THE ERROR COST OF MARRIAGE

*Orli Oren-Kolbinger**

Since its inception in 1918, the joint filing election has been one of the U.S. tax system's most controversial concepts. This tax election allows married taxpayers to file a joint tax return or file two separate returns. Some taxpayers err, either because they do not know they have a choice or simply because they choose unwisely and elect the less beneficial filing status.

The writers of the Code acknowledged taxpayers may need to correct a filing status error. Married taxpayers filing separately can retroactively amend their filing status for a previous year to joint filing under certain circumstances at no cost. Surprisingly, joint filers do not enjoy this opportunity to amend prior returns to filing separately in any circumstance. Scholars have extensively argued for and against treating married taxpayers as a single economic unit rather than on an individual basis. But they have yet to comment on this asymmetric amendment rule. This Article is the first to examine the overlooked problem of the asymmetric treatment of married taxpayers who wish to amend their initial filing status election.

This asymmetric error-correction rule is both unfair and administratively inefficient. First, it enables only one group of married taxpayers to revisit their election and correct their filing status. Given that the U.S. tax system incentivizes joint filing in several ways, married taxpayers assume joint filing is the sole or favorable election for them. That, however, is not always the case. This rule has adverse effects on the fairness of the tax system. Second, those who can correct their election do not bear the correction's administrative costs, producing an administrative inefficiency.

After identifying and explaining this puzzling problem, the Article proposes an elegant solution: a Pigouvian rule enabling all married taxpayers to amend, but requiring them to internalize all the associated administrative costs through a reduced tax refund. This rule eliminates administrative inefficiencies and unfairness at the same time.

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INTRODUCTION

Imagine it is tax filing season. You and your spouse are getting ready to file your federal income tax return. You both decide to file a joint return and check the "married, filing jointly" box on your Form

1040. At the same time, your next-door neighbors, who are also married, decide to file two separate returns by checking the "married, filing separately" box. The following year, you and your spouse, as well as your neighbors, realize you would have had a better outcome if you had chosen the other filing status. Therefore, both couples try to amend[1] their previous year tax return retroactively. Your neighbors succeed and receive the expected additional benefit. To your surprise, the Internal Revenue Service (IRS) rejects your amended return. The reason: The Internal Revenue Code (IRC) forbids you to make this change, because you initially elected to file jointly.

Since its inception in 1918, joint filing has been one of the most controversial and politically charged concepts in the U.S. tax system. According to this tax election, married taxpayers may elect to file a joint tax return (MFJ) or maintain the default status of "married, filing separately" (MFS) and file two separate returns. Scholars have extensively argued for and against treating married taxpayers as a single economic unit, rather than on an individual basis. But they have missed an important factor: the asymmetric amendment of this election.

This is the first Article to examine and answer the overlooked problem of the asymmetric treatment of married taxpayers who wish to *amend* their initial filing status election. The U.S. tax system incentivizes joint filing to such an extent that married taxpayers often perceive it as the sole or favorable election for them, even when that is not the case. In fact, 95% of married taxpayers file jointly, although many of them would benefit from maintaining the default of filing separate returns.[2] However, once the due date for this election has passed, only married taxpayers filing separately can retroactively amend their filing status.[3] Joint filers cannot.[4] This Article fills this gap in the literature and sets a foundation for an error-correction theory in tax.

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1. The terms "amend" and "correct" are used interchangeably throughout the text.

2. The existence of a "marriage penalty" occurs when two relatively equal earning people marry and their rate of taxation increases. This is due to the Tax Reform Act of 1969, which capped taxpayers filing individually at paying at most 120 percent of the tax paid by joint filers with the same income. *See* Stephanie McMahon, *Gendering the Marriage Penalty*, *in* CONTROVERSIES IN TAX LAW 27, 27–28 (Anthony Infanti ed., 2015); *see also* CHARLES P. RETTIG, BARRY W. JOHNSON & DAVID P. PARIS, INDIVIDUAL INCOME TAX RETURNS 2018 PUB. 1304 (REV. 09-2020) at 47–48 [hereinafter INDIVIDUAL INCOME TAX RETURNS 2018].

3. *See* I.R.C. § 6013(b).

4. *See id.*

Taxpayers make many explicit elections as they navigate the tax system. For example, all individual taxpayers can elect to either itemize their deductions or maintain the standard deduction.[5] Many small corporations are eligible to elect to be taxed under Subchapter S rather than the default of Subchapter C.[6] Sometimes taxpayers elect the option that provides them with fewer monetary or non-monetary benefits. I refer to these inferior elections as *election errors*. These errors may result in additional liabilities. Taxpayers are unable to fix an election error with a superseding return after the due date for the election has passed.[7] They can, however, file an amended return to fix some election errors using the error-correction mechanisms set forth in the IRC.

Error-correction mechanisms that are available to taxpayers throughout the IRC are inconsistent and at times asymmetrically applied among similarly situated taxpayers. Moreover, some error-correction mechanisms benefit taxpayers, and some do not. Congress acknowledges that taxpayers may need to correct an election error, but does not apply this principle in every instance.[8] In those instances when taxpayers are allowed to correct election errors, they can do so without incurring an administrative fee.[9]

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5. I.R.C. § 63. Commentators have criticized the concept of a standard deduction. Although this is a simple tax rule, it has a negative effect on horizontal equity by offering the same deduction to all taxpayers who do not elect to itemize. *See* Louis Kaplow, *The Standard Deduction and Floors in the Income Tax*, 50 TAX L. REV. 1, 1–2 (1994) (explaining how the standard deduction works).

6. I.R.C. § 1361; TAX FORM 2553 (2020).

7. *See* Keith Fogg, *Superseding Original Returns*, PROCEDURALLY TAXING (Jan. 13, 2017) (identifying an example of when someone was not able to file past the due date); *see generally* Nancy Rossner, *This Tax Season May Create Many Superseding Returns*, PROCEDURALLY TAXING (Apr. 21, 2020) (identifying examples of superseding returns).

8. For a list of the several hundreds of tax elections available to taxpayers, see ANTHONY J. DECHELLIS & KAREN L. HORNE, PPC'S TAX ELECTIONS DESKTOP (26th ed. 2020); *see also* Treas. Reg. §§ 301.9100-1 to -22 (1997). Not all tax elections are complemented with error-correction mechanisms. For example, the "check-the-box" regulations for entity classification generally allow entities to change their election of entity classification only once in a sixty-month period. Even so, entities are not allowed to change their election retroactively but only prospectively. *See generally* Heather M. Field, *Checking in on Check-the-Box*, 42 LOY. L.A. L. REV. 451 (2009).

9. In general, taxpayers are not subject to a fee when filing an amended return, although they might be required to file a paper amended return (1040-x). *See Here's What Taxpayers Need to Know About Filing an Amended Tax Return*, IRS (Oct. 29, 2020), https://www.irs.gov/newsroom/heres-what-taxpayers-need-to-know-about-filing-an-amended-tax-return; *Form 1040-X, Amended U.S. Individual Income Tax Return, Frequently Asked Questions*, IRS, https://www.irs.gov/filing/amended-return-frequently-asked-questions (last updated Apr. 13, 2021); *Tips For Taxpayers Who Need to File an Amended Tax Return*, IRS (Sept. 3, 2020), https://www.irs.gov/news

This Article focuses on married taxpayers' election of filing status for tax purposes and the asymmetric error-correction rules associated with it. The default for married taxpayers is filing two separate returns, which treats each spouse as their own separate taxable unit. However, MFS is just one of the choices available to married taxpayers. Married couples may also elect to file a joint return: MFJ.[10] If filing jointly, the tax laws and tax authorities typically view them as a unified taxable unit.[11]

The U.S. tax regime treats married taxpayers differently depending upon how they choose to file. There are several main differences. First, the decision to file jointly renders an individual spouse jointly and severally liable if the other spouse is found non-compliant.[12] This means the IRS can collect taxes owed on the joint return from either spouse, regardless of who is at fault. This is not the case for married taxpayers filing separate returns.[13]

Second, the tax system incentivizes married taxpayers to elect MFJ status by generally offering monetary benefits to those who elect to do so. Such incentives include preferential tax rates and specific tax credits not available to married taxpayers filing separately.[14] In addition, there are limitations on itemizing deductions for separate filers

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room/tips-for-taxpayers-who-need-to-file-an-amended-tax-return. In comparison, there may be substantive costs that taxpayers incur when correcting other types of errors, e.g., the I.R.C. § 1341 repayment credit. This Section may apply in the following scenario: the taxpayer reported the receipt of proceeds as income in a certain tax year. Then, in a later tax year, the taxpayer learned they were not eligible for the proceeds or that they were overpaid—meaning they did not have a claim of right over the proceeds—and therefore repaid that amount. In this case, the taxpayer can deduct the previously declared income on the latter tax return. However, if the taxpayer was subject to a higher marginal tax rate when reporting the proceeds as income than the marginal tax rate when reporting the consequent deduction, the taxpayer is worse-off. Section 1341 sets forth a repayment credit to make the taxpayer whole. However, this credit applies only if the deduction is at least $3,000. This means that taxpayers who deducted less than $3,000 bear a cost in the form of overpayment of taxes.

10. I.R.C. § 6013(a).

11. This was not always the case. Since its inception, the income tax system in the U.S. applied various rules on married taxpayers, including taxing them as if they were individual and or one unit. See further discussion in Part II.

12. I.R.C. § 6013(d)(3); 26 C.F.R. § 1.6013-4(b).

13. I.R.C. § 6013(d)(3). This is most evident and problematic in the case of "innocent spouses." *See* I.R.C. § 6015. Contrary to popular belief, scholars have demonstrated Congress did not make joint and several liability the "price" for married couples filing jointly. *See infra* Part II.A.

14. I.R.C. § 1. Further incentivizing the election of MFJ status is the theory of income splitting, which disfavors the low-income taxpayer of a married couple, predominantly the wife in a heterosexual marriage. *See generally* EDWARD MCCAFFREY, TAXING WOMEN 30 (1997); Amy C. Christian, *Joint and Several Liability and the Joint Return: Its Implications for Women*, 66 U. CIN. L. REV. 535, 536 (1998).

under Section 63(c)(6), e.g., allowing one spouse to elect to itemize their deductions only if the other spouse also elects to itemize.[15]

Third, Congress permits married taxpayers who maintained the MFS status—and later realized it was an inferior election in their case for any reason—to correct it to MFJ without incurring a correction fee and to enjoy any associated late benefits.[16] In contrast, the IRC does not permit married taxpayers who elected MFJ status to correct a similar election error and return to the default MFS status. Moreover, the U.S. tax system inherently frames the MFJ status as the preferred status for married taxpayers.[17]

As mentioned above, almost 95% of married taxpayers elect the MFJ status.[18] This means a disproportionately large number of taxpayers in the U.S. are not able to correct filing status election errors. Married taxpayers are unlikely to revisit a prior election despite a change in their financial circumstances. This is because many believe there would be negative consequences to not electing MFJ status in the form of losing their eligibility to certain tax benefits.[19] Consequently, taxpayers may be unknowingly locked into an inferior election and therefore not maximizing their tax benefits. However, taxpayers are currently unable to correct this election. Therefore, it is impossible to estimate how many married couples who elected MFJ would have applied for the change after learning they are better off financially with the default MFS election.

In this Article, I focus on the third difference between MFS and MFJ filers, which I refer to as a problem of Asymmetric Error-Correction Rules (AECR). AECR's are problematic for two reasons. First, they adversely affect horizontal equity. Similarly situated taxpayers are treated differently based on their ability to correct an election error. Only a small group of married taxpayers can revisit their election and correct their filing status. Given that the U.S. tax system incentivizes joint filing in several ways, this might frame joint filing as the sole or favorable election for married taxpayers even when that is not

15. In order to itemize, both spouses need to elect to itemize in their MFS returns. They can also both elect the standard deduction. They need to be consistent with the election on their MFS returns. It is not possible that one spouse will itemize and the other will elect the standard deduction. *See* I.R.C. § 63(c)(6); I.R.S., CAT NO. 15006I, PUBLICATION 504: DIVORCED OR SEPARATED INDIVIDUALS 5 (2019).

16. I.R.C. § 6013(b). For a discussion of the conditions associated with such corrections and the legislative history, *see infra* Parts II.A and III.

17. *See infra* notes 3–4.

18. INDIVIDUAL INCOME TAX RETURNS 2018, *supra* note 2, at 132.

19. *See, e.g.*, Michelle Lyon Drumbl, *Joint Winners, Separate Losers: Proposals to Ease the Sting for Married Taxpayers Filing Separately*, 19 FLA. TAX REV. 399, 422–23 (2016).

the case. Second, it has an adverse effect on the administrability of the tax system. This is because the IRS needs to reallocate resources to process the amended return and does not impose that cost on the taxpayers.

This Article considers three alternative error-correction rules.[20] First, an "All" approach: to promote fairness, the current Section 6013(b) error-correction rule should be expanded, allowing all married taxpayers to change their election from MFS to MFJ *and* from MFJ to MFS. In both cases, each of the spouses would have to agree to the change made. This would dismiss the concern that one spouse will unilaterally change the election. This rule would expand the number of error corrections, in comparison with the current error-correction rule that is available only to a fraction of married taxpayers. However, taxpayers would still not internalize the administrative cost of processing the additional tax return(s) under this approach. If so, the incentive to think through one's election ex ante diminishes. For this reason, the "All" approach is insufficient.

Second, a "Nothing" approach: this approach would prohibit married taxpayers from correcting a filing status election error by changing from MFS to MFJ and from MFJ to MFS. On the one hand, this would eliminate the asymmetry created by Section 6013(b) by prioritizing the need for taxpayers to consider the possible ramifications of their filing election choice. On the other hand, this approach is insufficient because some taxpayers make inferior elections—due to mistakes, time pressure, or even a second look later by a different tax adviser—and there should be at least some room for correction of human error.

I propose a third approach, which I refer to as a "Pigouvian All" approach.[21] This approach acknowledges and promotes both the fairness and administrability principles of tax policy. It is similar to the "All" approach because the Section 6013(b) error-correction rule will apply to all married taxpayers, whether their initial filing status election was MFS or MFJ. In addition, I propose to apply a processing fee that will depend on the complexity of the correction and be subtracted

20. Although the removal of joint filing can be a simpler solution to the AECR problem and various other concerns, it is less likely to occur. *See* NAT'L TAXPAYER ADVOC., 2005 ANN. REP. TO CONG. (2005); Stephanie McMahon, *To Have and to Hold: What Does Love (of Money) Have To Do with Joint Tax Filing*, 11 NEV. L. J. 718, 718 (2011) [hereinafter *To Have and to Hold*]. Therefore, the solutions I consider in this Article are based on the interplay between joint filing and separate filing.

21. *See, e.g.*, Louis Kaplow & Steven Shavell, *On the Superiority of Corrective Taxes to Quantity Regulation*, 4 AM. L. & ECON. REV. 1, 2–4 (2002) (explaining Pigou's theory of taxation).

from the potential refund the requesting taxpayer(s) is seeking. This way, the party who made the error—in this case, the married couple—internalizes the administrative costs for correcting it. If the expected refund is lower than the fee, the taxpayers should refrain from correcting the error. In any case, this will increase the salience of the election itself, even if the taxpayer will not correct it this time around.

The remainder of the Article is structured as follows. Part I introduces the concepts of tax elections, election errors, and error-correction mechanisms. Part II discusses the married taxpayers' election of filing status for tax purposes. Part III frames the problem of AECRs. Part IV proposes and discusses alternative solutions to the problem.

I.
TAX ELECTIONS, ELECTION ERRORS, AND ERROR-CORRECTION MECHANISMS

In this section, I first discuss the concept of tax elections. Then, I turn to discuss the idea of election errors and error-correction mechanisms in the Internal Revenue Code. This will set the framework for discussing the married taxpayers' filing status election and the asymmetric error-correction mechanisms associated with it.

A. Tax Elections

1. The Basics

Tax elections play an important role in the U.S. tax system.[22] Taxpayers make many elections during the tax year that affect their tax consequences and liabilities.[23] They are intended to promote simplicity and certainty, and to help ensure that taxpayers are acting according to their actual economic preferences.[24]

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22. *See* Heather M. Field, *Choosing Tax Explicit Elections as an Element of Design in the Federal Income Tax System*, 47 HARV. J. ON LEGIS. 21, 55–56 (2010) (explaining the choices taxpayers have and the implications of these choices). This article gives a framework for understanding and evaluating the use for explicit tax elections in the federal income tax system. It goes on to argue that explicit tax elections can be employed to accomplish valuable policy goals, in limited circumstances and when properly designed. *See id.* at 25.

23. *See generally* Heather M. Field, *Taxing Elections & Private Bargaining*, 31 VA. TAX REV. 1 (2011); Emily Cauble, *Tax Elections: How to Live With Them if We Can't Live Without Them*, 53 SANTA CLARA L. REV. 421, 449–50 (2013) (explaining how taxpayers will engage in tax planning through elections or other mechanisms); Edward Yorio, *The Revocability of Federal Tax Elections*, 44 FORDHAM L. REV. 463, 465–66 (1975).

24. *See generally* Field, *supra* note 22, at 56–57.

Tax elections can be explicit or implicit. When making an implicit tax election, taxpayers alter their behavior or the transaction to achieve a certain tax outcome. This leads to inefficiency.[25] Additionally, taxpayers can explicitly choose how to be treated for tax purposes.[26] Explicit elections are easier to use in tax planning compared with implicit elections. Explicit elections allow a taxpayer to achieve a particular tax treatment without having to alter their economic behavior, legal arrangements, and either the form or the substance of the transaction.[27] The downside is that taxpayers may use explicit elections in the tax rules in ways that Congress did not intend.[28] This Article focuses on explicit elections.[29]

Over the years, Congress has introduced various explicit elections to the IRC.[30] Some are simple to make, and some are more complicated. To make an informed election, taxpayers need to conform to the method of making the election,[31] meet the due date of making the election,[32] and understand the election's tax consequences.[33] Some elections have short-term effects, meaning they affect the tax consequences only during the tax year they have been made—e.g., standard deduction, filing status—and do not preclude the taxpayer from making a different election in the following year. Other elections have long-term consequences, affecting the tax consequences of the subsequent year—e.g. method of depreciation—and require taxpayers to predict their future stream of income.[34]

It would be plausible to assume that if Congress provided taxpayers with choices, taxpayers should be free to choose any of the available options according to their preferences, and Congress should be

25. *See* Cauble, *supra* note 23, at 450. The other explanation is that in some cases, if an election was eliminated, taxpayers would still choose their tax treatment. Rather than explicitly electing their tax treatment, taxpayers would obtain the same treatment by changing the non-tax features of their transactions. *See id.* at 449. Unlike explicit tax elections, changing nontax features of transactions distorts taxpayers' decision-making, which can cause inefficiency if taxpayers forgo transactions that would be preferable for nontax reasons. *See id.* at 450.

26. *See* Field, *supra* note 22 at 21–22, 30, 34 (exploring how explicit choices allow a taxpayer to achieve a particular tax treatment without having to alter their non-tax economic and legal arrangements).

27. *See* Field, *supra* note 22, at 30.

28. *See* Field, *supra* note 22, at 71.

29. Hereinafter, the use of the term "election" refers to an explicit election(s).

30. *See* Yorio, *supra* note 23, at 463 (noting at least 167 different elections); Cauble, *supra* note 25, at 427 (using the term "hundreds" to describe number of tax elections).

31. *See* Yorio, *supra* note 23, at 464.

32. *See id.* at 463–65.

33. *See id.* at 463–64.

34. *See id.*

indifferent to the taxpayer's election.[35] In addition, elections should be salient, allowing taxpayers to be made aware of the eligible elections available to them and make the election based on full information.

The taxpayer's decision to take the standard deduction or to itemize is a common example of an explicit election.[36] The standard deduction allows taxpayers to avoid keeping track of and substantiating all their itemized deductions.[37] However, this deduction is limited to a fixed monetary amount, in contrast with itemized deductions, which are not capped.[38] In order to itemize, taxpayers are required to make an election when filing their tax return. Thus, the standard deduction serves as a default rule.

Taxpayer-favorable default rules, such as the standard deduction, are beneficial for several reasons. They allow taxpayers to avoid the cost of filing elections, they allow the IRS to avoid the costs of processing elections, and they mitigate the cost of elections for unsophisticated taxpayers.[39] For example, if the taxpayer fails to file a tax return, the IRS will automatically choose the standard deduction for that taxpayer in the substitute return prepared by the IRS.[40]

35. *See* Field, *Taxing Elections & Private Bargaining*, *supra* note 23, at 6; Field, *supra* note 22, at 54–56. This Article focuses on private bargaining in the context of divorced couples and the dependency exemption. In the case of a divorced couple, the parent in the higher tax bracket could elect to take the dependency exemption, which at a higher marginal tax bracket would be worth more and then the divorced spouses could split the additional money that the lower tax bracket spouse would not have been afforded had they taken the dependency exemption. The IRC explicitly gives divorced parents in this circumstance the opportunity to strike a private bargain that would reduce their aggregate tax burden. *See* Field, *Taxing Elections & Private Bargaining*, *supra* note 23, at 3–4 (providing an example of what this situation might look like).

36. *See* Cauble, *supra* note 23, at 429; *see generally* Emily Satterthwaite, Elective Efficiency: Itemizing Our Way to a More Optimal Income Tax (2011) (Master of Laws thesis, University of Toronto).

37. *See* Field, *supra* note 22, at 54.

38. *Compare* I.R.C. § 63(c)(7) (providing dollar-amount information for the standard deduction), *with* I.R.C. § 63(d) (not providing a dollar amount or cap). *See also* Rev. Proc. 2019-44, 2019-47 I.R.B. 1093, 1098 (laying out the 2020 standard deduction amounts); Cauble, *supra* note 23, at 429 (describing the standard deduction and noting the 2012 standard deduction amount).

39. *See* Cauble, *supra* note 23, at 459.

40. *See id.* at 430. For further discussion of this example as part of the typology of existing error-correction mechanisms, see *infra* notes 174–189 and accompanying text.

2. *Pros of Tax Elections*

Explicit tax elections, such as those mentioned above, may simplify the administrability of the tax system.[41] Taxpayers can use them to reveal their preferences and provide information to the tax authorities.[42] The government can direct certain tax benefits through tax elections.[43] Tax elections, however, are not automatic because a taxpayer must fulfill certain requirements outlined in the IRC to be eligible for such elections. Thus, not every taxpayer may take advantage of an election. This different tax treatment of similar taxpayers inevitably leads to inequity.[44]

Tax elections also allow taxpayers to take an active role in their relationship with the tax system. They can engage in economic transactions that will produce the most beneficial tax consequences for them.[45] By allowing taxpayers to make elections, Congress subsidizes and incentivizes certain activities and can promote social goals accordingly.[46] However, offering too many elections might lead to excessive complexity and limit the taxpayer's tax planning ability. It is a delicate balance, but if elections are limited, taxpayers can realize more of them.[47] Limited tax planning opportunities also mean a smaller decrease in tax revenue because of this realization.[48]

3. *Cons of Tax Elections*

Although there are many benefits to tax elections, commentators have raised several tax-policy-related concerns. These concerns are

41. *See* Field, *supra* note 22, at 34. Additional benefits include coordinating between discontinuous tax rules, assisting with tax classification and tax planning. *See id.*

42. *See* Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 690–91 (2009). Raskolnikov offers a deterrence model and a compliance model and argues that taxpayers will sort themselves to either model through the election. Another example of revealing preferences or information to the government is the election to itemize deductions. Emily Satterthwaite suggested that the standard deduction lowers the cost of not itemizing deductions and that itemizing deductions can lead to a more tailored tax system. Satterthwaite, *supra* note 36, at ii.

43. *See* Field, *supra* note 22, at 63–65.

44. *See id.* at 69–70 (stating that explicit elections are subject to eligibility and technical requirements). *See also* Cauble, *supra* note 23, at 446–47.

45. *See* Field, *supra* note 22, at 55–56.

46. *See id.* at 25, 57.

47. *See id.* at 57.

48. *See id.* at 58.

generally focused on unfairness, complexity, and lack of revenue neutrality.[49] The magnitude of these concerns is an empirical question.

As mentioned above, one would expect that taxpayers will elect the most cost-effective option for them. This assumption might have an adverse effect on tax revenue. Taxpayers can elect the option that gives them the best tax results without needing to change their behavior.[50] A response to this concern is if Congress included an election in the IRC, it must have taken all consequences of these elections into account and is indifferent towards them, as long as the taxpayers are not misusing the law.[51]

In addition, tax planning is costly because it requires taxpayers to pay in the form of using their own time to understand their alternatives or paying a tax expert to provide them with tax planning services.[52] Paying tax planners or putting in one's own time to figure out explicit elections may also lead to inequity because a taxpayer in the same circumstances that chooses not to make the election obtains different tax results than those that do.[53]

Explicit elections increase administrative complexity because of the technical requirements associated with them. These requirements create room for errors, which I further discuss in Part I.B.[54] Because of the complexity, a taxpayer may argue that a deficient election should still be effective or may try to revoke an ill-advised election. As a result, there is a higher administrative burden on the IRS to process explicit elections to ensure eligibility.[55]

Many elections are binding and relief provisions remain rare,[56] which leads to unfairness.[57] But even with their inherent problems, tax elections still exist and are here to stay.[58]

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49. *See id.* at 26. *See also* Satterthwaite, *supra* note 36, at 74. Satterthwaite provides numerous examples of tax elections and the scholarly debate around the system's complexity, costs, and revenue reducing ability. *Id.* at 1 n.3.

50. *See* Cauble, *supra* note 23, at 445; Field, *Taxing Elections & Private Bargaining*, *supra* note 23, *Taxing Elections & Private Bargaining*, at 30–31; George K. Yin, *The Taxation of Private Business Enterprises: Some Policy Questions Stimulated by the "Check-the-box" Regulations*, 51 S.M.U. L. REV. 125, 130 (1997).

51. *See* Field, *supra* note 22, at 71–73 (relating to the concept of anti-abuse).

52. *See id.* at 30.

53. *See id.* at 31.

54. *See id.* at 28.

55. *See id.* at 28–29.

56. *See* Yorio, *supra* note 23, at 465. Yorio tries to determine under what circumstances a taxpayer should be allowed to revoke, to change, or to make a late federal income tax election.

57. *See* Cauble, *supra* note 23, at 424.

58. *See id.* at 424, 448.

B. Election Errors and Error-Correction Mechanisms

1. Identifying Election Errors

As mentioned above, taxpayers make many explicit elections each year. Tax elections are complex, and many taxpayers are unsophisticated. In order to make an election, the taxpayer needs to act as follows: First, the taxpayer must understand the election. Then, the taxpayer must determine whether they are eligible to make the election, whether the election is binding on them after the current tax year, and what their future financial situation will be. Finally, the taxpayer must decide which of the options would lead to better tax consequences.[59]

Clearly, taxpayers sometimes elect the option that is less beneficial to them. I refer to these inferior elections as *election errors*. These errors may result in additional tax liability. Taxpayers are unable to fix an election error with a superseding return after the due date for the election has passed. They can, however, file an amended return to fix some election errors using the error-correction mechanisms set forth in the IRC. Nonetheless, error-correction mechanisms available to a taxpayer in the IRC are inconsistent and at times asymmetrically applied among similarly situated taxpayers.

One important parameter of elections that may exacerbate election errors is whether the election has low salience. The salience of the election is critical to taxpayers before they make their election (ex ante). This is because some tax elections may be available "on paper" to many taxpayers, but functionally available only to sophisticated taxpayers that can navigate the election process. Those who choose not to take the explicit election may have not had the knowledge to do so.[60]

Even if the taxpayers receive advice from tax experts, they are not always aware of all the available elections and can elect the wrong option or err while electing the correct one.[61] A taxpayer's failure to elect the most cost-effective option might result in forgoing tax benefits or subjecting themselves to additional tax liabilities.[62] Taxpayers who choose not to make an explicit election may be unsophisticated taxpayers who lack the knowledge of their ability to make such elections.[63] Unsophisticated taxpayers might be prone to erring when

59. *See* Field, *supra* note 22, at 26–27.
60. *See id.* at 31.
61. *See* Ladden v. Commissioner, 38 T.C. 530, 534 (1962).
62. *See* Cauble, *supra* note 23, at 424.
63. *See* Field, *supra* note 22, at 31.

making an election, or end up not making an election at all, because elections require technical expertise, including how and when to make them.[64]

The error-correction mechanisms that are available to taxpayers in the IRC are also inconsistent. Moreover, some benefit taxpayers and some do not. For example, because many believe MFJ is the only option for married taxpayers who would like to maintain tax benefits, taxpayers are unlikely to revisit a prior election despite a change in their financial circumstances.[65] As a result, taxpayers may be unknowingly locked into an inferior election and are therefore not maximizing their tax benefits.

2. Identifying Error-Correction Mechanisms

In this Article, I focus on three error-correction mechanisms in the IRC. Under one mechanism, the IRS can initiate and correct taxpayers' errors for them without charging them of any fee to do so despite the IRS's limited resources. Under a second mechanism, taxpayers can file an amended return to correct election errors. The IRS does not charge a fee to process the amended return, again despite its limited resources. As a result, taxpayers do not internalize the cost of correcting that election error. Moreover, this mechanism allows married taxpayers to receive a late tax refund—or at least a non-monetary or declaratory benefit—for a closed tax year. Otherwise, taxpayers would not pursue it. Under a third mechanism, taxpayers are disallowed to correct their election errors at all.

C. Existing Approaches to Election Errors and Error-Correction

Tax scholars have addressed issues associated with taxpayers' elections, including unfairness and complexity, how to better design them, and how to balance between the benefits of elections and the problems they can create.[66] Again, "tax elections" means taxpayers have options to choose between. This raises the questions of when, can, and should taxpayers be allowed to change or revoke a previous election. Most of the discussion has focused on the design of elections, how to make more informed elections, and how to avoid making an election error and electing an inferior election in the first place.[67] The

64. *See id.* at 27.

65. *See* Drumbl, *supra* note 19, at 429–30 (providing an example of a taxpayer being unaware of the option to amend a prior election).

66. *See generally infra* Part I.A.

67. *See generally infra* Part I.A.

notion of designing coherent and consistent error-correction mechanisms, however, has received much less attention.

Several commentators have suggested focusing on the characteristics of an election. Heather Field has claimed that to avoid misuse and abuse of tax elections, Congress and the IRS should be detailed in the design of elections, to constrain the availability of the election to only those situations where the election's use is intended.[68] However, she explains that this approach—aimed at reaching a more precise policy outcome—may add complexity and additional cost. Alternatively, instead of changing the election itself, Congress may change the underlying tax provisions that apply depending on which choice is made in the election. Another alternative would be to require that the election operate in conjunction with anti-abuse rules. Anti-abuse standards may to some extent reverse efficiency, simplicity, and certainty gains.[69]

Emily Cauble has focused on the design of tax elections to lighten the unfairness associated with them.[70] Cauble pointed to the following four features: default rules, the salience of the election, the timing of the election, and persistence.[71] Imposing a default rule can significantly impact the consequences of the tax election.[72] Generally, default rules that meet taxpayer expectations are preferable to penalty default rules.[73] This is because penalty default rules do not consider the potential for taxpayers to fail to act and thus receive the penalty treatment. Additionally, transaction costs are generally reduced by choosing default rules that meet taxpayer expectations because fewer elections need to be filed, making the exercise of tax choice simpler for taxpayers and the administration of the IRS.[74]

Another occasion in which changing an election becomes relevant is state income taxes. Depending on the state where one resides, taxpayers may or may not be able to make different choices about how they prepare their federal versus their state income tax return. State legislatures must decide if a taxpayer should be bound, for state income tax purposes, to the election choice the taxpayer made for fed-

68. *See* Field, *supra* note 22, at 72–74.

69. *See id.*

70. *See* Cauble, *supra* note 23.

71. *See* Cauble, *supra* note 23, at 424.

72. *See* Field, *supra* note 22, at 66. *See generally* Field, *Taxing Elections & Private Bargaining*, *supra* note 23.

73. *See* Cauble, *supra* note 23, at 452.

74. *See* Field, *supra* note 22, at 67.

eral income tax purposes.[75] Whether tax elections should be consistent on the federal and state level is an important question, related to changing one's election.

Heather Field has also argued that state legislators should be careful when allowing deviations from a taxpayer's federal tax election if a tax election arises prior to the state's federal conformity starting point.[76] For example, this issue arises with respect to electing to itemize or take the standard deduction if the state taxable income begins with the taxpayer's federal taxable income or the federal adjusted gross income. Another example is if a deviation from the federal tax system would require information that is not provided on the federal tax return, such as where the taxpayer takes the standard deduction for federal tax purposes but wants to itemize for state purposes.[77]

Edward Yorio has discussed the issue of elections and error correction from an ex post angle.[78] He noted that taxpayers can err on the facts or on the law.[79] He begins the analysis with a court case from

75. *See* Heather M. Field, *Binding Choices: Tax Elections & Federal/State Conformity*, 32 VA. TAX REV. 527, 533 (2013). For example, Montana allows married taxpayers to deviate from their election of filing status for federal purposes. Most states do not allow that. *See id.* at 530.

76. *See id.* at 572.

77. *See id.* at 535. According to Field, conformity to the federal system is desirable because it can provide benefits to taxpayers and the States. *Id.* at 537. These benefits include simplification of tax preparation, reducing the risk of mistakes, ease of compliance, eliminating the need to keep separate records for each tax return, and making it easier to account for tax issues in making business decisions. In addition, for taxpayers who pay taxes in multiple states, it makes it significantly easier if all the state rules conform. *Id.* at 538. However, conformity is costly. Changes to federal tax expenditures and tax law can reduce state tax revenue. By conforming, states also sacrifice some of their sovereignty in allowing federal legislators to change state tax laws and control state tax policy. *Id.* at 541. An additional question for explicit tax elections is if the state and federal tax law conform, should the taxpayer be obligated to make the same choice for state tax purposes as they did for federal tax purposes? *Id.* at 544. There are a few basic options through which a state can implement conformity in the context of an explicit election. If the state wants to bind taxpayers to their federal choices, the state can impose a deemed federal choice, which automatically binds taxpayers without requiring state-level action. They can also impose mandatory matching choices, which requires taxpayers to make an affirmative state-level choice but binds them to their federal choice by requiring them to make the same choice. Alternatively, a state can impose default federal choices, but decide not to bind taxpayers to their federal choices. This allows the taxpayer to opt out of the default (deeming them to make the same choice for state purposes as for federal purposes). The other alternative is the unlinked choice, which permits taxpayers to make choices separate from their federal tax choice. A state can also choose not to conform and opt to decouple from the federal tax provision. *Id.* at 545–46.

78. *See* Yorio, *supra* note 23.

79. *See id.* at 470. In his article, Yorio discusses the following types of errors: 1) Errors a taxpayer can never correct; 2) Errors that have a short term effect vs. long term and require income assessment; 3) Scenarios in which the burden of proof is on

1929, *McIntosh v. Wilkinson*,[80] in which the taxpayer argued that he made an election by mistake and therefore, it should be revoked.[81] The Court drew the line between mistakes made under mistakes of fact and mistakes of law, deciding that only those based on mistakes of fact would be revocable.[82]

According to Yorio, there are two important conflicting issues of tax policy discussed here. One is the policy that a taxpayer should not have to pay more in taxes than the IRC requires simply because they misconstrued, or failed to make, a tax election.[83] On the other hand, the government counters that the burdens of tax administration should not be increased by accommodating a taxpayer who, through their own fault, made an incorrect tax election.[84]

Yorio argues that early opinions fail to analyze or focus on an inapposite rule that a mistake of fact serves to excuse an election, but a mistake of law does not.[85] He adds, however, that courts should not blindly grant relief to any taxpayer who claims it would be unfair to hold them to a mistaken election.[86] According to Yorio, the taxpayer should prevail unless the government establishes either that a specific administrative burden would increase by permitting the revocation or that the taxpayer's revocation or late election is motivated by hindsight knowledge of events subsequent to their original election's date.[87] Yorio argues that the best alternative is likely for Congress to

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the taxpayer; 4) Pure mistake (in favor of taxpayer) vs. hindsight, which are relevant to this Article; 5) Advice from a governmental agent (in favor of taxpayer); 6) Election perceived as inconsequential; 7) Ignorance, when the taxpayer does not know election exists (in favor of taxpayer), which is also relevant to this Article; 8) Not filing on time (in those cases we have penalty provisions, therefore taxpayers should not be punished further and should be allowed to correct the election – this is not in favor of taxpayers but should be); 9) Requests for correction because of an audit. *Id.* at 472–76. Yorio also discusses penalties, and argues that taxpayers should be allowed to correct if they were negligent, but not if they were fraudulent. *See generally id.*

80. McIntosh v. Wilkinson, 36 F.2d 807 (E.D. Wis. 1929).

81. *See* Yorio, *supra* note 23, at 466.

82. *See id*. at 466, 485. Yorio argues that, under certain circumstances, mistakes of law could be revocable if the taxpayer did not know they had an alternative at the time. Yorio provides an example where the taxpayer adopted straight-line depreciation and did not know of the potential to elect accelerated depreciation. There could be an argument in this circumstance that such an election is mistaken in its inception and therefore should be revocable within a reasonable time so long as hindsight did not induce the revocation.

83. *Id.* at 486.

84. *Id.*

85. *Id.* at 486.

86. *Id.*

87. *Id.* at 487.

enact a statute explicitly prohibiting revocations after a statutory limitation period of three years.[88]

II.
Electing Filing Status for Tax Purposes

Section 1 of the IRC specifies five filing statuses: single, head of household, married filing separately, married filing jointly, and qualified widow.[89] This Article focuses on married taxpayers' filing status election for tax purposes through a case study of an asymmetric rule that applies to married taxpayers who want to change or correct their initial election.

The default status for married taxpayers is filing two separate returns. It is referred to as "married, filing separately."[90] This, however, is only one filing option married taxpayers have. They may also elect to file a joint return, and be considered as "married, filing jointly," even if one spouse has no income or deductions.[91] The implications of whether married couples elect to file separately or jointly can be far-reaching and apply to taxpayers' tax rates, tax liability, and available tax benefits.

In this section, I present the historical developments of the filing status election. Then, I focus on married taxpayers' filing status election, and how the U.S. tax system incentivizes joint filing. Finally, I discuss joint and several liability as one consequence of joint filing before I proceed to the discussion in Part III.

A. Historical Developments

When Congress first implemented the income tax in 1913, each eligible taxpayer was required to file an individual return.[92] Married taxpayers were required to file two individual returns—one for each spouse—and did not have an option to file jointly.[93] In 1918, Congress introduced optional joint returns, which opened the door for the

88. *Id.* at 488.

89. I.R.C. § 1 (2018). Many jurisdictions have adopted exclusively individual taxation. Stephanie Hunter McMahon, *London Calling: Does the U.K.'s Experience with Individual Taxation Clash with the U.S.'s Expectations?*, 55 St. Louis L. Rev. 159, 159 (2010) (explaining how "the United States is one of the last countries to tax married couples jointly") [hereinafter *London Calling*]. The United Kingdom completed the transition of its tax system to an individual-based one in 1990. *Id.*

90. I.R.C. § 1.

91. I.R.C. § 6013(a).

92. Bryan T. Camp, *The Unhappy Marriage of Law and Equity in Joint Return Liability*, 108 Tax Notes 1307, 1308 (2005).

93. Christian, *supra* note 14, at 537.

discussion of joint and several liability.[94] Taxpayers reacted to optional joint returns by shifting income from one spouse to the other, therefore splitting their tax liability, or by filing jointly and combining their tax burden.[95] The Bureau of Internal Revenue interpreted optional joint filing as imposing joint and several liability.[96] Eventually in 1929, the Board of Tax Appeals[97] ruled in *Cole v. Commissioner*[98] that joint and several liability was appropriate for married taxpayers filing an optional joint return.[99] The Board's justification for permitting joint and several liability on optional joint returns was primarily administrative.[100] However, the Ninth Circuit reversed the Board's decision in *Cole*, holding that joint and several liability was inconsequential to joint filing because tax laws did not consider married spouses as a single unit for tax purposes.[101]

A few years after the Ninth Circuit's decision in *Cole*, Congress enacted Section 6013(d)(3) in the Revenue Act of 1938. This section provided that the liability, with respect to a husband and wife's joint return, shall be joint and several.[102] In doing so, Congress explicitly defined the tax unit of spouses as one married couple, rather than two individuals.[103]

Throughout this period, the typical family had a single source of taxable income in the form of the husband's wages.[104] Congress enacted the Revenue Act of 1948 to address issues regarding tax shifting schemes, where couples would shift income, usually to the wives, in order to lower the tax obligations resulting from the husband's tax bracket.[105] The purpose of the Act was to allow the federal government the ability to better monitor and target joint filers' efforts to re-

94. *Id.* at 539.
95. *Id.*
96. *Id.* at 540.
97. The Board of Tax Appeals later became the U.S. Tax Court. *See* HAROLD DUBROFF & BRANT J. HELLWIG, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS (2d ed.) (2014).
98. Cole v. Comm'r, 29 B.T.A. 602, 605 (1933).
99. *Id*.
100. Christian, *supra* note 14, at 540.
101. Cole v. Comm'r, 81 F.2d 485, 489 (9th Cir. 1935); Stephanie McMahon, *An Empirical Study of Innocent Spouse Relief: Do Courts Implement Congress's Legislative Intent*, 12 FLA. TAX REV. 629, 636 (2012) [hereinafter *An Empirical Study of Innocent Spouse Relief*]; Christian, *supra* note 14, at 541.
102. Camp, *supra* note 92, at 1307.
103. *See* Wilson v. Comm'r, 705 F.3d 980, 982 (9th Cir. 2013); *see also* McMahon, *Gendering the Marriage Penalty*, *supra* note 2. In addition, many places in the IRC treat family members as part of the same economic unit. *See, e.g.*, I.R.C. § 267; Camp, *supra* note 92, at 1309.
104. McMahon, *To Have and to Hold*, *supra* note 20, at 723.
105. *Id.* at 736–38.

duce their collective taxes, an advantage that was not available to single filers.[106] This phenomenon is referred to as income shifting between spouses.[107]

In order to effectively combat income shifting schemes between spouses, the Supreme Court had to address the lack of uniformity between common law and community property states.[108] In community property states, the default was to split couples' income between them, whereas spouses in common law states found it difficult to accomplish the same result.[109] The Revenue Act of 1948 made income splitting available to all married couples, as opposed to being available only to those in community property states.[110] Thus, by allowing all married couples to utilize income splitting, Congress made it so couples were less likely to participate in tax shifting schemes.

The Tax Reform Act of 1969 addressed the inequities of the 1948 Act's income splitting regime. This regime caused single taxpayers to pay more in taxes than married taxpayers earning the same amount—the "single's penalty."[111] The reform ensured that unmarried taxpayers filing individually would not pay more than 120 percent of the tax paid by joint filers with the same income.[112]

When Congress introduced joint filing in 1918, a married taxpayer's election of filing status was irrevocable, meaning that married taxpayers could not change their filing status election after the due date for filing the return had passed.[113] However, in 1951, Congress enacted what is currently Section 6013(b).[114] This provision permits taxpayers—under certain circumstances—to file joint returns after having already filed separate returns for a certain year.[115] As reflected in the legislative history for this section, the reasoning for the change was that "*a proper election frequently requires informed tax knowledge not possessed by the average person.*"[116] Therefore, disallowing

106. *Id.* at 738.
107. *Id.* at 718–19.
108. *Id.* at 728 (discussing the Supreme Court's ruling in *United States v. Robbins*, 269 U.S. 315 (1926), where the question presented was "whether all of a couple's community income could be assessed to the husband").
109. McMahon, *Gendering the Marriage Penalty*, *supra* note 2, at 29–30.
110. *Id.* at 32.
111. *Id.* at 27.
112. *Id.*
113. Camp, *supra* note 92, at 1307–08.
114. *See* S. REP. NO. 82-781, at 2018 (1951), *as reprinted in* 1951 U.S.C.C.A.N. 2018, 2018; previously § 51(g).
115. I.R.C. § 6013(b).
116. *See* S. REP. NO. 82-781, at 2018 (emphasis added); Drumbl, *supra* note 19, at 423.

taxpayers to elect the MFJ status and forcing them to maintain the MFS status *"may result in substantially excessive taxes."*[117] Congress did not address possible changes in the other direction, from MFJ back to the default of MFS.[118]

In capping the amount of taxes single filers paid, Congress meant to restore equity between single and married taxpayers who earned the same amount of income. It had, however, the effect of causing some spouses to face higher tax rates when they got married.[119] Instead of restoring equity between single and married taxpayers, the 1969 Reform created a marriage penalty. This reform occurred during a time when fewer than 10 percent of married couples had wives earning income that was relatively equal to their husbands' income.[120] Over time, the traditional one-earner family dynamic became less prevalent, and consequently, the number of taxpayers affected by the marriage penalty increased.[121] By 1979, dual-earner married couples outnumbered single-earner couples for the first time.[122]

During the second wave of feminism, women's groups developed a coherent position on the marriage penalty and effectively characterized the tax unit issue as a gender-related one.[123] Some women's groups then shifted their focus from equality for singles to equality for married joint filers, seeking to ensure that married couples did not pay a higher tax rate than if they had remained single.[124] Consequently, as attention to this inequality increased, Congress passed a tax reduction to benefit two-earner couples, thus incentivizing joint filing and marriage in general.[125]

Another modification to the significance of the election to file jointly came as a result of the Internal Revenue Service Restructuring and Reform Act of 1998.[126] This reform expanded the availability of "innocent spouse relief."[127]

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117. S. REP. NO. 82-781, at 2019 (emphasis added).
118. This issue is discussed further in Parts III and IV of the Article.
119. McMahon, *Gendering the Marriage Penalty*, *supra* note 2, at 27.
120. *Id.* at 38.
121. *Id.*
122. *Id.*
123. *Id.* at 39.
124. *Id.*
125. *Id.* at 40.
126. McMahon, *To Have and to Hold*, *supra* note 20, at 739.
127. *Id.* As discussed in Part II.D, *infra*, one of the consequences of joint filing is that one spouse is liable if the other spouse is non-complying when filing the joint return. In this case, the IRS can collect the taxes owed from either spouse. The only way a spouse can bypass that liability is if they can show they fit in one of the "innocent spouse" categories, listed in I.R.C. § 6015.

B. Married Taxpayers: Filing Jointly vs. Filing Separately

Married taxpayers can elect to file a joint tax return, as "married, filing jointly," or to maintain the default status of "married, filing separately."[128] In fact, 95% of married taxpayers elect the MFJ status.[129] Under the IRC, if a married couple chooses to file jointly, the IRS sees both spouses as a single taxable unit without differentiating between the taxes owed by each spouse. That is the case even if only one of the spouses generated the reported income or prepared the tax return.[130]

The MFJ election available to married taxpayers stems from the concepts of income aggregating and income splitting.[131] For example, joint filing treats married taxpayers as if each one earned exactly half of the total income.[132] This means that any income differences between the spouses are smoothed out, and the spouse who earns more shifts their income to the spouse that is in a lower tax bracket.[133] The couple as a unit may save tax money. But, this happens at the expense of one spouse—traditionally, the female spouse in a heterosexual couple—that bears some of the tax burden of the other spouse and is taking on more of the total tax burden to benefit the family unit compared with her tax liability if she would have filed a separate return.[134] When filing a joint return, the married couple's income is aggregated and then effectively split between the two because the tax brackets are twice as wide for married taxpayers who file a joint return.[135] This way, married couples with a single earner are favored compared with married couples with two earners.[136] This also has a negative effect on women joining the work force.[137]

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128. Drumbl, *supra* note 19, at 399.

129. RETTIG ET AL., *supra* note 2, at 47–48.

130. McMahon, *An Empirical Study of Innocent Spouse Relief*, *supra* note 101, at 636.

131. Amy C. Christian, *Joint Versus Separate Filing: Joint Return Tax Rates and Federal Complicity in Directing Economic Resources from Women to Men*, 6 S. CAL. REV. L. & WOMEN'S STUDIES 443, 444 (1996-1997).

132. *See* Rev. Proc. 2019-44, 2019-47 I.R.B. 1093, at Table 1 & Table 4 (showing the limits for filing separately are exactly half those for filing jointly).

133. Christian, *supra* note 131, at 444.

134. *Id.* at 444–45.

135. *Id.* at 445.

136. *Id.* at 446.

137. *Id.* at 446–47. Choosing a filing status also provides a tax planning opportunity for a married couple. As Heather Field explains in *Choosing Tax Explicit Elections as an Element of Design in the Federal Income Tax System*, this choice conveys information to the government about the way the two individuals view themselves and their relationship. *See* Field, *supra* note 22. Field provides the following examples to make this point: A couple that is legally separating may file separately to keep their financials private from one another. A couple that marries later in life may decide to

C. The U.S. Tax System Incentivizes Married Taxpayers to Elect the MFJ Status

The U.S. tax system incentivizes married taxpayers to elect the MFJ status by generally offering monetary benefits to those who elect to do so.[138] Such incentives include preferential tax rates and specific tax credits that are not available to married taxpayers filing separately. In addition, there are limitations on itemizing deductions for separate filers, such as allowing one spouse to elect to itemize their deductions *only if* the other spouse also elects to itemize.[139]

Filing separate returns may result in losing several tax benefits—such as tax deductions and tax credits—that are available only to married taxpayers who file jointly. For example, a married taxpayer filing separately must itemize their deductions if their spouse is electing to itemize, thereby disqualifying their use of the standard deduction.[140] A married taxpayer filing separately also cannot claim the earned income tax credit.[141] Finally, the tax rates and income brackets are less preferential for separate filers.[142]

There is an economic incentive for married couples to elect MFJ status if one spouse earns more than the other because of the way joint income is aggregated and then split when filing jointly.[143] As the income difference between spouses grows larger, the incentive to file jointly grows as well; the benefit of splitting the income grows while the cost of aggregating the income grows smaller. However, there are several scenarios where the MFJ status does not result in a beneficial outcome for the couple. These include equal-earner married couples—because income splitting leads to similar results as separate filing—and those who have high itemized deductions that yield a larger tax benefit as the adjusted gross income is smaller.[144]

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maintain separate financials. Conversely, some couples may want to file jointly because they consider a joint tax return symbolic of the couple's marital unity. Currently, the ability to file jointly or separately reflects a married couple's personal circumstances rather than just a pure tax-planning opportunity. *Id.* at 65.

138. Or at least a declaratory benefit (e.g., in the case of same-sex marriage).

139. I.R.C. § 63.

140. I.R.C. § 63(c)(6)(A).

141. I.R.C. § 32(d).

142. Drumbl, *supra* note 19, at 402.

143. Christian, *supra* note 131, at 447; Harvey S. Rosen, *Is It Time to Abandon Joint Filing?*, 30 NAT'L TAX J. 423, 424–25 (1977).

144. *See, e.g.*, I.R.C. § 67(a); I.R.C. § 213. The impact of these situations is even more relevant given the current COVID-19 crisis. *See* Orli Oren-Kolbinger, *Global Pandemics and Economic Uncertainty: The Importance of Error-Correction Mechanisms in Crisis*, PROCEDURALLY TAXING (June 8, 2020), https://procedurallytax-

The income aggregating and splitting process operates as follows: the income of both spouses is combined, which reduces the tax the high-income spouse needs to pay compared with the tax owed when filing separate returns and increases the tax the low-income spouse needs to pay compared with the tax owed when filing separate returns. These effects happen simultaneously when a couple decides to elect the MFJ status.[145] It is important to remember the social context in a situation like this: If a husband earns more than his wife, the aggregation and splitting of income which takes place when filing a joint return rather than two separate returns has an adverse effect on the wife compared to the tax results that would occur if each filed separately.[146] Under this regime, the outcome is wealth transfer from the wife to the husband.[147]

As Amy Christian explains, the only way the spouse that earns less income—which is predominantly the female spouse in a heterosexual marriage—can avoid the monetary consequences of joint filing is to file a separate return.[148] We see, however, that this is not happening for several reasons.[149] Joint filing is a mechanism of wealth transferring from the spouse that earns less to the one who is earning more. History shows this means wealth transferring from women to men. If there is income disparity between the spouses, together they would be better off filing a joint return in comparison with filing two separate returns. But we get this outcome because the spouse who earns less is subsidizing the tax cost of the other spouse.[150] The decision the low-earner spouse needs to make is whether to support the family unit and file a joint return, which increases the tax burden on her but lowers the tax burden on the family as one economic unit, or support herself and file a separate return, which means she pays less tax money while increasing the total tax toll on the family.[151] On the other hand, the high-income earner should favor joint filing, which will make him and the family better off. So, while the male spouse's interests are aligned with those of the family unit, the female spouse's interests are not aligned, and she must choose between her own benefit and her fam-

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145. Christian, *supra* note 131, at 448. *See also id.* at 452–54 (numerical examples of income aggregating and liability apportioning, and their effect on wives).

146. *Id*. at 449.

147. For a discussion on whether the wife has access to the tax her spouse saves, see *id.* at 455–65.

148. *Id*. at 465.

149. *Id.*

150. *Id.* at 465–67.

151. *Id.* at 465.

ily's benefit. Meanwhile, this decision will decrease her incentive to work because her first dollars will be taxed at the couple's marginal rate, not a zero rate.[152]

Not all married taxpayers file a joint return. Rather, some maintain the default "married, filing separately" filing status. Empirical evidence shows that about 5% of married taxpayers file separate returns.[153] Those who file separate returns do so because they cannot file a joint return or because they do not want to file a joint return. A married taxpayer will be considered "married" for tax purposes unless the taxpayer falls within one of the three exceptions: 1) the taxpayer is legally separated from their spouse; 2) the taxpayer and spouse are living separately and the taxpayer pays for more than half of the furnishing and maintenance of the principal place of occupancy for the taxpayer's child; or 3) the taxpayer qualifies for head of household status and their spouse at any time during the year was a nonresident alien.[154]

Why would a taxpayer file separately? Some separate filers elect this option because it provides them with monetary benefits, e.g., when there are income disparities between spouses and the spouse with the lower income can elect to itemize deductions that are dependent on the taxpayer's adjusted gross income[155] (AGI).[156] In most cases in which married taxpayers elect to file separate returns, they do so to avoid potential joint and several liability or because they prefer to keep their finances separate.[157]

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152. *Id.* at 465–68.

153. RETTIG ET AL., *supra* note 2, at 47–48.

154. Drumbl, *supra* note 19, at 408.

155. *Id.* at 409 n.28. These itemized deductions are referred to as miscellaneous itemized deductions and have been suspended until 2025 as part of the Tax Cuts and Jobs Act of 2017. *See* Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017), § 11045 (codified as amended at I.R.C. § 67(g)).

156. Adjusted gross income is defined in I.R.C. § 62, as gross income minus the deductions allowed in the section. I.R.C. § 62.

157. Drumbl, *supra* note 19, at 409. Nonetheless, some married taxpayers file separately because they cannot file a joint return. Situations where couples are separated, but not legally, would necessitate married couple filing separate status, though they may be eligible for head of household status. *Id*. at 410. In addition, this situation might arise if, in a situation of spousal abuse, one spouse refuses to sign or participate in the filing. If one spouse has fled the relationship, but remains legally married, they may not wish to contact their ex-spouse to coordinate a joint return. *Id.* at 411. Another reason a spouse may file separately is if their spouse has abandoned them. An individual is still considered married if the abandonment took place within the last 6 months or if they do not have dependent children. *Id.* at 412. The Treasury has also expanded the spousal abuse exception to include abandoned spouses that cannot locate their spouse (both are limited to the premium tax credit).

An interesting question is whether the effect of "income splitting" still holds when it comes to taxpayers who earn equal incomes. If we focus only on the tax rate structure, taxpayers would be, at most, indifferent between joint filing and separate filing.[158] Accordingly, we would expect that married taxpayers who earn equal incomes would be at least equally likely to maintain the default of MFS status or elect the MFJ status. Once accounting for most taxpayers' preference to avoid joint and several liability, we would expect that most taxpayers in this situation would prefer to maintain the MFS status.

There are additional scenarios in which MFS status is beneficial for a married couple. That is the case when a taxpayer has itemized deductions that are dependent upon their AGI. For example, consider unreimbursed medical expenses as defined in Section 213 of the IRC. Taxpayers can deduct a larger portion of their medical expenses if their AGI is smaller.[159] Another example is Section 67(a) miscellaneous itemized deductions, which are currently suspended.[160] These depend on the taxpayer's AGI, and the size of the benefit increases as AGI decreases.[161]

Taxpayers' AGI and unreimbursed medical expenses fluctuate over time. This point is especially true for some taxpayers in the climate created by COVID-19. During a pandemic that is coupled with an economic crisis, many married taxpayers are incurring income reductions and increased medical expenses of all sorts.[162] In these circumstances, it may be more beneficial to file separately because the deduction of medical expenses is higher as the AGI is lower. There-

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If one spouse is a nonresident alien, the couple is not permitted to file a joint return. The couple may elect to treat the nonresident spouse as a U.S. resident for tax purposes, but in most circumstances, this is very undesirable. Therefore, in most cases the U.S. resident has no choice but to file married filing separately. Additionally, bad advice, no advice, or lack of planning may lead to electing the "married, filing separately" status. Finally, married filing separately might come down to a couple's desire to keep finances separate and to avoid joint liability. In this situation, the couple has consciously made a choice to file separately as opposed to being forced into it. *Id*. at 412–14.

158. *See* Rev. Proc. 2019-44, 2019-47 I.R.B. 1093, at Table 1 & Table 4 (showing the limits for filing separate are exactly half of filing jointly); *compare id.*, *with* Christian*, supra* note 131.

159. *See* I.R.C. § 213.

160. *See* Tax Cuts and Jobs Act § 11045 (codified as amended at I.R.C. § 67(g)).

161. *See* I.R.C. § 67(a).

162. *See, e.g.*, Margot Sanger-Katz & Ron Lieber, *Employers Can Let Workers Change Health Plans Without Waiting*, N.Y. TIMES (May 12, 2020), https://www.nytimes.com/2020/05/12/business/employer-health-plans-coronavirus.html; Reed Abelson, *Coronavirus May Add Billions to U.S. Health Care Bill*, N.Y. TIMES (Mar. 28, 2020), https://www.nytimes.com/2020/03/28/health/coronavirus-insurance-premium-increases.html.

fore, if married taxpayers reelect the MFJ status for tax year 2020 solely because they have traditionally done so in the past, they are potentially accepting a larger tax burden. This is because their combined AGI is higher than their separate AGIs, which lowers the allowed deduction. Even if they realize they have made an election error, they will not be allowed to correct this error once the due date for filing their 2020 tax return has passed. Another timely example is the recent Economic Impact Payment (EIP) benefit. In filing their 2019 return, low-income married taxpayers may have been better off maintaining MFS status if one spouse lacks a social security number (SSN). This is because the EIP is available to married taxpayers filing jointly *only if* both have an SSN.[163]

Lastly, the IRC also imposes limitations on how and when married taxpayers may amend their filing to file jointly after one or both spouses have filed a separate return.[164] This is particularly detrimental to low-income taxpayers.[165] Low-income taxpayers are also affected by the Earned Income Tax Credit (EITC), the premium tax credit, and the special rules regarding itemized deductions for MFS filers.[166]

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163. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 § 6428(g) (2020); *Recovery Rebate Credits and Economic Impact Payments*, INTERNAL REVENUE SERV., https://www.irs.gov/coronavirus/economic-impact-payments (last visited Feb. 18, 2021); *see also* Leslie Book, *Court Rules Against Government in CARES Litigation Challenging Statute's Denial of Payments to Mixed Status Couples*, PROCEDURALLY TAXING (Aug. 7, 2020), https://procedurallytaxing.com/court-rules-against-government-in-cares-litigation-challenging-statutes-denial-of-payments-to-mixed-status-couples/ (discussing the decision of a federal district court in Maryland in *Amador v. Mnuchin*, 476 F. Supp. 3d 125 (D. Md. Aug. 5, 2020), to allow the suit to proceed to the merits. The suit was filed on behalf of U.S. citizens who were denied the COVID stimulus benefits after filing a joint return with spouses who do not hold an SSN but an ITIN. The court denied the government's motion to dismiss the suit).

164. I.R.C. § 6013.

165. Drumbl, *supra* note 19, at 403.

166. The EITC is a refundable credit designed to serve as an anti-poverty program. The credit is available only to individual tax filers or to joint filers, but only one credit is on the combined income of both individuals. The premium tax credit is designed to assist lower-income taxpayers who buy health insurance through the ACA's marketplace and has been made unavailable to married persons filing separately. Temporary regulation has created an exception for married taxpayers who are living apart from their spouse at the time the return is filed and are also victims of domestic abuse or spousal abandonment. There is a three-year rule, which limits taxpayers' ability to avail themselves of the exception for more than three consecutive years. Finally, there are provisions which require taxpayers filing separately to itemize if their spouse does. An individual spouse filing separately cannot claim the standard deduction if their spouse has chosen to itemize their deductions. The reasoning is that in a single economic unit, a couple could itemize deductions under one spouse and still obtain the standard deduction under the other spouse. It is especially damaging in a situation where one individual in a separated couple is low-income. The low-income spouse is less likely to have large expenses to deduct from their tax return and will get stuck

D. Consequences of MFJ and MFS Filing Statuses: Joint and Several Liability

Joint filing is a filing status available only to married couples.[167] While there are some benefits to the MFJ status, those who elect it are jointly and severally liable for any tax deficiency attributable to either spouse.[168] This may expose an unsuspecting spouse to joint and several liability.[169]

Congress introduced joint filing as part of the Revenue Act of 1918,[170] five years after implementing the income tax in 1913.[171] During this initial five-year period of the income tax in the U.S., married taxpayers were not permitted to file jointly and were subject to the same tax schedule as single filers.[172] That schedule allowed a taxpayer to exempt the first $3,000 of their income. In addition, married taxpayers were permitted to exempt an additional $1,000 of their joint income if they lived together. This means that during the first five years of the income tax, married taxpayers received favorable tax treatment that was not dependent on filing a joint return.[173]

Before Congress added the joint and several liability provision in 1938,[174] the IRS tried advocating for joint liability; however, the courts ruled in favor of taxpayers in this context.[175] It took Congress ten more years to add the separate tax rate schedule for married taxpayers filing a joint return.[176] The intent behind this preferred schedule was to equate the legal treatment of married taxpayers in common law states and community property states, and thus was detached from joint and several liability.[177] However, it should also be noted that not all married taxpayers who file a joint return benefit from doing so. What might be perceived as preferential tax treatment, in reality, is

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paying more than if they took the standard deduction. Drumbl, *supra* note 19, at 414–22. Drumbl offers solutions that would allow less punitive separate filing for married taxpayers. *Id.* Drumbl argues that the IRC can do a better job of determining eligibility and avoiding the preclusion of credits and deductions solely based on filing status. *Id.* at 441.

167. I.R.C. § 6013.

168. I.R.C. § 6013(d)(3).

169. Camp, *supra* note 92, at 1307–19. However, this was not always the case, calling into question the claim that joint liability is the "stick" that accompanies the "carrot" of joint filing.

170. Revenue Act of 1918, 40 Stat. 1057, 1074.

171. Revenue Act of 1938, 52 Stat. 447.

172. Camp, *supra* note 92.

173. *Id.* at 1307–08.

174. 52 Stat. 447.

175. Cole v. Comm'r, 81 F.2d 485, 489 (9th Cir. 1935).

176. Camp, *supra* note 92.

177. *Id.* at 1307–08.

meant to offset the marriage penalty that is imposed on spouses who are equal earners.[178]

Many argue in support of joint and several liability for joint filing as an administrative necessity.[179] A different argument focuses on the theory that filing a joint return turns spouses into a single taxpaying unit.[180] Currently, the IRC treats family members as part of a single economic unit in many other contexts.[181] On the other hand, others argue that joint and several liability overrides the norm of taxation according to the taxpayer's ability to pay.[182] With the burden of joint and several liability weighing heavily on married couples, the decision to file a joint return is crucial.[183]

Commentators have claimed that joint and several liability is mostly burdening women.[184] To avoid liability, a married individual may determine it is more cautious to elect "married, filing separately" status when filing a tax return.[185] However, the U.S. tax system is designed in a way that incentivizes filing joint returns by offering married couples significant monetary benefits.[186] As a result, many couples prefer to file jointly and not separately because the latter makes them ineligible for various tax benefits. As a result, a majority of married couples file jointly.[187]

One circumstance under which a taxpayer can avoid joint and several liability is if the taxpayer can show that the return itself was signed under duress.[188] If a taxpayer can show that they signed the document under duress, a court will find the document invalid. However, the taxpayer will need to provide the IRS with evidence of duress.[189] If a tax return is shown to be a product of duress, there has effectively been no joint return, and the IRS will acknowledge it as a

178. *Id*. at 1308–09; Richard C. E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317, 371 (1990).
179. Christian, *supra* note 14, at 541–43.
180. *Id*. at 545; Camp, *supra* note 92, at 1309.
181. I.R.C. § 267; Camp, *supra* note 92, at 1309.
182. Christian, *supra* note 14, at 545.
183. Drumbl, *supra* note 19, at 403.
184. Christian, *supra* note 14, at 536; *see also* Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547 (2020).
185. Michele LaForest Halloran, *A Taxpayer's Prickly Path Joint and Several Income Tax Liability*, 91 MICH. B.J. 30, 30 (2012).
186. These benefits are more significant in the case of low-income taxpayers.
187. INDIVIDUAL INCOME TAX RETURNS 2018, *supra* note 2, at 136; LaForest, *supra* note 185, at 30–31.
188. McMahon, *An Empirical Study of Innocent Spouse Relief*, *supra* note 101, at 636.
189. LaForest Halloran, *supra* note 185, at 31.

"married, filing separately" return.[190] If an individual cannot provide evidence that their return was invalid, an alternative form of relief from liability can be found by requesting "innocent spouse relief" under IRC Section 6015.

Joint and several liability is problematic for several reasons: it shifts liability from one spouse to the other, mostly from men to women. It joins the other elements of the joint filing system, which generally affects women negatively. In fact, the assumption that married spouses function as one single economic unit does not necessarily hold today, given that spouses are more economically independent than before and that there are significant divorce rates in the U.S.[191] Therefore, commentators argue that joint filing should be repealed, or that at least, Congress needs to revisit joint and several liability rules.[192]

III.
Identifying The Problem: Asymmetric Rule Regarding Changing Filing Status of Married Taxpayers

The Internal Revenue Code presents a menu of options available to married taxpayers seeking to change their filing status. However, the options available to married taxpayers are inconsistent and create asymmetric error-correction mechanisms. In this section, I will present the legislative history regarding allowing married taxpayers to alter their filing status. This section will then outline the three asymmetric error-correction mechanisms created through the ability of married taxpayers altering their filing status. Finally, this section will conclude with an explanation on why the asymmetry is problematic.

A. Changing Filing Status After Making an Election: The Legal Rules

When joint filing was first introduced in 1918, an election of filing status by a taxpayer was irrevocable.[193] This meant married taxpayers could not change an existing error to their elected filing status

190. *Id.*

191. *See generally* Alexandra Killewald, *How Work, Gender Norms and Money Shape the Risk of Divorce*, Work in Progress (Oct. 7, 2016), https://workinprogress.oowsection.org/2016/10/07/how-work-gender-norms-and-money-shape-the-risk-of-divorce/.

192. Christian, *supra* note 14, at 615–16, n.352.

193. Camp, *supra* note 92, at 1307–08.

using a superseding return after the filing due date had passed.[194] However, in 1951, Congress enacted what is currently IRC Section 6013(b) to alleviate some pressure on married taxpayers deciding between filing statuses.[195]

Section 6013(b)(1) provides married taxpayers with a unique opportunity. Under certain circumstances, married taxpayers can elect to file a joint return after having already filed separate returns for the same tax year, even after that tax year's filing date has passed.[196] This opportunity to change filing status is not available for married taxpayers who have filed jointly and wish to alter their filing election status after the filing deadline had passed. Married taxpayers filing a joint return are bound to this election and cannot deviate from it.[197]

As reflected in the legislative history, the reasoning for Congress enacting what is currently Section 6013(b) was that "*a proper election frequently requires informed tax knowledge not possessed by the average person*."[198] Moreover, disallowing married taxpayers from altering their filing status from "married, filing jointly" (MFJ) to "married, filing separately" (MFS) had the potential risk of "*substantially excessive taxes*" for married taxpayers due to reasons such as the lack of time and tax knowledge to consider the filing election decision.[199] Therefore, Congress amended the IRC to provide married taxpayers filing using MFS status the ability to change their election and elect MFJ status if this change occurred within the period of the statute of limitations or before a legal procedure has been initiated by either the IRS or the taxpayer.[200] This provision grants married taxpayers more time to consider electing MFJ status, even if the taxpayers already elected the MFS status. However, Congress remained silent about permitting similar changes in filing status in the opposite direction—from the MFJ status back to the default status of MFS.[201]

According to Section 6013(b)(2), married taxpayers can change their filing status from MFS to MFJ unless one of the following events have occurred: (1) if 3 years had passed from the last date prescribed

194. *See, e.g.*, Rossner, *supra* note 7; Fogg, *supra* note 7.

195. *See* S. REP. NO. 82-781, at 2018 (1951), *as reprinted in* 1951 U.S.C.C.A.N. 2018, 2018.

196. I.R.C. § 6013(b); *see also* Drumbl, *supra* note 19, at 423.

197. The only exceptions are "innocent spouse relief" under I.R.C. § 6015 and if the MFJ election is void (e.g., if the taxpayer is not eligible for this status), which are different scenarios than the one I refer to in this Article and are outside of its scope.

198. *See* S. REP. NO. 82-781, at 2018 (emphasis added).

199. *Id*. at 2019; *see also* Drumbl, *supra* note 19, at 423.

200. *See* Glaze v. United States, 641 F.2d 339, 340 (5th Cir. Unit B Apr. 1981).

201. *See* S. REP. NO. 82-781, at 2018 (1951).

by law for filing the return for such taxable year; (2) if a Notice of Deficiency (NOD) under Section 6212 had been mailed to either spouse and the spouse filed a petition with the Tax Court within the prescribed time; (3) if either spouse had commenced a suit in court for recovery of any part of the tax for such taxable year; or (4) if either spouse has entered into a closing agreement under Section 7121 with respect to such taxable year, or a civil or criminal case arises against either one with respect to such taxable year has been compromised under Section 7122.[202]

The three-year statute of limitations affects couples differently. If one spouse filed a separate return, the non-filer spouse has three years from the filing deadline to file jointly with that spouse before they have no choice but to file as married filing separately for those years.[203] However, if neither spouse filed, there is no time restriction.[204] Two non-filers are allowed at any time later to file a joint return and reduce their liability by the amount of any credits that would have been due.

Issues emerged with the enactment of Section 6013(b). First, the clear language of Section 6013(b) and the legislative history indicate the section applies in cases where the taxpayer wants to change their filing status after previously filing a return. This means that a taxpayer must have a tax return on file before asking to amend it under Section 6013(b).

Another issue is present in the background of the legislative change, particularly in the structure of the family unit and the incentive to file a joint return. During the historical period in which Section 6013(b) was enacted, many married couples were comprised of one spouse occupying the "breadwinner" role of the household and the other spouse occupying the "homemaker" role, where the "homemaker" spouse would not be employed. Traditionally, the "breadwinner" role was occupied by the husband, while the "homemaker" role was occupied by the wife. Given the historical context of the American household and the taxation structure of married couples, there was an economic incentive for married couples to file a joint return to receive a tax benefit.

Joint filing generates an administrative benefit by allowing for fewer returns that must be processed and reviewed by the IRS. Given this rationale, it is surprising that after married taxpayers have filed

202. *See* Drumbl, *supra* note 19, at 423–24.

203. I.R.C. § 6013(b)(2).

204. *See* Drumbl, *supra* note 17, at 426.

two separate returns, they are allowed to change their elections, even after the deadline. This means that after their two returns have been already processed, they could file an additional third return and receive a tax refund as a result. Otherwise, there would be no reason to change their election status if it does not benefit them.

Another associated issue deals with gender, as the taxpayers who might benefit from this new provision are from one-earner households. Married taxpayers with two income earners might not be better off filing a joint return because of the marriage penalty. If they filed two separate returns, there is no reason for them to change their election to a joint return. However, if for any reason they decided to file a joint return (maybe one spouse recently joined the work force and is now earning the same salary as the other spouse), they might be automatically filing a joint return because this is what they did in the past. However, it should not matter why they are not filing a joint return. What is important is that they have filed a joint return and if they learn they are better off filing two separate returns, they cannot do it under any circumstances.[205]

Congress imposed certain limitations on the ability to amend such returns, which are particularly detrimental to low-income taxpayers.[206] Changing filing status under Section 6013(b)(1) is not possible under the following circumstances: (1) Three years have passed from the last date prescribed by law for filing the return for such; (2) a notice of deficiency has been mailed to either spouse with respect to that taxable year, and the spouse, as to such notice, files a timely petition with the Tax Court; (3) after either spouse has commenced a suit in any court for the recovery of any part of the tax for such taxable year; (4) after either spouse has entered into a closing agreement with respect to such taxable year; or (5) after any civil or criminal case arising against either spouse with respect to such taxable year has been bargained.[207]

Throughout the years, taxpayer requests to change filing status from MFJ to MFS were denied by the IRS. Some of these taxpayers have petitioned the Tax Court to allow for this change in filing status. In *Ladden v. Commissioner*, courts did not allow petitioners to revoke

205. The only avenue available is to file an innocent spouse relief request, which would be completely inapposite in this situation. To do so, one spouse would need to argue abuse or no knowledge, assuming they are still married and cannot use the Section 6015(c) route.

206. Drumbl, *supra* note 19, at 423.

207. I.R.C. § 6013(b)(2).

their joint return election once the filing period expired.[208] In subsequent cases, both the Tax Court and other courts cited the *Ladden* case and said for any taxable year with respect to which a joint return has been filed, separate returns shall not be made by the spouses after the time for filing the return of either spouse has expired.[209]

B. Error-Correction Mechanisms: Married Taxpayers' Filing Status Election

While the Tax Court has dismissed petitions requesting changes of election status from MFJ to MFS, the IRC presents married taxpayers with a variety of alternative scenarios and options when seeking to correct their elected filing status.[210] However, all of these mechanisms are inconsistent. Some mechanisms benefit taxpayers while others provide no benefit at all. Of three error-correction mechanisms introduced below which apply to married taxpayers' filing status election, this Article will heavily focus on the latter two, as they generate "Asymmetric Error-Correction Rules" (AECRs).

Under the first mechanism, the IRS initiates and corrects taxpayers' errors for them without charging them any fee to do so. For example, if a married taxpayer fails to file a tax return, the IRS automatically defaults them to MFS status in the substitute return the IRS prepares.[211]

Under the second mechanism, taxpayers can file an amended return to correct election errors. Married taxpayers are permitted to amend their filing status from MFS to MFJ after the due date for that tax year has passed if they fulfill the requirements listed in Section 6013(b).[212] When doing so, however, taxpayers produce an externality. The IRS now needs to reallocate resources to process an *additional* return for an already closed tax year only because the taxpayers previously elected an inferior alternative. Even so, the IRS does not charge a fee to process the amended return, despite its limited resources. As a result, taxpayers do not internalize the cost of correcting

208. *See* Ladden v. Comm'r, 38 T.C. 530, 534 (1962).

209. *See id.*; Coggin v. United States, No. 1:16-CV-106, 2018 WL 3448302, at *4 (M.D.N.C. July 17, 2018); Riedel v. Comm'r, 37 T.C.M. (CCH) 1849-2, 1849-3 (1978); Leger v. Comm'r, 29 T.C.M. (CCH) 101, 102 (1970).

210. *See, e.g.*, I.R.C. § 6013.

211. IRM 4.12.1.24 (10-05-2010) ("If married taxpayers fail to execute a joint return, the examiner will have to close the case using a filing status other than married filing joint. Generally, these taxpayers' filing status will be married filing separate. Based on facts and circumstances, the examiner will need to determine if a return is required to be filed by one or both spouses.").

212. *Id.*

that election error. Moreover, this mechanism allows married taxpayers to receive a late tax refund—or at least a non-monetary or declaratory benefit (e.g., in the case of same-sex marriage)—for a closed tax year. If such a benefit does not exist, taxpayers will not pursue it.

Under the third mechanism, taxpayers are not permitted to correct their election errors. As previously discussed, given the language of Section 6013(b), married taxpayers *cannot* change their filing status from MFJ to MFS, although the latter is the default filing status for married taxpayers. The only avenues to be relieved of joint and several liability are the innocent spouse relief under Section 6015 or if the MFJ election is void (e.g., if the taxpayer is not eligible for this status), which are different scenarios than the ones referred to in this Article.

C. The Problem with AECRs

The AECRs generated from the second and third mechanisms available to married taxpayers are problematic for two main reasons. First, it has an adverse effect on horizontal equity. Similarly situated taxpayers are treated differently based on their ability to correct an election error. Second, it has an adverse effect on the administrability of the tax system. This is because the IRS needs to reallocate resources to process the amended return, and it does not pass that cost to the taxpayers.

A rule that allows only one group of taxpayers to change their election after the deadline has passed might be simple, since the IRS will handle fewer requests for changes. However, almost 100% of all married taxpayers file a joint return. We also know that there has been a rise in the number of households with dual earners, and many of these earn similar incomes. Therefore, we should expect a decrease in the number of taxpayers who are filing a joint return.

Fewer married couples file separate returns compared with married couples who file a joint return.[213] Therefore, it can be expected that the actual number of taxpayers changing their elections from separate returns to joint returns will be lower than joint filers who would want to change their election back to the default of separate returns. This means that the asymmetric rule is simpler in the sense it draws a clear line between those who can make the change and those who cannot. In addition, the asymmetric rule applies to a small group of taxpayers to begin with.

213. INDIVIDUAL INCOME TAX RETURNS 2018, *supra* note 2, at 132.

If in the past, there was a reason to incentivize taxpayers to file jointly, especially households with only a single wage earner, it is not the case anymore. We can assume that within the group of married taxpayers filing a joint return, there is a large enough group of taxpayers who are not optimizing their tax outcomes. These non-optimal tax outcomes create a tax election error. In the past, this would not have been a real problem, because most married couples would be better off filing a joint return compared with separate returns. Again, this is no longer the case today.

Although the AECR is simple because it is cheap to apply and applicable to only a small group of taxpayers, it has adverse effects on equity. This is because the AECR treats similar taxpayers differently. Horizontal equity is disrupted as the law treats similar taxpayers differently, only according to their initial choice of filing status.

For example, assume there are two couples earning the same total income and each spouse earns the same salary. One couple maintained MFS status and the other elected MFJ status. Assuming all else is equal (same family size, same assets, etc.), there is no advantage in filing a joint return. In this case, taxpayers might be better off filing two separate returns to avoid joint and several liability because there is no monetary benefit from filing a joint return. If they already filed under MFJ status and the due date for filing the tax return has passed, the taxpayers will not be allowed to change their election back to separate filing and will not be treated like a couple who filed separate returns to begin with.

Another example is that of two couples that earn the same total income, but one couple has only one wage earner that earns all income while the other couple comprises two wage earners. We will assume both spouses in the second couple earn the same income. In this case, if both couples maintained MFS status, the first couple can become better off by changing the status to joint filing, which they can do under Section 6013(b).

Given the small percentage of married taxpayers who file using MFS status, the pool of married taxpayers who have potential access to Section 6013(b) is very small. The other taxpayers who elected MFJ status are not allowed to amend their status election even if this would benefit them.

It is also not good to have a system that prohibits some taxpayers from correcting their errors. The tax system is complicated, and many taxpayers get lost in the multitude of provisions. Therefore, we want a system that allows for corrections. The current system only allows one group to correct its filing status election error. This group is small to

begin with, and there is an even smaller number of taxpayers within this group who would need to change their election. On the other hand, with the tax system structured to incentivize joint filing even in cases where it is not beneficial to the taxpayers, many MFJ taxpayers will not have access to a needed error-correction rule.

IV.
SOLUTIONS: MOVING FROM AN ASYMMETRIC APPROACH TOWARDS A PIGOUVIAN ONE

In Part III, I discussed the asymmetric error-correction mechanisms that apply to married taxpayers when it comes to correcting their filing status election errors. I explained why the current asymmetric treatment of married taxpayers in Section 6013(b) is unfair and adds to the complexity of the tax system.

In this Part, I offer several solutions to the filing status election AECRs. It is important to note that the following analysis assumes that the elimination of joint filing is not a valid option in the current U.S. tax system.[214] First, I consider an "All" approach: Section 6013(b) error-correction rule should be expanded, allowing all married taxpayers to change their election from MFS to MFJ *and* from MFJ to MFS. This argument has been raised in the past by taxpayers who petitioned the Tax Court.[215] Taxpayers claimed that the rule regarding filing an amended return to fix a filing status election error should apply equally to married taxpayers independent of their initial election. Second, I consider the counterpart "Nothing" approach: repealing Section 6013(b) and prohibiting married taxpayers from correcting a filing status election error from MFS to MFJ and from MFJ to MFS. Third, I explain why neither the "All" or "Nothing" approaches are sufficient and turn to proposing a third solution. This solution focuses not only on the principle of fairness but also simplicity. According to this solution, which I refer to as "A Pigouvian All" approach, the error-correction rule in Section 6013(b) will apply to married taxpayers, whether their initial filing status election was MFS or MFJ. In addi-

214. The concept of joint filing in ingrained in the U.S. tax system. Proponents of its elimination were not successful. *See, e.g.*, McMahon, *London Calling*, *supra* note 85, at 161. In addition, the National Taxpayer Advocate, in their 2005 Annual Report to Congress, proposed legislation that would eliminate joint and several liability for joint filers. *See* 2005 NAT'L TAXPAYER ADVOC. ANN. REP. TO CONG., at 408. This, however, did not reach fruition.

215. *See, e.g.*, Ladden v. Comm'r, 38 T.C. 530, 534 (1962); Coggin v. United States, No. 1:16-CV-106, 2018 WL 3448302, at *3 (M.D.N.C. July 17, 2018); Riedel v. Comm'r, 37 T.C.M. (CCH) 1849-2, 1849-3-4 (1978); Leger v. Comm'r, 29 T.C.M. (CCH) 101, 102 (1970).

tion, I propose to apply a simple processing fee that will be deducted from the potential refund the requesting taxpayer(s) are seeking.

A. The "All" Approach: All Married Taxpayers Are Allowed to Change Their Filing Status

The "All" approach would apply the existing rule that allows MFS filers to change their election to MFJ in the reverse, allowing those taxpayers who elected MFJ to change to MFS. This would require Congress to allow joint filers to correct their filing status election error to the default of MFS, under the same circumstances that allow separate filers to correct their election error and elect MFJ status as set forth in Section 6013(b).

The rationale for the "All" approach is that as a society, we should prefer to have a system that allows error-correction over a system that does not allow error-correction. This system would allow more taxpayers to correct their errors in the place of a system that allows fewer taxpayers to correct their errors. Given the low salience of this election in the first place—our current framing portrays MFJ as superior to MFS or even the only option for married taxpayers—it is important to allow for error correction.

As discussed earlier, Section 6013(b)(1) provides married taxpayers who made an MFS election with a unique opportunity. They can initially elect to file two separate returns for a certain taxable year and later to change their filing status for that taxable year to MFJ for any reason. This option is available even after the filing deadline for that tax year has passed. The purpose of this provision is to allow married taxpayers more time to consider electing a joint filing status.

There is no apparent reason to differentiate between the two groups of taxpayers when it comes to their access to the IRS or their access to error-correction mechanisms. The legislative history shows that at the time that Section 6013(b) was enacted, there was a reason to incentivize married couples to file a joint return.[216] The language utilized by Congress indicates that the legislative intention was to make sure that those couples who want to file a joint return could do that even if the time had passed. There was an underlying assumption that there would be taxpayers who would like to deviate from the default of filing separate returns to file a joint return. There was not concern about taxpayers who filed a joint return and would like to

216. *See* S. REP. NO. 82-781, at 2018–19 (1951), as reprinted in 1951 U.S.C.C.A.N. 2018, 2018.

return to separate filing status. It is unclear why Congress did not make the change available to all married couples.

According to the horizontal equity principle, similar taxpayers should ultimately be treated equally. Although the AECR does not focus on tax rates, it blocks the access of most married taxpayers to the IRS when these taxpayers need to correct an election error. As a result, they cannot maximize the tax benefits for which they are eligible, which undermines the reason to have an election in the first place. This, in turn, affects the tax liabilities of these taxpayers. Therefore, in order to have equal tax treatment, the rule, which focuses on access to the IRS, should apply to both groups of taxpayers. Also, as a society, we should give preference to a system that allows taxpayers to correct their errors. The current tax system only allows one group of taxpayers to do so. On top of that, taxpayers are not required to bear the error-correction costs. The other group is not allowed to make the change to begin with, even if the couple is willing to bear the cost of making the change.

Therefore, under the "All" approach, Section 6013(b) would apply to all married taxpayers. This decision would not be unilateral, requiring both spouses to each agree on a change. One spouse would not be able to act without the other spouse's knowledge. This approach also mitigates the low salience of the election. It allows taxpayers to reconsider if they find out they made an erroneous election. This in turn increases the salience of the initial election, making taxpayers increasingly aware of the two options. Finally, there is no concern of potential abuse of the error-correction rule. This is because Section 6013(b) sets a statutory time limit of either three years after the last possible filing date for the taxable year, or more importantly in this context, the mailing of a notice of deficiency to either spouse.

B. The "Nothing" Approach: All Married Taxpayers Are Not Allowed to Change Their Filing Status

The tax treatment of married couples is currently asymmetric. If the only purpose is to make sure the same rule applies to both groups, one could argue that a valid solution would be to repeal Section 6013(b) and revert to the pre-1951 rule. This solution makes sure both groups are treated equally and are equally barred from making changes to their elections.

Justification for the "Nothing" approach is centered around fairness and horizontal equity along with promoting simplicity by removing the cost to the IRS of processing additional tax returns. This solution prioritizes the need for taxpayers to consider the possible

ramifications of their filing election choice. However, this approach is also insufficient. Humans may make inferior elections and there should be at least some room for error correction.

In the current system, which incentivizes taxpayers to file jointly to begin with, we might expect that if the "Nothing" approach is adopted, even the few that file separately would initially file jointly. This is why it makes sense to make the election more salient. But again, the rationale behind this solution would be that it is simpler to administer, and it applies to all married couples equally.

C. Why "All" or "Nothing" Will Not Do

The two aforementioned solutions, "All" and "Nothing" approaches, are insufficient for several reasons that revolve around the fairness and administrability of the relevant tax rules.

In regard to fairness, the "Nothing" solution falls short. Although it promotes fairness between similar married couples, it distinguishes between married and non-married taxpayers. This is because under this approach, married taxpayers cannot fix an election error, while single taxpayers and those who are eligible for "Head of Household" status can. This is the case even after the due date for the election has passed, as long as it is before the end of the 3-year statute of limitations. In addition, this approach is also insufficient because humans make inferior elections and there should be at least some room for error correction. Although it is applied in a fair way, we as a society feel uncomfortable with having a system where taxpayers cannot correct their errors.

On the other hand, the "Nothing" approach is simple and promotes administrability in the sense that there will not be a need to process amended returns after already processing the initial tax return(s) filed by the same taxpayers in the past. Therefore, there are no future processing costs for additional tax returns. In terms of simplicity, we have on the one hand fewer returns to process, and taxpayers must make a thoughtful election from which they cannot deviate. On the other hand, the "Nothing" approach has adverse effects on simplicity because it does not allow error correction at all, while the IRC does allow other filing status choices to be amended.

The "All" approach also has its drawbacks. On the one hand, it allows error correction and promotes fairness as it treats similar married taxpayers the same. In this context, it equates married taxpayers in general with non-married taxpayers who are allowed to correct an election error at any point during the 3-year statute of limitation period. On the other hand, it is a costly solution because it produces

additional tax returns to process on top of the original returns, and it has no screening mechanisms to minimize the filing of frivolous amended returns.

The "All" approach does promote fairness, as it treats similar married couples the same way. However, under this rule, an expansion of the existing rule, those who can change their election are not required to bear the cost of the change. This cost can be viewed as an externality because taxpayers do not internalize the full cost of their decisions. Taxpayers might decide to file jointly as a default and deviate from it if they learn that they would be better off filing two separate returns.

Both solutions promote the fairness of the tax system because they propose to apply the same rule to similar taxpayers. The "All" solution, however, is preferable over the "Nothing" solution because it allows for error correction. Yet the "All" solution is also incomplete, because it does not account for the cost of making the change, similar to the current Section 6013(b).

D. The "Pigouvian All" Approach

A better approach to the asymmetry problem would be: (1) to allow all married taxpayers to change their initial filing status election under the circumstances described in Section 6013(b) as set forth in the "All" approach, and (2) to require taxpayers to pay the costs of correcting their errors. This solution, called the "Pigouvian All" approach,[217] allows for error correction but forces taxpayers who want to change their filing election to internalize the costs of their decision to change the election.[218]

Currently, the IRC allows only a (relatively small) group of taxpayers to change their filing status election at no cost. My solution is to permit all married taxpayers to have the option to change their election status. However, these taxpayers would bear the administrative cost of the change, in the form of a reduced refund. The current rules that apply to married taxpayers frame joint filing as a superior option, and some taxpayers even perceive it as their sole filing option once they are married. This characteristic, along with the fact that the current tax environment does not impose a cost on taxpayers to change their election, makes the current route for error correction ineffective.

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217. *See* Kaplow & Shavell, *supra* note 21.

218. As mentioned earlier in the Article, it is impossible to figure out the extent of the problem and subsequently the economic impact of the proposed solution because we cannot know how many married couples would have changed their election from MFJ to MFS because this is currently not an option.

The "Pigouvian All" approach addresses the issues highlighted in Part I.B regarding the changing of an election status. In selecting one's first or initial filing status, the taxpayer reveals their preferences. In this context, the taxpayer reveals preferences regarding filing status given all rules and stipulations which apply to that election status. The federal tax system operates under the assumption that taxpayers make a thoughtful and rational decision when electing filing status.[219]

The "Pigouvian All" approach works in two dimensions. The first addresses fairness and expands the error-correction rule to all married taxpayers. The second addresses the internalization of actions, because it requires taxpayers to bear the cost of making the change in any direction. This cost would be based on the average cost of processing such additional return(s) and would be known to taxpayers. To advance fairness, the fee would not exceed the refund. In addition, the election between joint and separate statuses should be more salient. Therefore, I propose that on the Form 1040, it should be stated more clearly that married taxpayers have two alternatives.

CONCLUSION

To err is human. Due to the complexity of the U.S. tax system, it is almost inevitable to err and make inferior elections. As a society, we have incorporated error-correction mechanisms into our tax system. These should be consistently available to all taxpayers; however, this is not currently the case.

Married taxpayers might be more prone to erring when electing filing status for tax purposes because this election lacks salience. AECRs pose a real-life problem, as they create a barrier for married taxpayers to utilize the tax benefits they are eligible for. If married taxpayers were allowed to correct an election error, they would have more information going forward. This way, they will not make the same mistake the following tax years.

In this Article, I explain why a broad error-correction rule, accompanied by a simple processing fee, would help married taxpayers to make mindful initial decisions. This would mostly help dual-income equal-earner couples and low-income taxpayers to eventually make mindful initial decisions. The cost of expanding the existing

219. One might argue that this approach burdens those taxpayers who initially were not required to file a tax return at all but elected to file jointly with their spouse, by requiring them to file a separate tax return in order to resolve the election error. However, this is not an actual burden because these taxpayers were supposed to file a tax return to begin with in order to receive the post-correction tax benefit they now realized they forfeited by filing jointly.

mechanism and applying it to all married taxpayers can be easily offset by a simple processing fee. The proposed error-correction rule reflects better tax policy.

More research is needed regarding error-correction mechanisms in tax. In future work, I will address additional simple and low-cost ways to increase the salience of this election. These will include utilizing tax preparers and technology to serve as mediators and warn taxpayers they should reconsider a previous election. Increasing salience would improve simplicity and the social awareness of tax elections in general. In addition, I will offer a theory of error-correction mechanisms in tax. A theoretical framework will allow weighing ex ante solutions focused on increased salience with ex post error-correction mechanisms. It will aim to offer ways in which they can substitute or complement one another.

It is time to revisit this 70-year-old AECR problem. The current crisis amplifies the need to do so. Until then, the "Pigouvian All" approach offers an easy and practical solution that can be implemented immediately without the political constraints associated with the debate over joint filing.