the right to marry.”⁹⁷ Thus, while the court declined to identify a level of scrutiny that should be applied to these cases, this sentence makes clear that the *Druker* court believed that no matter what the level of scrutiny applied, the tax law would survive it.

Together, *Johnson*, *Mapes*, and *Druker*, while all decided by different courts, comprise the main cases that have addressed the marriage tax penalty. While they ultimately all reached the same result and upheld the constitutionality of the marriage penalty, their rationales and the standards of review they applied were inconsistent and often unclear or absent.⁹⁸ Nevertheless, their holdings have been and con-

93 *Id.* (“The policy of taxing all couples with equal incomes equally . . . is not unreasonable. Nor is it unreasonable to attempt to tax the household economies enjoyed by married people We in the judiciary, are neither equipped nor inclined to second guess the legislature in its determination of appropriate tax policies.”). *But see infra* note 123 and accompanying text (explaining that, ordinarily, in performing a rational basis scrutiny there is no need to inquire into the motivation of the legislature).

94 697 F.2d 46 (2d Cir. 1982).

95 *Id.* at 50 (noting that the adverse effects of the marriage penalty are “merely indirect” and “not an attempt to interfere with an individual’s freedom to marry”).

96 *Id.*

97 *Id.*

98 In sum, *Johnson* applied strict scrutiny, but was unclear about whether the law was constitutional under due process or equal protection. *See Johnson v. United States*, 422 F. Supp. 958, 971 (N.D. Ind. 1976) (applying strict scrutiny). *Mapes* was decided under the

tinue to be used in subsequent cases that address challenges to marital status distinctions in tax laws.⁹⁹

B. Government Benefits

Courts' treatment of the allocation of government benefits based on marital status has been similar to their treatment of tax laws that distinguish between single and married persons. Perhaps the most famous and widely cited of these cases is *Califano v. Jobst*.¹⁰⁰ Reaching the Supreme Court during the same period as the main tax cases discussed above, *Jobst*, which was decided under the Due Process Clause of the Fifth Amendment, addressed whether Congress could mandate that secondary social security disability benefits¹⁰¹ terminate upon a person marrying, even if his or her spouse was also a disabled person.¹⁰² As with the tax cases, not all secondary social security disability beneficiaries were harmed by this law.¹⁰³ Rather, if a person receiving secondary social security disability benefits married a person who was also receiving social security disability benefits, neither recipient would have his or her benefits terminated.¹⁰⁴ On the other hand, recipients, such as Mr. Jobst, who married non-beneficiaries, lost their benefits permanently upon marriage.¹⁰⁵ The Court admitted that

Equal Protection Clause, but only applied rational basis review. See *Mapes v. United States*, 576 F.2d 896, 901-02 (Ct. Cl. 1978) (applying rational basis review). Lastly, *Druker* was also decided under the Equal Protection Clause, but declined to specify the appropriate level of scrutiny, though it did say that the law would survive strict scrutiny. See *Druker*, 697 F.2d at 50 (explaining that there was nothing in the Equal Protection Clause that prohibited the marriage penalty).

⁹⁹ See, e.g., *Rinier v. State*, 641 A.2d 276, 282 (N.J. Super. Ct. 1994) (citing to *Mapes* to uphold a New Jersey law that mandated that married couples who filed a joint federal tax return also file a joint state return).

¹⁰⁰ 434 U.S. 47 (1977).

¹⁰¹ The term "secondary social security benefits" indicates that the person receiving the benefits is not the disabled worker, but rather a family member of a disabled worker. In addition, this case only discussed social security *disability insurance* benefits and that is all that is being discussed in this Comment. This should not be confused with supplemental security income, the qualifications and disqualifications for which are very different and are not addressed here. For the differences between the two programs, see Beth Lawrence, *Social Security Disability (SSDI) and SSI?*, DISABILITY SECRETS, <http://www.disabilitysecrets.com/page5-13.html>.

¹⁰² *Jobst*, 434 U.S. at 48.

¹⁰³ *Id.* at 49 (explaining how not all beneficiaries would lose benefits).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* This result would still occur today. See Alison Barjaktarovich, *Social Security Disability and Getting Married: Will It Affect Disability Benefits?*, DISABILITY SECRETS, <http://www.disabilitysecrets.com/page6-37.html> ("If you are an adult disabled child receiving benefits under your parent's work record, getting married will cause your SSDI benefits to stop."). Secondary social security disability benefits are also terminated upon marriage if the dis-

while secondary social security disability “benefits were intended to provide persons dependent on the wage earner with protection against the economic hardship occasioned by the loss of the wage earner’s support” (should the wage earner pass away), receipt was not based on *actual* need or dependency.¹⁰⁶ Rather, “Congress . . . elected to use simple criteria, such as age and marital status, to determine *probable* dependency.”¹⁰⁷ Thus, because he married, Mr. Jobst was deemed less likely to need financial support in the form of social security than if he had remained single. The fact that his spouse was also disabled prior to marriage (and hence was also a needy person) was inconsequential.¹⁰⁸ In other words, in the eyes of the law, two needy, dependent individuals somehow became more financially independent simply by virtue of marrying.

However, the Court found that “[t]here is no question about the power of Congress to legislate on the basis of such factual assumptions.”¹⁰⁹ In fact, the Court held that “[g]eneral rules,” such as the one enacted here, “are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases.”¹¹⁰

Yet, despite this allowance for “arbitrary consequences,” the Court was quick to note that “a general rule may not define the benefited class by reference to a distinction which irrationally differentiates between identically situated persons.”¹¹¹ Thus, if the law had classified on the basis of “race, religion, or political affiliation,” it would be struck down.¹¹² However, the Court held that “a distinction between married persons and unmarried persons is of a different character” because “[b]oth tradition and common experience support the conclusion that marriage is an event which normally marks an important

abled worker was the recipient’s ex-spouse. *See id.* (“If you are receiving Social Security benefits under your ex-spouse’s work record, getting married will cause your benefit payments to stop. . . . If you are a divorced spouse receiving benefits on your deceased ex-spouse’s work record, you’ll lose these benefits if you get remarried before age 60 (or before age 50 if you are disabled).”).

106 *Califano v. Jobst*, 434 U.S. 47, 50–52 (1977).

107 *Id.* at 52 (emphasis added).

108 *See id.* at 56–57 (acknowledging but rejecting the plaintiff’s argument that, because his spouse was also disabled, his benefits should not have been terminated).

109 *Id.* at 53.

110 *Id.*

111 *Califano v. Jobst*, 434 U.S. 47, 53 (1977)

112 *Id.* (explaining that differences in race, religion or political affiliation could not rationally justify distinctions in benefits).

change in economic status.”¹¹³ Thus, while there may be cases, perhaps even many cases, for which this assumption does not hold true, the Court reasoned that “there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.”¹¹⁴

However, while the Court recognized that there were differences between classifying based on race and based on marital status, it failed to explicitly identify the test to which it was subjecting the law. Instead, it held that “[s]ince it was *rational* for Congress to *assume* that marital status is a relevant test of probable dependency, the general rule . . . terminating all . . . benefits when the beneficiary married, satisfied the constitutional test normally applied in cases like this.”¹¹⁵ From this language, it appears the Court applied a test akin to rational basis review. Furthermore, the Court found that although the law may deter marriage, it could not be characterized “as an attempt to interfere with the individual’s freedom to” exercise his fundamental right to marry.¹¹⁶ Thus, the fundamental right argument could not be used to successfully to raise the level of scrutiny applied. Consequently, despite the facts of the case, the law and the distinctions it created were upheld as constitutional exercises of Congress’s powers that did not violate due process, based upon “rational” traditions, probabilities, and assumptions.

Social Security is not the only context in which courts have upheld marital status as a legitimate classification upon which to base the distribution of government benefits. In *Women Involved in Farm Economics v. U.S. Department of Agriculture*, the United States Court of Appeals for the District of Columbia addressed an equal protection challenge to a law that imposed a per-person limit on funds that could be distributed to farmers, but in doing so, defined a husband and wife as one person.¹¹⁷ Under the law, the limit that a single person could receive at the time this case was brought was \$50,000 per year.¹¹⁸ However, “[i]n order to be considered a separate” or single “person for the purpose of the payment limitation,” an individual must meet three requirements: (1) “[h]ave a separate and distinct interest in the land or crop involved[;]” (2) “[e]xercise separate responsibility for such interest[;]” and (3) have a separate account for the cost of

113 *Id.*

114 *Id.*

115 *Id.* at 53–54 (emphasis added).

116 *Id.* at 54.

117 876 F.2d 994, 995 (D.C. Cir. 1989).

118 *Id.* at 996.

farming from which all other individuals are excluded.¹¹⁹ Therefore, numerous people who operated the same farm, such as business partners, could still qualify as separate persons under the Act, and each could be eligible to receive the maximum \$50,000 annual payment.¹²⁰ But married couples, unless they had unrelated farming interests prior to marriage, were absolutely barred from being considered as separate persons, even if they could meet the three requirements.¹²¹ Consequently, under the law, two individuals who lived together and shared all personal expenses could still receive separate payments as long as they were not married and met the statutory requirements. Yet, married individuals, solely by virtue of their marriage, could not.

Relying on *Zablocki*, the court applied rational basis review because it found that the classification did not directly or substantially interfere with a person's fundamental right to marry.¹²² In applying this standard, the court, citing various Supreme Court cases, noted that "[o]rdinarily, there is no necessity in rational-basis scrutiny for a separate inquiry into the legislature's *actual* motivation [for passing the law in question], for the legislature's subjective motivation does not undermine a classification's validity provided legitimate motivations are conceivable."¹²³ Thus, Congress's stated interests of (1) "encouraging maximum participation in agricultural stabilization efforts" and (2) ensuring fair and reasonable application of the benefit program, were more than adequate to satisfy the conceivable "legitimate interest" component of rational basis review.¹²⁴

Furthermore, the court approvingly held "that the regulation" did nothing "more . . . than assume that, whatever their roles, married men and women constitute one economic unit."¹²⁵ Since this assumption had already been upheld in *Jobst*,¹²⁶ the court concluded that

Congress . . . has reasonably determined that married couples . . . are more likely than other 'partners' in farming enterprises to share completely in the products of their efforts—in other words, to be economically interdependent—and the Constitution requires no more precision than this in the circumstances we confront.¹²⁷

119 *Id.*

120 *Id.*

121 *Id.*

122 *Women Involved in Farm Econ.*, 876 F.2d at 1004.

123 *Id.* at 1005.

124 *Id.* at 996–97.

125 *Id.* at 1005.

126 *See supra* note 115 and accompanying text.

127 *Women Involved in Farm Econ.*, 876 F.2d at 1007.

Thus, despite the absolute bar and the potentially arbitrary consequences it could produce, the law satisfied rational basis review and was upheld against the equal protection challenge, based, once again, on likelihoods and assumptions.¹²⁸

Together, *Jobst* and *Women Involved in Farm Economics* show that courts are very willing to allow Congress to condition the receipt of government benefits upon a person's marital status, since under both the Due Process and Equal Protection Clauses such laws are only subject to rational basis scrutiny because they do "not involve a suspect classification" and do not substantially "affect a fundamental right."¹²⁹ In addition, perhaps because of the level of scrutiny applied, as in the tax cases, the courts have been unsympathetic to the specific facts asserted by the plaintiffs regarding the effects the laws have on their particular relationships. Instead, courts defer to Congress's determination of probabilities and assumptions regarding financial dependency. Relying on these determinations, both state and federal courts in subsequent cases have reached similar results in the government benefit context.¹³⁰

C. School Activity Regulations: A Counterpoint

As the cases above show, since the 1970s, at least in the tax and government benefits contexts, courts have made it clear that they will uphold marital status distinctions that in effect disfavor married cou-

128 *Id.*; Debra Kahn, *Constitutional Law—Perpetuating the Presumption of Marital Interdependence Under the Agricultural Act—Women Involved in Farm Economics v. United States Department of Agriculture*, 63 TEMP. L. REV. 881, 887 (1990) ("[T]he United States Court of Appeals for the District Court of Columbia Circuit found that the regulatory presumption that married persons constitute a distinct economic unit for purposes of farm subsidies was rationally related to the legitimate government objectives of efficiency and preventing evasion of the payment limitations.").

129 *Conklin v. Shinpoch*, 730 P.2d 643, 647 (Wash. 1986).

130 *See, e.g., Smith v. Shalala*, 5 F.3d 235, 240 (7th Cir. 1993) *affirming* *Smith v. Sullivan*, 767 F. Supp. 186, 190 (C.D. Ill. 1991) ("It is sufficient [in government benefits context] that the classification is rationally related to the legitimate goals set forth by Congress."); *Munoz v. Sullivan*, 930 F.2d 1400, 1408 (9th Cir. 1991) (stating that Congress was "free to draw the distinction it did" because Congress had a rational concern in preventing couples from pretending to be legally separated, but still living together, from getting more government funds than legally married couples who live together); *Conklin*, 730 P.2d at 651 (Dore, J., dissenting) (noting that the majority held "that the Department of Social and Health Services can deny the State's [General Assistance–Unemployable] financial help to disabled persons, who but for their marital status to SSI recipients would receive such aid."); *Attorney General v. Civil Service Comm'n*, No. 306685, 2013 WL 85805, at *4 (Mich. Ct. App. Jan. 8, 2013) ("The exclusion of the cited groups from the . . . benefits policy does not clearly demonstrate that the policy is arbitrary or unrelated to the state's interests.").

ples and impose burdens that such persons only suffer because they chose to enter marital unions. However, in other circumstances courts have found that this classification and the burdens it imposes violate the Fourteenth Amendment.

One area in which courts have consistently struck down laws that burden married but not unmarried individuals is regulations that restrict participation in school activities. For example, in *Bell v. Lone Oak Independent School District*,¹³¹ the Court of Civil Appeals of Texas held that a school regulation that prohibited all married students from participating in extracurricular activities violated the Equal Protection Clause.¹³² Here, the court applied strict scrutiny analysis and required “the school district to show that its rule should be upheld as a necessary restraint to promote a compelling state interest.”¹³³ As support for application of this standard, as opposed to rational basis review, the court observed that

[t]here can be no doubt in anyone’s mind that if the same rule provided that a particular race or color of person would be ineligible to play football, the state courts and federal courts would promptly strike the rule down as being discriminatory towards a class of individuals. The same logic applies to married students’ participation in extra-curricular activities.¹³⁴

Interestingly, it was this exact comparison between race and marital status that the *Jobst* Court declined to make when it found that rational basis review was the appropriate test.¹³⁵

The *Bell* court also provided some interesting dicta concerning public policy and marriage. It noted that

[i]t is the public policy of this state to encourage marriage rather than living together unmarried . . . and through the years [this state has] . . . jealously guarded the bonds of matrimony. It therefore seems illogical to say that a school district can make a rule punishing a student for entering into a status authorized and sanctioned by the laws of this state. We find no logical basis for such rule.¹³⁶

While this reasoning was certainly not the sole basis for the court’s decision, it seems to have contributed to the court’s analysis.

Ultimately, because the school district could show neither a clear connection to the proffered interest of preventing drop-outs nor “a clear and present danger to the other students,” the faculty, or the

131 507 S.W.2d 636 (Tex. 1974).

132 *Id.* at 638.

133 *Id.*

134 *Id.*

135 *See supra* note 112 and accompanying text.

136 *Bell*, 507 S.W.2d at 638.

school system itself, the court held that “the evidence is legally insufficient to establish that the rule in question is a necessary restraint to promote a compelling state interest”¹³⁷ Therefore, the rule was struck down as an equal protection violation.¹³⁸

While some differences between the school activities and the tax/government benefit cases are facially and overwhelmingly obvious, the former serve as interesting and helpful points of comparison when trying to discern the courts’ rationales in the tax and government benefit cases. First, they show that courts will not always uphold distinctions based upon marital status that burden married individuals. Second, in striking down the school regulations, courts have been willing to impose strict scrutiny analyses because they held that regulations pertain to and burden the fundamental right to marry.¹³⁹ However, courts have specifically declined to find such burdens in the tax and government benefits contexts. Thus, in some ways, these analyses, rationales, and results seem to directly contradict the tax and government benefit cases. Why do courts engage in such drastically different reasoning? Why are challenges in some fields successful and others are not? And why is there a lack of clear constitutional analysis in one type of cases but not in the other? In the next Part, this Comment will compare these cases further and offer four potential reasons.

IV. POTENTIAL REASONS FOR THE DIFFERENT TREATMENT OF MARITAL STATUS

As we have seen, “courts have generally been unsympathetic to” married persons “subject to” tax and government benefits penalties.¹⁴⁰ However, given that governments and courts have generally sought to

¹³⁷ *Id.*

¹³⁸ *Id.* Notably, rules very similar to the one at issue in *Bell* have been struck down by federal courts using the same rationales. *See, e.g., Holt v. Shelton*, 341 F. Supp. 821, 823 (M.D. Tenn. 1972) (striking down a regulation that prohibited married students from participating in all school activities except classes after subjecting the regulation to strict scrutiny since it infringed on the fundamental right to marry and finding that “the sole purpose and effect of the regulation is to discourage . . . marriages which are perfectly legal under the laws of Tennessee and which are thus fully consonant with the public policy of that State”); *Romans v. Crenshaw*, 354 F. Supp. 868, 869 (D.C. Tex. 1972) (striking down a regulation that prohibits married or formerly married students from participating in extracurricular activities as violative of equal protection despite the school district’s arguments that the regulation served to achieve the interests of preventing “fraternization by married students” and “undue interest in and discussion of sex by unmarried students”).

¹³⁹ *See supra* note 138.

¹⁴⁰ Gerzog, *supra* note 58, at 28.

promote the institution of marriage,¹⁴¹ it is interesting to question “[w]hat public polic[ies are] served by th[ese] restriction[s].”¹⁴² What are the courts’ reasons, both constitutional and political, for unquestioningly upholding the tax and government benefit marriage penalties? Since the courts’ rationales in these cases have been shown to be inconsistent both amongst themselves and with other marital status cases (namely, the school activities cases just discussed), in order to answer these questions, it is necessary to examine the cases closely to draw out common language and themes. This Comment suggests that there are at least four potential explanations for courts’ rejection of equal protection and due process challenges to marital status discrimination in the tax and government benefits contexts: (1) the nature of taxation and government benefit distribution, both their complexities and courts’ position relative to them; (2) the difficulty of applying the right-to-marry precedents discussed in Part I; (3) courts’ belief in a deference to the assumption that marriage does and should privatize dependency; and (4) the existence of many other benefits that advantage married couples compared to singles. This Part will both explore each potential reason and critique its soundness, particularly with respect to societal changes over the past several decades.

A. *The Nature of Taxation and Government Benefit Distribution*

The first reason that courts may treat the burdens placed on married couples differently in the tax and government benefit contexts as opposed to other contexts concerns the subject matter itself. Tax and government benefit schemes are inherently complex. Their operations are difficult for even judges to understand. Particularly in the tax opinions, courts rely on this fact to support their rejection of

¹⁴¹ See e.g., *Skinner v. Okla.*, 316 U.S. 535, 541 (1942) (“Marriage . . . [is] fundamental to the very existence and survival of the race.”); *Meyer v. Neb.*, 262 U.S. 390, 399 (1923) (“Without doubt, it [the Fourteenth Amendment] denotes . . . the right . . . to marry . . . and generally to enjoy those privileges long recognized at common law to the orderly pursuit of happiness by free men.”); *Peden v. State*, 930 P.2d 1, 17 (Kan. 1996) (recognizing that promoting marriage is “a valid state objective”); *Bell*, 507 S.W.2d at 638 (“It is the public policy of this state to encourage marriage rather than living together unmarried . . . and through the years [we] have jealously guarded the bonds of matrimony.”); Robert E. Rains, *Disability and Family Relationships: Marriage Penalties & Support Anomalies*, 22 GA. ST. U. L. REV. 561, 595 (2006) (quoting President George W. Bush’s speech during “Marriage Protection Week” in 2003 in which he said, “Marriage is a sacred institution, and its protection is essential to the continued strength of our society.”).

¹⁴² Rains, *supra* note 141, at 564.

equal protection and due process challenges.¹⁴³ For example, the *Johnson* court acknowledged its own “lack of expertise in the complex arena of taxation.”¹⁴⁴ Consequently, partly because judges struggle to understand these subject areas, they are unlikely to find constitutional violations.¹⁴⁵

More importantly, the subject area presents a problem for judges because it does not lend itself to obvious, clear-cut solutions. As a number of scholars have acknowledged, in the case of taxes, Congress must choose between a set of competing interests, namely, a progressive tax scheme, horizontal equity,¹⁴⁶ and ability to pay.¹⁴⁷ The *Druker* court observed that “it is simply impossible to design a progressive tax regime in which all married couples of equal aggregate income are taxed equally and in which an individual’s tax liability is unaffected by changes in marital status.”¹⁴⁸ Similarly, the *Mapes* court recognized that “the perplexities of shaping a legislative scheme which distributes the incidence of the personal income tax equitably between married and single taxpayers have confounded Congress for many years.”¹⁴⁹

This difficulty, coupled with the typical treatment of economic legislation,¹⁵⁰ has generally affected (by lowering) the level of scrutiny

143 See, e.g., *Mapes v. United States*, 576 F.2d 896, 904 (Ct. Cl. 1978) (“We in the judiciary, are neither equipped nor inclined to second guess the legislature in its determination of appropriate tax policies.”); *Johnson v. United States*, 422 F. Supp. 958, 974 (N.D. Ind. 1976) (“[T]his court finds itself ill-equipped to judge the merits of plaintiffs’ suggestions or of the many others which might be offered.”); Gerzog, *supra* note 58, at 39–40 (describing the court’s acknowledgement of “their own lack of expertise” in the tax cases and their resulting deferral to Congress); Pilzner, *supra* note 59, at 1343 (highlighting that the *Johnson* court “[a]cknowledg[ed] the complexity of the [Tax] Code”); see also *Califano v. Jobst*, 434 U.S. 47, 56–57 (1977) (acknowledging that Congress’s rule is easy to implement).

144 *Johnson*, 422 F. Supp. at 971.

145 This is further supported by the fact that, in the area of taxation, courts have also upheld tax penalties on unmarried persons, thus illustrating that courts are extremely hesitant to delve into this subject where classification based on marital status is at issue. See, e.g., *Kellems v. Comm’r of Internal Revenue*, 58 T.C. 556, 558–59 (T.C. 1972) (upholding the constitutionality of a penalty on unmarried people where there was “no evidence submitted showing the intent of Congress was to regulate or restrict or penalize persons who are not married”); *Peden v. State*, 930 P.2d 1, 18 (Kan. 1996) (upholding a singles tax penalty under rational basis review because it was rationally related to the legitimate state objective of encouraging singles to marry and stay married).

146 Horizontal equity refers to the idea “that persons similarly situated be equally taxed.” Gerzog, *supra* note 58, at 33.

147 *Id.* at 31.

148 *Druker v. Comm’r of Internal Revenue*, 697 F.2d 46, 50 (2d Cir. 1982).

149 *Mapes v. United States*, 576 F.2d 896, 899 (Ct. Cl. 1978).

150 Recall that economic legislation is usually accorded rational basis review. See *supra* note 17 and accompanying text.

courts impose on such laws.¹⁵¹ It also affects how that lower standard is applied. For example, the *Johnson* court wrote that

[a]bsent the complexities of the Internal Revenue Code, the Government would normally bear the burden of demonstrating that no less burdensome means exist which would satisfy its interests. Theoretically, a better answer than the present tax structure may exist[,] one which either does not burden the plaintiffs or which burdens them to a lesser extent. But the tax system is an 'arena in which no perfect alternatives exist.' [citation omitted] Given this fact, this court cannot require the Government to demonstrate more convincingly than it has that no less burdensome means exist.¹⁵²

The same "difficulty" argument has been made in regards to the distribution of government benefits, since it concerns the allocation of finite funds.¹⁵³ For example, the *Women Involved in Farm Economics* court "reasoned that it would be difficult for the Secretary of Agriculture to ascertain the extent to which a husband and wife have made separate economic contributions" to the farm.¹⁵⁴ Thus, the level of review needed to survive constitutional scrutiny may be lowered and courts may be more willing to defer to legislative "expertise."

These difficulties can be contrasted with the school activities cases in which a simple, easy to implement solution was available. That is, by allowing married couples to participate in extracurricular activities, the unmarried students do not have rights or benefits taken away from them. As was shown, this is not true in the tax context because "tax disparities will exist no matter how the rates are structured."¹⁵⁵ Therefore, removing the marriage penalty would result in unequal taxes for singles. Someone will always be disadvantaged; "[t]his is simply the nature of the beast."¹⁵⁶ Similarly, in the government benefit context, distribution to one person may result in another person receiving fewer financial benefits. In addition, there are "administrative difficulties . . . in formulating . . . exception[s] that [would] allow[] for separate treatment of" married couples, such as the Jobsts,

151 See *Mapes*, 576 F.2d at 903 (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973)) ("In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all . . . fiscal schemes become subjects of criticism under the Equal Protection Clause.")

152 *Johnson v. United States*, 422 F. Supp. 958, 974 (N.D. Ind. 1976) (quoting *San Antonio Indep. School Dist.*, 411 U.S. at 41).

153 See, e.g., *Conklin v. Shinpoch*, 730 P.2d 643, 649, 651 (Wash. 1986) (recognizing that classifications "involving finite state funds must be treated with deference," that "the United States Supreme Court has considered the finite character of funds in upholding economic classifications," and that "limitations are necessary in any public assistance program").

154 Kahn, *supra* note 128, at 887.

155 *Mapes*, 576 F.2d at 904.

156 *Id.*

who do not fit the presumed marriage mold of becoming more economically stable upon marriage.¹⁵⁷ No such separate treatment would be necessary in the school activities context. It seems clear that these considerations and difficulties at least contribute to courts' different treatment of marital status in the tax and government benefit areas and their willingness not to require "mathematically perfect justice."¹⁵⁸

Furthermore, when addressing taxation and government benefits, courts are also concerned that these are areas in which "the federal government traditionally has had very broad classification powers."¹⁵⁹ The *Johnson* court specifically expressed concern about "abrogat[ing] the constitutional taxing power of Congress."¹⁶⁰ Similarly, in *Women Involved in Farm Economics*, the court found that judicial intervention is warranted "only if Congress' choice in imposing burdens or erecting classifications represents a display of arbitrary power, not an exercise of judgment."¹⁶¹ Since the courts in these cases have found "no evidence that Congress intended to burden or deter marriage" by creating these classifications, the courts have deferred to the legislature.¹⁶²

However, it is not clear that the courts' concerns about the subject matter are *good* reasons to subject marital status to a different and more deferential constitutional treatment in these contexts. Why should courts be able to alter constitutional requirements just because subject matter is conceptually or administratively difficult?¹⁶³ As was made evident by the *Hoeper* decision, some courts are willing to

157 Kahn, *supra* note 128, at 888.

158 Gerzog, *supra* note 58, at 40.

159 *Johnson v. United States*, 422 F. Supp. 958, 971 (N.D. Ind. 1976). See also *Women Involved in Farm Economics v. USDA*, 876 F.2d 994, 1004 (D.C. Cir. 1989) ("In the realm of social and economic regulation, in particular, the role of the courts is narrow . . ."); Pilzner, *supra* note 59, at 1345 (noting that the *Mapes* court deferred to Congress's "expertise" in drafting tax legislation). Congress has the power to "[t]o lay and collect [t]axes" pursuant to Article I of the Constitution. U.S. CONST. art. I, § 8, cl. 1. Government benefits are also within Congress's power to distribute as part of the Spending Clause. *Id.*

160 *Johnson*, 422 F. Supp. at 974.

161 *Women Involved in Farm Economics*, 876 F.2d at 1004 (citations omitted) (internal quotation marks omitted).

162 *Johnson*, 422 F. Supp. at 972.

163 Recall that *Zablocki* held that strict scrutiny was only appropriate when the right to marry was substantially burdened. *Zablocki v. Redhail*, 434 U.S. 374, 381–82 (1978). Substantial burdens were not found in the tax and government benefit cases discussed above. Yet, it is difficult to see why there was any more of a burden in *Bell*, where the court struck down a rule prohibiting married students from participating in extracurricular or athletic activities, than in those cases affecting married couples' finances. *Bell v. Lone Oak Indep. Sch. Dist.*, 507 S.W.2d 636, 638 (1974).

critically wrestle with these issues even under rational basis review rather than simply defer to Congress's wisdom. And, as the court in *Conklin v. Shinpoch* recognized in the context of government benefits, "while an economic classification involving finite state funds must be treated with deference, the finitude of the fund is not, in itself a sufficient reason for upholding the classification."¹⁶⁴ If it were, "any such classification involving a state fund would be valid, since all funds are finite."¹⁶⁵

Additionally, some scholars have posited that the difficulties relied upon by the courts are not as severe as the opinions suggest. For example, after detailing the number of disabled adult children ("DAC") receiving benefits compared with the number of disabled beneficiaries,¹⁶⁶ Robert Rains argues that "[i]t is difficult to believe that the administrative burden posited by the [*Jobst*] Court would be significant" since "the number of disability claims that would be added by allowing a DAC recipient to continue to receive benefits after marriage to a disabled person not receiving benefits would be infinitesimal in the general Social Security adjudicative system."¹⁶⁷ In addition, Wendy Gerzog has argued that one solution to the marriage tax penalty would be "to afford married persons filing separately the opportunity to utilize the tax rates presently applicable to single individuals."¹⁶⁸ This, she has claimed, "represents a feasible and easily implemented alternative to the marriage penalty."¹⁶⁹ While this solution would ad-

¹⁶⁴ 730 P.2d 643, 649 (Wash. 1986).

¹⁶⁵ *Id.* (citation omitted).

¹⁶⁶ Rains, *supra* note 141, at 565 (explaining that "recipients of DAC benefits constitute approximately 750,000 out of over 12,400,000 disabled beneficiaries").

¹⁶⁷ *Id.* at 565-66. Debra Kahn has made similar arguments concerning the benefits system at issue in *Women Involved in Farm Economics*. She has argued that while the court accepted the government's assertion that testing for the actual interdependence of a husband and a wife "would be too difficult to administer and overly permissive," it failed to recognize and give weight to the fact that the government was willing to examine dependency in the case of partnerships, that there was no explanation as to "why it was more difficult to administer a test of separateness for a married couple than for a partnership," and that "the legislature could easily deal with any problems involving circumvention of the maximum payment limitations and any other inequities by increasing the stringency of the edibility criteria." Kahn, *supra* note 128, at 890-91. Kahn contends that "[i]f married couples meet the criteria, then they deserve the subsidy payments. Any subsequent fraud problems will not be due to the fact that married couples were treated in the same manner as others, but will point to the need to apply stricter scrutiny to everyone who cohabitates." *Id.* at 891.

¹⁶⁸ Gerzog, *supra* note 58, at 48.

¹⁶⁹ *Id.* Amy Christian has also explored potential solutions to the marriage tax penalty problem, suggesting that this is not a hopeless subject in which we can achieve equality. See generally Amy C. Christian, *Legislative Approaches to Marriage Penalty Relief: The Unintended Effects of Change on the Married Couple's Choice of Filing Status*, 16 N.Y.L. SCH. J. HUM. RTS.

mittedly need to be implemented by Congress, its existence suggests that the case for equality amongst people of different marital statuses in this subject area is not as hopeless as the courts make it seem.

Second, the difficulties associated with the subject matter do not satisfactorily explain why the tax cases in particular were subjected to different standards of review amongst themselves.¹⁷⁰ Additionally, these disparities present problems with the potential argument that, unlike in the school activities cases, economic legislation is involved here, so only rational basis review should be applied. If that is true, why did the *Johnson* court seem to apply a higher standard?

Finally, while this subject area may be one in which Congress has broad power to legislate, Antoinette Pilzner has recognized that “[c]ongressional concern with” the effects of these penalties “seems to disappear once these sections have been codified.”¹⁷¹ Therefore, “[t]he courts appear to be the only receptive audience to hear and evaluate” these citizens’ “complaints about unequal treatment.”¹⁷² To dismiss such cases then as outside the courts’ role effectively denies citizens any potential relief. Thus, while the nature of the subject at issue may be one explanation of the different treatment of marital status in these cases, because courts must wrestle with difficult issues, because the difficulties in this area might not be insurmountable, and because citizens must have an avenue of redress for constitutional violations, it is questionable whether this reason is a *good* one.

B. Difficulties in Applying the Right-to-Marry Precedents

Another reason that courts may seriously struggle with—and challenges are not successful against—marital status distinctions in the tax and government benefits contexts is that the major cases that have addressed marriage (*Loving*, *Baird*, and *Zablocki*) are not easily applicable to them. That is, the facts of and language used by the major cases present significant challenges for tax and government benefits plaintiffs, particularly in terms of the standard of review to be applied. Plaintiffs obviously want the courts to apply the highest standard of review possible (since that gives them the best—perhaps only—chance to win their cases). The first obstacle plaintiffs face

303 (1999) (analyzing the text, and the consequences, of marriage penalty relief proposals).

170 Recall that the *Johnson* court used language that suggested it was applying a strict scrutiny standard, while the *Mapes* court specifically applied rational basis review. See *supra* Part II.A.

171 Pilzner, *supra* note 59, at 1349.

172 *Id.*

though is that “[i]n general . . . for purposes of equal protection . . . married” couples “as a group are not a burdened or suspect class,”¹⁷³ and there have been no strong arguments that “the ‘marriage penalty’ is . . . ‘an attempt to interfere with the individual’s freedom to marry.’”¹⁷⁴ Therefore, unlike the plaintiffs in *Loving*, they cannot avail themselves of the strict scrutiny standard afforded to classifications that invidiously discriminate along suspect lines.

Thus, they must argue that the laws infringe on their fundamental right to marry, which requires them to grapple with *Zablocki*. The problem though is that *Zablocki* specifically held “that every . . . regulation which relates in any way to the incidents of or prerequisites for marriage” does *not* necessarily have to “be subjected to rigorous scrutiny.”¹⁷⁵ Instead, citing *Jobst*, the Court held that “reasonable regulations that do not *significantly* interfere with *decisions to enter into the marital relationship* may legitimately be imposed.”¹⁷⁶ Thus, “[t]he key to a clear application of the [*Zablocki*] test” seems to “lie[] in the identification of what constitutes a significant,” substantial, and direct “interference with” and individual’s exercise of his or her “right to marry.”¹⁷⁷ While the Court has offered “relatively little guidance on” this point, from *Zablocki* we at least know that “classification[s] which determine[] who may lawfully enter into the marriage relationship” are considered significant, substantial, and direct burdens.¹⁷⁸ But, as evidenced by the *Zablocki* Court’s citation to *Jobst*, the removal of government benefits likely do not.

As the cases outlined in Subparts II.A and II.B show, courts have been unwilling to find significant, substantial, and direct burdens when economic marital status classifications are involved. Specifically, the *Mapes* court “refused to apply strict scrutiny to the tax rate schedules because they [did] not present a direct obstacle to marriage.”¹⁷⁹ Similarly, the *Women Involved in Farm Economics* court held

¹⁷³ *Id.* at 1351–52.

¹⁷⁴ *Druker v. Comm’r of Internal Revenue*, 697 F.2d 46, 50 (2d Cir. 1982) (quoting *Califano v. Jobst*, 434 U.S. 47, 54 (1977)).

¹⁷⁵ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

¹⁷⁶ *Id.* (emphasis added).

¹⁷⁷ *Harv. L. Rev. Ass’n*, *supra* note 11, at 1251.

¹⁷⁸ *Zablocki*, 434 U.S. at 404 (Stevens, J., concurring).

¹⁷⁹ *Pilzner*, *supra* note 59, at 1344. *See also Gerzog*, *supra* note 58, at 39 (discussing the *Mapes* court’s finding that “strict scrutiny of the marriage penalty was unnecessary because the penalty merely discourages, rather than proscribes, marriage”). The same result was reached in other tax cases as well. *See, e.g., Rinier v. State*, 641 A.2d 276, 280 (N.J. Super. Ct. 1994) (holding that “the challenged provisions of the New Jersey tax place ‘no direct legal obstacle in the path of persons desiring to get married’” but instead, “[a]t

that “the district court was quite correct in concluding that heightened scrutiny of the husband-wife rule is inappropriate because the rule does not ‘interfere directly and substantially with the right to marry,’ . . . nor significantly discourages marriage.”¹⁸⁰ Thus, it seems that because the tax and government benefit laws do not affirmatively prevent people from entering marriage, because, unlike the laws at issue in *Loving* and *Zablocki*, marriage remains “their choice to make,”¹⁸¹ the parties’ arguments for infringement of a fundamental right have been struck down.

However, if this is correct, as plaintiffs have recognized, there is a potential problem with the courts’ application of *Zablocki*. For, *Zablocki* actually said that “reasonable regulations that do not significantly interfere with *decisions* to enter into the marital relationship may legitimately be imposed.”¹⁸² Thus, taking the *Zablocki* language literally, plaintiffs can argue that these laws significantly interfered with their *decisions* to enter into marriage. While some courts denied that this was the case,¹⁸³ others recognized it, but still found that the fundamental right to marry was not infringed.¹⁸⁴ Thus, even though scholars have determined that tax code “categorizations drive people’s behavior”¹⁸⁵ and that marriage penalties in the distribution of government benefits “no doubt influence many couples’ decisions to

most . . . impose an indirect burden suffered not from marrying, but ‘from marrying one in a particular income group’”).

180 *Women Involved in Farm Econ. v. USDA*, 876 F.2d 994, 1004 (D.C. Cir. 1989) (citations omitted).

181 *Rimier*, 641 A.2d at 282.

182 *Zablocki*, 434 U.S. at 386 (emphasis added).

183 *See Mapes v. United States*, 576 F.2d 896, 898 (Ct. Cl. 1978) (stating that “we have no data showing that as yet [tax effects] operate in [a] manner” by which they impact people’s important decisions in life since “[l]ove and marriage defy economic analysis”).

184 *See Califano v. Jobst*, 434 U.S. 47, 54 (1977) (“That general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby.”); *Druker v. Comm’r of Internal Revenue*, 697 F.2d 46, 50 (2d Cir. 1982) (holding that “[w]e do not doubt that the ‘marriage penalty’ has some adverse effect on marriage,” but rational basis review was still appropriate because “[t]he tax rate structure . . . places ‘no direct legal obstacle in the path of persons desiring to get married’ . . . [n]or is anyone ‘absolutely prevented’ by it from getting married” (citations omitted)); Pilzner, *supra* note 59, at 1349 (“To date, constitutional challenges to the disparate tax rate schedules as impermissibly burdening the fundamental right of marriage have failed to have any enduring effect on the Code. In general, courts have found that, while undeniably burdening married individuals, the tax rate schedules do not impose an insurmountable or even significant obstacle to taxpayers contemplating entering into or continuing a marital relationship.”).

185 Margaret Ryznar, *To Work, or Not to Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921, 934 (2009).

marry, cohabit, separate, or divorce,”¹⁸⁶ and even though “[i]n cases involving other fundamental rights . . . the Supreme Court has interpreted . . . the concept of a burden . . . broadly,”¹⁸⁷ courts have been unwilling to find substantial interference because the tax and government benefits laws do not set “prerequisite[s] for the issuance of a marriage license.”¹⁸⁸

But, if a substantial obstacle can only be found if the law at issue creates an affirmative and explicit barrier to marriage, one may wonder why the school activities cases, which did not involve regulations that required students to “meet[]some condition prior to marriage,” still applied strict scrutiny.¹⁸⁹ Recall that they held that since “any infringement by” the government “upon a fundamental right of its citizens is subject to the closest judicial scrutiny” and the regulations at issue “infringe[d] upon” the students’ “fundamental right to marry,” strict scrutiny was appropriate.¹⁹⁰ One explanation is that the cases cited in this Comment were decided before *Zablocki*, and so that language had not yet been used by the Court. However, it is interesting to note that *Johnson*, which was also decided before *Zablocki*, still upheld the tax law under strict scrutiny even though it affected a fundamental right. The Harvard Law Review Association has suggested that the difference could be because the interference in the school activities cases is more substantial since, unlike economic changes, it “affect[ed] the couple in ways not naturally associated with mar-

186 Rains, *supra* note 141, at 573–74. See also Gerzog, *supra* note 58, at 36–37 (“[O]n decisions to marry . . . the penalty clearly has been perceived as a disincentive Couples may still divorce in order to avoid the marriage penalty, although they may continue to live together. They are more likely to remain divorced, however, in order to obtain a continuing tax advantage. Rather than nullify the effect of tax-motivated divorces, the revenue ruling may simply encourage permanent divorce.”); Leslie Whittington, *Manipulating Marriage? Federal Income Taxes and the Household Structure Decision*, 16 N.Y.L. SCH. J. HUM. RTS. 129, 130–31 (1999) (“[W]e find that taxes do influence marriage and divorce decisions. We find that the marriage tax has a negative impact on marriage probabilities We find that the marriage tax has a positive impact on the probability of divorce So marriage appears, both in the aggregate and in the microeconomic or household data, to in fact be affected by taxes.”).

187 *Johnson v. United States*, 422 F. Supp. 958, 972 (N.D. Ind. 1976). See also Paul L. Caron, *Is the Marriage Penalty Unconstitutional?*, TAXPROF BLOG (May 12, 2008), http://taxprof.typepad.com/taxprof_blog/2008/05/is-the-marriage.html (“[I]t’s hard to imagine that a \$6000 tax on abortions would not be held to ‘significantly interfere’ with what the Supreme Court calls the fundamental constitutional right to an abortion . . .”).

188 Harv. L. Rev. Ass’n, *supra* note 11, at 1252. In fact, one court went so far as to argue that the “Internal Revenue Code provides an opportunity to the young to demonstrate the depth of their unselfishness” by getting married despite the effects of the tax code. *Mapes*, 576 F.2d at 898.

189 Harv. L. Rev. Ass’n, *supra* note 11, at 1255.

190 *Holt v. Shelton*, 341 F. Supp. 821, 823 (M.D. Tenn. 1972).

riage.”¹⁹¹ That is, “governmental measures affecting a person’s economic circumstances seem to represent a less substantial interference because changes in economic circumstances typically affect the decision to marry,” whereas “a change in one’s ability to engage in sports is not typically associated with a decision to marry.”¹⁹² Relatedly, insofar as these cases concern economic rights, it is noteworthy that, at least when deciding a case under substantive due process, “the Supreme Court has not invalidated a statute . . . where only economic rights are implicated since the Lochnerian period.”¹⁹³

Thus, because they are not a suspect class and because they cannot satisfy the substantial interference *Zablocki* standard, plaintiffs have had to fight the tax and government benefits law under rational basis review generally applied to economic legislation. Of course, the law in *Baird* was subjected only to rational basis review and the marital status distinction was struck down.¹⁹⁴ Therefore, plaintiffs could argue¹⁹⁵ that since “the marital couple is not an independent entity . . . but an association of two individuals” and “the right of privacy . . . is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion,” they should be treated like all other individuals under the tax and government benefit laws.¹⁹⁶ In fact, this was essentially the winning argument in *Hooper* (which, notably, has not been directly overturned: “[A]ny attempt by a state to measure the tax on one person’s property or income by reference to the property or income of another is contrary to due process of law as

191 Harv. L. Rev. Ass’n, *supra* note 11, at 1254.

192 *Id.*

193 Levinson, *supra* note 10, at 321. Though one could rightly question whether only economic rights are involved here. Certainly the plaintiffs would argue that much more is at stake.

194 *But see* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 32 (1972) (suggesting that more than rational basis review was used in *Baird*).

195 In fact, particularly when discussing the *Women Involved in Farm Economics* case, numerous scholars have recognized that courts have moved away from treating husband and wife as one unit. *See, e.g.*, Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 427 (2005) (“[In the 1970s] [m]arriage came increasingly to be viewed as a private relationship intended to promote *individual* happiness, which in turn supported an approach to legal regulation that emphasized privacy and decisional autonomy: individuals should decide for themselves when and how to enter into and exit from relationships.” (emphasis added)); Kahn, *supra* note 128, at 886, 887 (“Many courts, however, have rejected the notion that a husband and wife should be treated as one person The abolition of the interspousal tort immunity doctrine epitomizes society’s recognition that husband and wife are separate individuals whose individual rights are not forfeited upon marriage.”).

196 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

guaranteed by the Fourteenth Amendment.”¹⁹⁷ In other words, each person, whether married or single, has the right to be treated like other individuals. However, *Baird* also recognized that classifications could be made so long as “all persons similarly circumstanced shall be treated alike.”¹⁹⁸ As *Jobst* makes clear, due to presumptions about dependency,¹⁹⁹ courts have been unwilling to find that for purposes of economic legislation, the married and unmarried are similarly situated.²⁰⁰ Therefore, the laws have survived review.

But a number of scholars have argued that these analyses were wrong and have instead provided alternatives that do not require wrestling with the more problematic language in *Loving*, *Baird*, or *Zablocki*. For example, Martha Fineman has posited that marriage, since it no longer “serves the essential function of managing dependency,” should be abolished “as a legal category.”²⁰¹ Clearly, this would eliminate all marital-status based discrimination. Put another way, married and unmarried individuals could be treated identically, no matter what. However, this is a fairly radical solution given the number of marital-status based distinctions in our current legal system and is therefore unlikely to be adopted.

Debra Khan provides a more realistic approach. In discussing *Women Involved in Farm Economics*, she argued that

[b]ecause the husband-wife rule involved both government benefits and an overtly discriminatory classification, the court should have applied a ‘heightened standard’ and considered factors such as the character of the classification, the importance of the benefits provided, the validity of the presumption of marital interdependence, and the asserted state interests supporting the classification. This approach would have enabled the court to balance the costs of promulgating the husband-wife rule against the government’s claims of administrative convenience and necessity to avoid excessive subsidy payments.²⁰²

Similarly, Antoinette Pilzner has argued in the tax context that married taxpayers could be deemed “a quasi-suspect class” because “like gender, an individual’s marital status bears no relation to the individuals’ proportionate liability for fiscal support of the government

197 *Hooper v. Tax Comm’n of Wisconsin*, 284 U.S. 206, 213 (1931).

198 *Id.* at 447 (citations omitted) (internal quotation marks omitted).

199 The courts’ presumptions about marital dependency will be discussed in Subpart IV.C.

200 *But see Hooper*, 284 U.S. at 217 (“[T]he state has, except in its purely social aspects, taken from the marriage status all the elements which differentiate it from that of the single person. In property, business and economic relations they are the same.”).

201 Fineman, *supra* note 2, at 261, 267.

202 Kahn, *supra* note 128, at 889.

through the payment of income taxes.”²⁰³ If married taxpayers are deemed a quasi-suspect class, Pilzner suggests that Congress’s

stated goals of equity, economic efficiency and minimal complexity . . . might not be held to be substantially related to the important governmental interest of revenue collection under a heightened scrutiny analysis. These individual Code sections could then be excised from the statute or revised to correct the unequal treatment.²⁰⁴

Unlike eliminating marital-status distinctions, changing the level of scrutiny applied in these cases would be simple for courts to implement, would result in fairer outcomes, and would permit the courts to adhere more closely with the rationales in *Loving*, *Baird*, and *Zablocki*.

C. Assumed Privatization of Dependency

A third, and perhaps the most important, reason that challenges to tax and government benefit marital status discriminations have failed is either explicitly or implicitly addressed in most of these cases: The courts unquestionably accept Congress’s assumption that married persons have greater financial resources and independence from the government or others than their unmarried counterparts and therefore (in the case of taxes) can afford to pay more and (in the case of government benefits) can afford to receive less.²⁰⁵ However,

²⁰³ Pilzner, *supra* note 59, at 1354, 1354 at n.87.

²⁰⁴ *Id.* at 1354. Pilzner also contends that “[c]urrent societal trends,” such as “the pervasive presence of two-earner married couples . . . may require Congress to reassess its rationale for treating married taxpayers as differently as the Code has since 1948.” *Id.*, at 1352. Margaret Ryznar has also suggested that intermediate scrutiny might be appropriate for tax legislation since the current tax law, by most severely penalizing those couples who earn equal amounts of money, creates disincentives for women to enter the workforce and therefore discriminates on the basis of gender. Ryznar, *supra* note 185, at 941–42. However, such an argument raises a host of other questions that are not the subject of this Comment.

²⁰⁵ *See, e.g.*, *Califano v. Jobst*, 434 U.S. 47, 53 (1977) (“Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status . . . [so] there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.”); *Cherry v. Sullivan*, 30 F.3d 73, 75 (7th Cir. 1994) (“Indiana has the additional legitimate interest in recognizing the marital relationship for what it is, a relationship of interdependence wherein it is neither unfair nor unrealistic to require one spouse to support the other”); *Women Involved in Farm Econ. v. USDA*, 876 F.2d 994, 1007 (D.C. Cir. 1989) (“Congress . . . has reasonably determined that married couples, as a group, are more likely than other ‘partners’ in farming enterprises to share completely in the products of their efforts—in other words, to be economically interdependent—and the Constitution requires no more precision than this in the circumstances we confront.”). Scholars have also recognized the relationship between marriage and financial dependency. *See, e.g.*, *Fineman, supra* note 2, at 242–43 (“[M]arriage

there are two serious flaws with this assumption and courts' reliance on it: (1) scholars have shown that it is largely invalid and outdated; and (2) it is underinclusive in that cohabitating couples often have the same financial independence as married couples, yet the former are often not subject to the same financial penalties.

First, many scholars have shown that we “can . . . question . . . the validity of the assumption that a married person is less likely to be dependent” on others “for support than one who is unmarried.”²⁰⁶ This is partly because marriage “no longer serves individual and societal dependency needs in the way that it once did.”²⁰⁷ For example, Fineman argues that it is a myth to “assume[] that the marital family serves the essential function of managing dependency” because, due to high rates of divorce and other causes, “the family imagined in this discourse and policy no longer exists.”²⁰⁸ Similarly, Gerzog concludes that “while economies of scale and available funds for discretionary uses are proffered as justifications for the existence of the marriage penalty [in the tax code], they are not compelling” because they do

can . . . be seen as serving society by taking care of the dependency and vulnerability of some members of the marital family.”); Gerzog, *supra* note 58, at 34–35 (“The marital status of an individual reflects his ability to pay in several ways. First economies of scale are produced by the marriage of two individuals who previously maintained separate households; necessary living expenses are thereby reduced. . . . Incidental expenses are lower as well Because of the savings inherent in most marriages, it may logically be argued that a married couple should, in fact, pay more taxes than two single persons with individual incomes one-half that of the couple, and that the marriage penalty serves to equalize the respective abilities to pay.”); Scott, *supra* note 7, at 236, 240–41, 243 (observing that marriage is a “union . . . of economic sharing,” that it “is likely to function more reliably as a family form that provides . . . financial and emotional understandings about mutual responsibility, support, and sharing,” that “the duty to share a portion of each spouse’s estate automatically attach[es] upon marriage,” and that “[t]he marital vows . . . represent explicit and implicit promises by each spouse to accept a set of responsibilities that will assure that the other’s dependency needs are met.”); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 9 (2000) (“[T]he heavier tax [on married couples] was appropriate [according to the General Explanation of the Tax Reform Act of 1969] because a married ‘couple’s living expenses are likely to be less than those of two single persons and therefore the couple’s tax should be higher than that of two single persons.” (internal citations omitted)).

²⁰⁶ *Jobst*, 434 U.S. at 53.

²⁰⁷ Scott, *supra* note 7, at 235. See also Fineman, *supra* note 2, at 245 (“Marriage does not have the same relevance as a societal institution as it did even fifty years ago, when it was the primary means of protecting and providing for the legal and structurally devised dependency of wives.”).

²⁰⁸ Fineman, *supra* note 2, at 267. See also Enjoli Francis, *Marriage Rate Falls to Record Low in U.S., Pew Says*, ABC NEWS (Dec. 14, 2011, 2:02 PM) (quoting W. Bradford Wilcox, director of the National Marriage Project at the University of Virginia, as saying that “[m]arriage is less likely to anchor the adult life course,” and “plays a less central role as an institution in American life.” (internal quotation marks omitted)).

not reflect true dependency.²⁰⁹ Finally, in the context of *Women Involved in Farm Economics*, Debra Kahn contends that the court not only “based its analysis on an invalid presumption that married farmers are always economically interdependent,” it also “assumed that because unique economies of scale exist with respect to consumption, it was rational to assume such efficiencies exist with respect to the input and production considerations inherent in farming.”²¹⁰ However, since “[t]he Agricultural Act’s farm subsidy program is concerned with production, not consumption” the presumption was irrelevant.²¹¹ These arguments at least suggest that while marital status may once have been indicative of financial need, it may no longer be a rational basis upon which to uphold the marriage penalties.

Second, the courts’ acceptance of the assumption that marital status reflects a person’s financial need and ability to pay is grossly underinclusive given the fact that two single individuals can cohabit and share finances (as is happening at an exponential rate today),²¹² yet avoid the marriage penalties. As Lawrence Zelenak has argued, “[t]he argument” for the marriage penalties “depends on the assumption that the proper comparison to the married couple living together is to their unmarried selves living apart.”²¹³ But

[t]he entire analysis crumbles if the relevant comparison is to unmarried cohabitation. A marriage license does not make living any cheaper for those already living together. When cohabitation is a viable alternative—as it may not have been in 1969, but as it is for millions today—the appeal to economies of sharing completely misses the point of the marriage penalty complaint. When the standard formulation of the complaint is a comparison with the tax on cohabitants, it is ludicrous to defend the marriage penalty by citing economies of cohabitation.²¹⁴

When the comparison is made between married and cohabitating partners, it is difficult to argue that they are not similarly situated, thus presenting an equal protection problem. Furthermore, it is noteworthy that the reverse could be true as well. That is, a married

209 Gerzog, *supra* note 58, at 36.

210 Kahn, *supra* note 128, at 881, 889.

211 *Id.* at 889.

212 See Rob Stein, *Study: Record Number of People are Cohabiting*, NPR (April 4, 2013, 2:32 AM), <http://www.npr.org/2013/04/04/176203263/study-record-number-of-people-are-cohabitating> (noting that today’s rate of cohabitation is the highest to date).

213 Zelenak, *supra* note 205, at 10.

214 *Id.* at 10–11.

couple could live apart and maintain separate households and finances and yet still be subject to the marriage penalties.²¹⁵

One response to this criticism is that “marriage is superior as a setting for satisfying family dependency needs,” whereas “[i]nformal unions,” such as cohabitation “function far less effectively to assure that the dependency needs of vulnerable family members will be met.”²¹⁶ However, rather than ignoring the gross underinclusiveness of the marriage penalty, it would be wiser for courts to recognize that, insofar as they are justified on the basis of financial dependency, marriage penalties are largely irrational. Another solution is provided by Elizabeth Scott, who argues that rather than eliminating the marriage penalties, “the financial obligations of marriage should be extended to long-term cohabitants in order to provide protection for financially vulnerable partners.”²¹⁷ The Supplemental Security Income program currently adopts a similar approach. That is, if a person lives with one or more other people and receives “in-kind support,” defined as the provision by someone else of the recipient’s food and/or shelter, the amount of the recipient’s benefits is reduced by one-third.²¹⁸ Thus, long-term cohabitants and married couples could both experience a reduction in benefits.²¹⁹

But regardless of the solution chosen, the bottom line is that the marriage penalties simply should not be able to survive even rational basis review based on the invalid, underinclusive, and irrational presumption of financial independence of married couples.

215 See Gerzog, *supra* note 58, at 35 (noting a criticism of the marriage tax penalty that argues “that the ability to pay of married persons who live apart can be equated with that of single persons who maintain their own households”).

216 Scott, *supra* note 7, at 245, 248.

217 *Id.* at 233. In fact, some legislatures have already created such laws that deem people married for purposes of government benefit distribution when they have cohabitated for a certain period of time. Furthermore, courts have upheld such laws as rational. See, e.g., *Smith v. Shalala*, 5 F.3d 235, 240 (7th Cir. 1993) (holding that Congress acted rationally when it “elected to use the ‘deemed married’ provision as a signpost of financial need and to eliminate fraud and ease administrative burdens”).

218 Alison Barjaktarovich, *How In-Kind Income and Support Affects Your SSI Disability Payment*, DISABILITY SECRETS, <http://www.disabilitysecrets.com/resources/supplemental-security-income-ssi/in-kind-income-support-disability-payment> (explaining what counts as in-kind income and how that income reduces SSI benefits). See also Laurence, *supra* note 101 (cautioning same-sex partners that “if you are receiving SSI and you and your [significant other] begin living together, Social Security could lower your monthly SSI payment by one third if your [significant other] beings [sic] to pay for part of your share of your food or housing costs”).

219 See Laurence, *supra* note 101 and Barjaktarovich, *supra* note 218 for an explanation of the circumstances that can cause reduction in SSI benefits for married and cohabitating couples.

D. The Existence of Other Benefits and the Limited Applications of the Penalties

A final, albeit never stated, reason that courts may be unwilling to find violations in the marriage penalties of the tax and government benefit laws is that married couples receive many other benefits as a result of being married.²²⁰ For example, married couples enjoy special treatment in the areas of “military and government pensions, family leave, health and life insurance, . . . inheritance rights[,] and guardianship designations.”²²¹ Thus, it is likely difficult for courts to see them as “victims of improper state [or government] action” when the burden placed on them is “only” economic.²²²

Furthermore, under both the tax and government benefit laws, not all, and potentially even a small number of, married couples are burdened.²²³ In fact, some married couples are benefited by the statutes at issue. For example, “[t]here is a marriage bonus in the . . . tax code as well” that applies to those couples comprised of one wage earner.²²⁴ Or, if the law does not benefit some married couples, it may allow for ways around the marriage penalty. For example, the *Women Involved in Farm Economics* court observed that “if a husband and wife formed a corporation to operate their farm—and met the corporation eligibility standards—they could qualify for two maximum payments,” even though they were precluded from qualifying as separate individuals.²²⁵

Of course, “[t]he couples subject to the marriage tax” or unable to get around the penalty at issue “are not consoled by the fact that other couples enjoy tax marriage bonuses” or loopholes in the law, and it is unclear why the existence of benefits to others makes this discrimination constitutional.²²⁶ In addition, it is worth remembering that courts have consistently stated that it is sound public policy to

²²⁰ See Scott, *supra* note 7, at 237 (“Legal marriage is a status that carries many government benefits.”).

²²¹ *Id.* at 253.

²²² Lundin, *supra* note 18, at 1192.

²²³ See Gerzog, *supra* note 58, at 31 (“The first [reason for retaining the marriage penalty] . . . is that the penalty affects only a minority of married couples.”).

²²⁴ Ryznar, *supra* note 185, at 928. See also *Mapes v. United States*, 576 F.2d 896, 902 (Ct. Cl. 1978) (“It is evident that many benefit by the [tax] rates created in the statute.”); Gerzog, *supra* note 58, at 27 (observing that sometimes marriage “results in a tax savings”); Pilzner, *supra* note 59, at 1353 (“[S]ome married taxpayers realize a tax liability decrease by filing a joint return.”)

²²⁵ *Women Involved in Farm Econ. v. USDA*, 876 F.2d 994, 1006 (D.C. Cir. 1989).

²²⁶ Zelenak, *supra* note 205, at 1.

encourage marriage.²²⁷ Therefore, it is not evident why the existence of marital benefits in some contexts would preclude others that might also encourage marriage. Finally, one should also question why an entire class might need to be burdened in order for a constitutional violation to be found. Regardless of the number of people affected, sound constitutional analysis would seem to require that laws irrationally and arbitrarily distinguishing amongst people should be struck down. Thus, to the extent these considerations factor into courts' decisions in upholding marriage penalties, they are inappropriate.

CONCLUSION

Whether because of the subject matter, the tenuous connection to the leading right-to-marry precedents, the acceptance of assumed privatization of dependency within marriage, the host of other benefits afforded to married couples, or a combination of these factors, courts have made it clear that they are going to continue to uphold marriage penalties in tax and government benefit laws against due process and equal protection challenges. Nevertheless, this has not stopped plaintiffs from challenging the penalties, and politicians and lawmakers continue to try to find more equitable solutions.²²⁸ For example, in 2010 President Barack Obama signed the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, which, among other things, "extended marriage penalty relief for married couples filing jointly."²²⁹ And before the 2012 presidential election, he proposed to continue that relief.²³⁰ In addition, as previously mentioned, Supplemental Security Income now adjusts the value of benefits paid when a maritally single person lives with another person and does not provide for his or her own food and shelter.²³¹

Of course, this does not mean that these same politicians and lawmakers are completely abolishing marriage penalties. In fact, while he seemed to support marriage penalty relief in the tax context,

²²⁷ See *supra* note 136 and accompanying text.

²²⁸ See Ryznar, *supra* note 185, at 923 (observing that "both Democrats and Republicans support marriage penalty relief, although the details of an exact solution have been elusive").

²²⁹ *Candidates Individual Tax Policies*, FOREMAN & AIRHART, <http://www.foremanairhart.com/candidates-tax-policies/> (last visited Mar. 28, 2014) ("In late 2010, Congress passed and President Obama signed the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 . . . which extended through 2012 the Bush-era tax cuts.").

²³⁰ See *id.* ("Obama has proposed to extend the Bush-era tax cuts, including marriage penalty relief, for individuals, with the exception of a rate increase for single taxpayers with incomes at or above \$200,000 and joint filers with incomes of \$250,000 or more.").

²³¹ See *supra* notes 218–219 and accompanying text.

President Barack Obama also signed the Affordable Care Act which creates “higher health insurance costs for couples who marry.”²³² This is because the Act requires married couples to file joint tax returns, and their healthcare premiums are then based on their combined total income.²³³ This requirement does not apply to cohabitating couples, and therefore they avoid the penalty.²³⁴ While it is difficult to see how such a requirement could survive the *Johnson* court’s basis for distinguishing *Hooper*,²³⁵ given the most recent jurisprudence, it is unlikely that this penalty will be struck down as unconstitutional marital status discrimination under either the Due Process or Equal Protection Clause.

Therefore, it seems apparent that these marriage penalties are not going away. Yet, if they are going to stay, it would be wise for the courts to require and find clearer, stronger, more rational, and up-to-date grounds upon which to uphold them.

²³² Michael Tennant, *ObamaCare’s Marriage Penalty*, THE NEW AMERICAN (Aug. 19, 2013, 3:21 PM), <http://www.thenewamerican.com/usnews/health-care/item/16352-obamacare-marriage-penalty>.

²³³ *Id.*

²³⁴ *Id.* In fact, according to one hypothetical example, not only do cohabitating couples avoid the penalty, they save a significant amount of money. In this example, wherein the woman earned about \$46,000 per year and the man earned \$56,000 per year, the couple saved \$8,000 per year just in healthcare premiums by *not* getting married and simply cohabitating. *Id.* According to another example, “[s]ixty year-olds earning \$62,041 each a year would save \$11,028 annually” in healthcare costs “if they broke up.” Jacqueline Leo, *Why Divorce Attorneys Will Love Obamacare*, THE FISCAL TIMES (Oct. 2, 2013), <http://www.thefiscaltimes.com/Articles/2013/10/02/Why-Divorce-Attorneys-Will-Love-Obamacare>.

²³⁵ Recall that the *Johnson* court distinguished the law at issue in its case from *Hooper*’s on the grounds that the *Hooper* law did not give married couples a choice about whether to file joint or separate returns. *See supra* notes 80–83 and accompanying text.