Competing Goals Amidst the “Opt-Out” Revolution: An Examination of Gender-Based Tax Reform in Light of New Data on Female Labor Supply

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I. INTRODUCTION

Though we are nearly forty years removed from the second wave of the women’s movement, the issue of women working outside the home remains a

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popular topic of debate. The recent stagnation of women’s labor force participation, especially among married, educated, wealthy mothers, has particularly garnered media attention. Lisa Belkin’s controversial 2003 New York Times Magazine article, *The Opt-Out Revolution*, which chronicled the lives of Princeton graduates with law degrees and MBA’s who were “opting out” of the workforce and choosing to stay

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2. Data supporting the proposition that the labor force participation rate of the subset of educated, wealthy women is declining or stagnant is not as well substantiated. Often cited for this theory is a 2000 Harvard Business School study finding that only 38% of female MBAs were still working full time 10 years after graduation. See Martha Lagace, *Getting Back on Course*, HARV. BUS. SCH. NEWS., Sept. 4, 2001, http://hbswk.hbs.edu/item.jhtml?id=2457&t=innovation&noseek=one. However, the data has been criticized as anecdotal. See Bonnie Erbe, *The Truth About Women and Careers*, SEATTLE POST-INTELLIGENCER, Mar. 25, 2004, available at http://seattlepi.nwsource.com/opinion/166167-erbe25.html. Recent research may more concretely demonstrate that married, educated women within a certain age group are leaving the labor force, or that their participation in the labor force is at least stagnant. See Katharine Bradbury & Jane Katz, *Women’s Rise: A Work In Progress*, FED. RES. BANK OF BOSTON REG’L REV., First Quarter 2005, 58, 64 (2005) (finding that college educated women aged 25-54 had decreased their labor force participation rates by nearly 3% from 1994-2004, from 84.7% to 81.8%, and that mothers had experienced an 8% decline); Claudia Goldin, *The Quiet Revolution that Transformed Women’s Employment, Education, and Family* 24-25 (Nat’l Bureau of Econ. Research, Working Paper No. 11953, 2006), http://kuznets.fas.harvard.edu/-goldin/papers/GoldinEly.pdf (finding that labor force participation of college educated women in their thirties has remained at about 76% for the last 15 years).

home with their children, 4 launched a charged debate about women and work 5 that continues to be explored today in the nation’s media outlets. 6

Notably absent in the media’s coverage of women’s labor force participation is any discussion of the tax system. 7 Though few would argue that taxes are the deciding factor in women’s labor market decisions, the financial ramifications of one spouse entering or leaving the labor market are undoubtedly major considerations for most families. For over thirty years, legal scholars have argued that certain aspects of the tax system ensure that married women take home only a portion of their pre-tax income and, at times, the system may even make paid work a losing proposition from a financial standpoint. 8

4. See Belkin, supra note 3.
5. See numerous articles described supra note 3, most of which mention Belkin’s piece. Even labor economists have taken note of Belkin’s article and the controversy it engendered. See Bradbury & Katz, supra note 2, at 62; Goldin, supra note 2, at 16 n.49; HEATHER BOUSHEY, ARE WOMEN OPTING OUT? DEBUNKING THE MYTH 1 (2005), http://www.ccpr.net/publications/opt_out_2005_11.pdf. Belkin was vociferously criticized for her focus on a small subset of women who could afford to leave the paid labor force, even though she prefaced her article with a disclaimer. See, e.g., Deborah L. Rhode, Women and Work, 26 NAT’L L.J. 35, 35 (2003); Erbe, supra note 2; Eileen McNamara, Recycled Stereotyping, BOSTON GLOBE, Mar. 21, 2004, at B1; Young, supra note 3. However, Belkin’s article is not alone in its focus on the exodus of highly educated, professional women from the workforce; most of the recent mass media attention has discussed this particular demographic. See supra note 3; BOUSHEY, supra, at 9 (“Much of the focus of the discussion on women’s labor force participation has been on one specific group of mothers: highly educated, older, first-time mothers.”).
6. See supra note 3. The term “opt out” has in fact become nearly synonymous with the idea of professional women leaving high powered positions. See Goldin, supra note 2, at 16 (section entitled “Opting Out of the Revolution”); Bradbury & Katz, supra note 2, at 62 (section entitled “Are Professional Women “Opting Out”?”) BOUSHEY, supra note 5, at 1 (paper entitled “Are Women Opting Out?”).
The recent stagnation of women's labor force participation, in combination with new research suggesting a decline in women's labor elasticities, demands a fresh look at proposals for tax reform. In this paper, I first examine the new data on women's labor participation and elasticity and briefly explain aspects of the tax code that are viewed as distorting women's labor force decisions. I then look at the three arguments generally advanced in favor of tax reform to eliminate gender bias—equal treatment, efficiency, and fairness. I consider which reform proposals advance each goal, and question whether the new data strengthens or weakens the various proposals. I also examine the political viability of each reform in light of the history of changes to the tax code and debates surrounding the marriage penalty in the last twenty-five years. Ultimately, I argue that a combination secondary earner/childcare credit, while not ideal, is the most effective way to address the tax disincentives for married women, while still partially satisfying the competing goals of equal treatment, efficiency, fairness and political feasibility.

II. NEW DATA ON FEMALE LABOR PARTICIPATION AND ELASTICITY

The increased labor force participation of women in the second half of the twentieth century is often cited as one of the most dramatic social and economic trends in the United States since World War II. From 1950 to 1990, women's overall interaction with the labor force nearly doubled, from 30% to 57%. Throughout the 1990s this trend began to slow, with women's labor force involvement increasing by less than three percentage points from 1990-2000.
Female interaction with the labor force reached its high of 60% in 1999 and has since remained stagnant at a level well below the proportion of men working for wages, especially when marriage is taken into account. In 1998 the labor force participation of mothers with young children reached a record high of 59%, and in 2000 this closely-watched benchmark declined for the first time since the Census began tracking it in 1976 to 55%. The participation rate of married women in their thirties with college degrees has hovered around 76% since 1990, and the equivalent rate for high school graduates has remained at 72% for fifteen years.

Curious about the decline in women’s labor force participation after decades of growth, several economists have examined this recent phenomenon. Katharine Bradbury and Jane Katz of the Federal Reserve Bank of Boston specifically set out to examine whether highly educated women were “opting out” of the workforce. Using data from the Current Population Survey and Bureau of Labor Statistics, the authors found that “[w]hile highly educated women are much more likely to work in the first place, changes over time in their labor force participation” reflect the national trend of decline. The authors estimate that the labor force participation of college educated women aged 24-55 decreased slightly in the last ten years, from 84.7% in 1994 to 81.8% in 2004, in line with the general slowdown in women’s labor force involvement. The decline was slightly greater for married women, and especially

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14. See 2006 CENSUS, supra note 1, at 392 tbl. 585, showing that since 1999 the participation rate has fluctuated between 59.2% and 59.9%.
16. See 2006 CENSUS, supra note 1, at 389 tbl. 580 (showing women’s overall labor force participation at 59.3% and men’s at 75.3% in 2004).
17. Whereas single women and men had labor force participation rates that differed by only 4% in 2004, married men and married women’s rates differed by nearly 17%. See id. at 392 tbl. 584. For the 25-34 age group, this delta increased to nearly 30%. See id.
21. See generally Bradbury & Katz, supra note 2, at 62. The authors are cautious about using the term “opting out,” recognizing that “[d]ecisions to work, and how much to work, always involve some balancing of the relative rewards and costs of working for pay, unpaid work at home, and leisure . . . .” Id. at 64.
22. Id. at 64.
23. Id.
24. Id. at 65.
steep—increasing to 8%—for married women with children under the age of three. In contrast to the trend for women, the researchers found that married men with children under age eighteen actually had higher participation rates than married men without children.

Claudia Goldin’s recent paper chronicling a century of women’s labor supply movements also addresses the question of whether highly educated women are “opting out” of the workforce. To evaluate this theory, she examines a data set comprised of women and men who attended selective universities and finds that it does not yet confirm that female college graduates have opted out of the labor force in significant numbers. She reports that the median woman from her sample “was never out of work for more than six months at a time,” and that the average total out

25. Id. at 64-65. But see Boushey, supra note 5, at 2, 11-12 (arguing that the presence of a child in the home plays less of a role in women’s labor force participation now than it did in the 1980s, and that the child penalty is less for highly educated women in their thirties than for all other groups). Bradbury and Katz also noted that the decline appeared higher in women with high earning husbands. Bradbury and Katz, supra note 2, at 65.

26. Id. Though Bradbury and Katz do not engage in an in-depth assessment of the decline, they suggest that it could be attributable to a slowdown in real wage growth during the period, discrimination, greater income from other sources, changing cultural norms, or shifting timing of labor force breaks. Id. at 66-67. While they find these potential explanations plausible, the authors nonetheless find the recent trend curious, because although one would expect married women with children and high earning husbands to be the most sensitive to a “softening of women’s wages or an increase in impediments to advancement,” those same factors existed in the 1970s and 1980s when the labor force participation of this subset of women increased rapidly. Id. at 67.

27. See Goldin, supra note 2, at 16-18. Goldin also separately considers whether women’s labor force participation more generally (not merely the subset of highly educated women) has reached a natural peak. Id. at 14-15. Notwithstanding the fact that “it appears that a plateau in female labor force participation was reached a decade and a half ago,” id. at 14, Goldin contends that the evidence does not yet support the theory that women’s labor force participation has reached a natural rate. Id. at 15. She argues that women’s labor force participation numbers must be viewed in light of changing demographics, and that women in their thirties are demonstrating a stronger commitment to the labor force today than in the 1980s because their labor force participation numbers have remained constant while their likelihood of having children has increased. Id. Goldin does concede, though, that there may be evidence of a natural rate for women in their twenties, who have flat labor force participation rates while their likelihood of having children has decreased. Id.

28. Goldin uses the “College and Beyond” data set of the Andrew W. Mellon Foundation for her analysis, which consists of the results of a survey of individuals from thirty-four “selective” universities. Id. at 16. The data set is restricted due to confidentiality requirements. Id. at 16 n.50. Goldin argues that this data set meets the stringent requirements of data needed to analyze whether an “opt-out revolution” occurred because it covers a sufficient time span, compares similarly educated men and women, and only includes those who attended exclusive undergraduate institutions. Id. Goldin also looks at Current Population Survey data—though she does not specify precisely what years—and concludes that like the College and Beyond study, CPS data does not indicate that women “have opted out in significant numbers [or] that the phenomenon has increased.” Id. at 17.

29. Id. at 17-18. Goldin does note, however, that there is not yet sufficient data to estimate the path of the most recent generations. Id.
of work time during a fifteen year period was only 1.55 years.\textsuperscript{30} Like Bradbury and Katz, however, Goldin discovered that time spent away from work was directly correlated with number of children—average out of work spells for this group increased from 0.41 years for those without children to 2.08 for women with children.\textsuperscript{31} A regression analysis confirmed that children were the most important factor predicting time spent out of work for women, with the first child increasing time not spent at work by 0.36 years, two children by 1.41 years, and three children by 2.84 years.\textsuperscript{32} Also like Bradbury and Katz, Goldin found that for men, time out of work actually \textit{decreased} with the child burden, for one child by 0.14 years, for two children by 0.18 years, and for three children by 0.21 years.\textsuperscript{33}

In a recent paper, Cornell labor economists Francine Blau and Lawrence Kahn also examine the recent slowdown in women's labor supply. Blau and Kahn do not question whether women are “opting out” of the labor force, but instead take the stagnation of female labor force participation as a given and examine its potential causes. The authors primarily attribute the stagnation to labor supply curve shifts.\textsuperscript{34} They find a significant outward shift in supply curves in the 1980s, which they argue drove the increased female labor force participation in that decade; they suggest that the absence of such a shift resulted in the stagnation of the 1990s.\textsuperscript{35} But Blau and Kahn are more intrigued by their findings on wage elasticity than labor supply shifts.\textsuperscript{36} They report that married women’s wage elasticity decreased steadily throughout the 1980s and 1990s, and estimate that in the twenty year period from 1980 to 2000, women’s own wage elasticity\textsuperscript{37} declined up to 56% and their cross

\textsuperscript{\ldots}
wage elasticity\(^3\) decreased up to 47\% in absolute value.\(^3\) The authors embrace Goldin's argument that "women's own and cross wage labor supply elasticities [are] becoming more like men's" and posit that the decrease in elasticity is likely due to increased female labor force participation, rising divorce rates, and women's continued focus on career.\(^4\) While Blau and Kahn found that their results are generally consistent across different subgroups, they did see a slight increase in cross-wage elasticities for young mothers from 1990-2000 as compared to the decrease for the population of married women as a whole.\(^5\) Furthermore, while women's elasticities may be approaching men's, Blau and Kahn still found men's labor supply to be far less responsive to their own wages than women's labor supply.\(^6\)

III. GENDER BIAS IN THE TAX CODE

Though labor economists have come to differing conclusions regarding the recent decrease in women's labor supply, there is little question that female labor for participation has at least leveled off after five decades of rapid increase.\(^7\) In particular, women with children may be decreasing their labor force interaction,\(^8\) though that is still unclear.\(^9\) Further, more and more evidence is suggesting that

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38. Cross wage elasticity is the responsiveness of labor supply to changes in husbands' wage rates. Id. at 5.
39. Id. at 2-3. Duke Economics Professor Bradley Heim's work echoes the findings of Blau and Kahn. Heim, supra note 10, at 3. Using data from the census from 1979 to 2003, Heim argues that married women's labor supply has experienced "an 80% decrease in hours wage elasticity, and an over 60% decrease in the absolute value of income hours elasticity." See id. Like Blau and Kahn, he finds that very little of this change can be attributed to demographic changes in the composition of the married female labor force, such as changes in education levels or family size. Id. at 32-40. A Congressional Budget Office Paper also reaches similar findings. See Kyoo-il Kim & Jose Carlos Rodriguez-Pueblita, Are Married Women Secondary Earners? The Evolution of Married Women's Labor Supply in the U.S. from 1983 to 2000 36 (Cong. Budget Office Working Paper No. 2005-11, 2005), available at http://www.cbo.gov/ftpdocs/69xx/doc6994/2005-11.pdf (cited with permission) (finding that wage labor supply elasticity of white, married women decreased significantly from 1983 to 2000, but, unlike Blau and Kahn, finding that elasticity with respect to other income has remained relatively constant); id. at 37 ("[O]ur study partially answers the original question raised by Heckman (1993) 'Has the consensus view of the 1960s of high labor supply elasticities for married women and low labor supply elasticities for married men held up?' Our answer is 'no.'").
40. Id. at 3.
41. Id. at 28-29. The 2000 numbers were still much smaller than 1980 numbers in absolute value. Id. at 29.
42. Id. at 2-3 (estimating women's own elasticity at about 0.4 and men's own elasticity at 0.01 to 0.14 in 2000).
43. See supra notes 11-20.
44. See supra notes 25, 30-33 and accompanying text.
45. See BOUSHEY, supra note 5, at 2, 11-12 (arguing that the presence of a child in the home plays less of a role in women's labor force participation now than it did in the 1980s).
married women’s labor supply is far less sensitive to their own wages and their husband’s wages than it once was.\textsuperscript{46} Despite these dramatic changes in women’s labor supply over the last half century, many aspects of the tax code have remained unchanged since 1948.\textsuperscript{47}

Though the tax system is technically gender neutral in that it does not distinguish between the sexes, legal scholars and others have noted that in practice the tax code operates to discourage the labor force participation of secondary earners in a marriage—usually women.\textsuperscript{48} The provisions in the tax code reflecting gender bias have been discussed at length in numerous articles,\textsuperscript{49} so I provide only a brief overview here.

\begin{itemize}
\item \textsuperscript{46} See Blau & Kahn, supra note 1, at 26; Heim, supra note 10, at 1, 3; Kim & Rodriguez-Pueblita, supra note 39, at 36-37. It is unclear whether the decreasing labor supply elasticity of married women has been accepted as a consensus view among economists. The phenomenon was discussed in the Monthly Labor Review recently, suggesting the findings are gaining acceptance. See, e.g., Labor Supply Behavior of Married Women, MONTHLY LABOR REV., Feb. 2006, at 71 (citing Blau and Kahn’s paper). However, a Congressional Budget Office Report from 2004 states that economists had not yet come to an agreement regarding the labor supply elasticity of married women. See CONG. BUDGET OFF., CBO’S PROJECTIONS OF THE LABOR FORCE 9 & n.13 (2004) http://www.cbo.gov/ftpdocs/58xx/doc5803/09-15-LaborForce.pdf (“Some recent evidence suggests that the labor supply response to changes in after-tax wage rates might be smaller than in the past, particularly among married women, although that has not yet become a consensus view.”) (citing Heim’s work). However, at that point neither the Blau & Kahn paper nor the Kim & Rodriguez-Pueblita paper had surfaced.
\item \textsuperscript{47} More specifically, many aspects of the tax system affecting women’s barriers to employment have remained unchanged. For example, the much critiqued joint filing provision in the tax code has not changed since it was first instated in 1948, and a secondary earner deduction existed briefly in the 1980s but has never returned. See McCAFFERY, supra note 8, at 89. Only child care expense provisions have changed significantly since the 1950s. See id. at 114-15.
\item \textsuperscript{48} See supra note 8. Though more and more women are likely becoming primary wage earners in marriages, women are generally still the secondary earners; in 2004, families in which only women worked made up 3.7% of families with children under 18. See 2006 CENSUS, supra note 1, at 394 tbl. 588. Moreover, the labor force participation of married men is consistently 15% to 30% higher than that of married women across working age groups, even in recent years. Id. at 392 tbl. 584. Further, as Goldin reports, women are far more likely to take time off work to care for children. See supra notes 30-33 and surrounding text. See also McCAFFERY, supra note 8, at 20-23:

\begin{itemize}
\item There is no necessary reason to assume that the wife should be secondary. . . . But once the question has been posed, there is apt to be a secondary earner in most families, and is it overwhelmingly likely to be the wife. However distasteful and gendered this fact might be, however we might wish for reality to be different, not seeing that women are far more likely to be the secondary earners will blind us to a very large set of problems.
\end{itemize}

Id. at 21.
\item \textsuperscript{49} See supra note 8.
\end{itemize}
A. Joint Filing

The joint filing system, in combination with the progressive rate structure, creates disincentives for secondary earners to enter the labor force. Married couples do not pay the same amount of taxes as they would under a single filing system. Instead, the earnings of each spouse are pooled together and their tax liability is based upon their combined income under the joint filing rate structure. Because tax rates are progressive, meaning that marginal rates increase as income increases, this system benefits couples with disparate incomes by allowing them to shift some of the income of the higher earning spouse into a lower tax bracket. In contrast, it adversely affects those with equal incomes because neither the joint filing brackets nor exemption levels are twice as large as under the single filing system; the system pushes part of the income of equal earning spouses into a higher marginal tax bracket than the bracket applied to single filers. This result is the oft-discussed "marriage penalty."
While the marriage penalty only affects couples with equivalent or near-equivalent incomes, the secondary earner bias, also a byproduct of joint filing and the progressive rate system, affects all couples. Since joint filing pools two incomes and then applies the appropriate exemptions and tax rates to calculate a couple's tax liability number, it encourages couples to think in terms of a primary earner and a secondary earner. The primary earner, usually the husband, can be thought of as taking advantage of the initial exemption and the lower tax rates that apply to lower income levels; these benefits apply to the primary earner whether or not the secondary earner works. When the secondary earner is faced with her labor force decision, her first dollar of income is subject to the same marginal tax rate as the primary earner's last dollar of income—the exemption and lower tax rates that apply at the lower income levels no longer apply because they have already benefited the primary earner. Consequently, the secondary earner faces a very high marginal rate on even very low income levels—rates that she would not encounter were she able to file individually and benefit from the single exemption and progressive rate schedule. Even part-time work at low wage rates may be taxed at up to 35% under the current tax system if the primary earner places the couple in the highest tax bracket, and once social security and payroll taxes are included, that number can easily increase to over 50%. The situation may be even worse for low income workers due to the loss of means-tested benefits; secondary workers in low income families can face effective tax rates of over 100%.

progressive taxation and equal treatment of equal earning couples; the marriage penalty and bonuses exist because we have sacrificed the third goal of marriage neutrality.


56. See McCaffery, supra note 8, at 19-23, 56-57, 69.

57. Id. at 56. Marjorie Kornhauser addressed the interesting question of whether married couples actually pool their assets in her Hastings Law Journal article. Kornhauser, supra note 8, at 67. She found that married couples do not always pool their resources and that many unmarried couples do pool their resources; she used this data to critique the joint return. Id. at 105-11.

58. See supra note 48 and accompanying text

59. See McCaffery, supra note 8, at 19-20; Johnson, supra note 51, at 2296-97.

60. McCaffery, supra note 8, at 19-20, 56-57.

61. I.R.C. § 1(a) (maximum individual tax rates are currently at 35%); see GOKHALE & KOTLIKOFF, supra note 8, at 10-11 (a woman with a husband earning $100,000 faces a marginal tax rate of 61% if she earns $10,000; 56% if she earns $50,000).

62. See id. at 10 fig. 1. (a woman earning $10,000 whose husband earns $20,000 faces an effective marginal tax rate of 122%); see also id. at 11 fig. II (showing consistently high marginal tax rates faced by secondary earners in low income families).
B. Nontaxation of Imputed Income

The nontaxation of imputed income further complicates this picture. While the tax code taxes income "from whatever source derived," liquidity concerns, as well as basic notions of practicability, privacy, and enforceability, prevent it from taxing imputed income, or income that one derives from performing nonmarket work for oneself.64

Whenever income is not taxed, it may distort labor force decisions. Untaxed labor is relatively more attractive than taxed labor, sometimes leading one to choose the untaxed work even if one would have valued the taxed labor more highly in a pre-tax world.65 While imputed income may be observed in a number of situations, the income one derives from caring for one's own home and children may be particularly significant, and has a notable impact on female labor force participation and elasticity.66 For many women the decision to work is not characterized as a simple labor/leisure tradeoff, but instead as a choice between the paid labor market and

63. I.R.C. § 61(a).
64. See KLEIN ET AL., supra note 52, at 66 ("[O]verwhelming considerations of practicality, privacy, public comprehension, and enforcement make any suggestion that we tax [imputed income] seem patently unsound."). But see Staudt, supra note 8, at 1573-74 (arguing in favor of taxing housework).
65. For example, if a lawyer is paid $50 per hour and is taxed at a 30% rate, then his after-tax income is $35 per hour. If he would have to pay a mechanic $40 per hour to fix his car, then in a pre-tax world he would choose to work his hour as a lawyer and pay the mechanic to fix his car because he would still have $10 in his pocket. In a taxed world, however, his after-tax pay is $35, so once he pays the mechanic to fix his car he will have lost $5 (payments for services are not deductible under the tax code). This creates an incentive for the lawyer to spend the hour fixing the car himself even though in a pre-tax world he would rather work and pay the mechanic to fix his car. See KLEIN ET AL., supra note 52, at 62-67.
66. Such as living in one's own home, performing one's own house or auto repairs, or filing one's own taxes. Id. at 64 (homeownership), 65 (services).
67. See id. at 66 ("It may be difficult to take seriously problems arising from such services as painting one's house, shining one's shoes, or filling one's gas tank. There is, however, another set of services that cannot be dismissed so readily: the services performed essentially full time for the members of one's household, usually by women. In other words, the service of homemakers. These services raise an important tax issue because they are of substantial value... ").
68. See BLAU & KAHN, supra note 1, at 4-5 ("The difference [between men's and women's labor supply elasticities] is usually explained by the traditional division of labor in the family, in which women are seen as substituting among market work, home production and leisure, while men are viewed as primarily substituting only or primarily between market work and leisure... Since women have closer substitutes for time spent in market work than men do, changes in market wages are expected to have far larger substitution effects on women's labor supply."). See also Joseph Bankman & Thomas Griffith, Social Welfare and the Rate Structure: A New Look at Progressive Taxation, 75 CAL. L. REV. 1905, 1925-26 (1987) (imputed income may be a factor in married women's sensitivity to changes in wage rates).
unpaid work at home in the form of caring for children and housework. While any income earned in the paid market is taxed at a high rate, the income women derive from unpaid work at home (which they would otherwise have to pay someone to perform) is completely untaxed, creating a preference for the unpaid labor.

C. Limited Childcare and other Deductions

Though Code section 162 allows deductions for "ordinary and necessary" expenses incurred in conducting a trade or business, the usefulness of this provision is limited by section 262, which does not allow deductions for personal living or family expenses. Even basic expenses incurred by workers, such as commuting and work clothes, are not deductible, and only a portion of childcare costs are given preferential tax treatment. Code section 21 currently allows for a Dependent Care Tax Credit ("DCTC") of 35% for household and childcare expenses, up to $3,000 for one child and $6,000 for two or more children. Unlike business expenses, which

69. See generally KLEIN ET AL., supra note 52, at 67 (discussing how the tax system effects leisure choices); Blau & Kahn, supra note 1, at 4-5. The market work disincentives created by the nontaxation of imputed income may become especially problematic once a family has children. Johnson, supra note 51, at 2299-2300.

70. See discussion supra Part II.A.

71. I.R.C. § 162(a).

72. I.R.C. § 262(a).

73. I.R.C. § 162(a)(2) allows for a deduction for "traveling expenses . . . while away from home in the pursuit of a trade or business," but commuter expenses are not deductible. See also Treas. Reg. § 1.162-2(e) (1960); Comm'r v. Flowers, 326 U.S. 465, 469-70 (1946); Hantzis v. Comm'r, 638 F.2d 248, 252-53 (1st Cir. 1981) (for the purposes of the Code, "home" may be defined as one's place of business, thus limiting the deduction of traveling expenses to situations where one is actually away from one's principal place of business, not one's home).

74. See Pevsner v. Comm'r, 628 F.2d 467, 469 (5th Cir. 1980) (work clothes are only deductible if they are required for work, not adaptable for use outside of work, and are not worn outside of work).

75. In 1938 the Supreme Court held in Smith v. Comm'r that expenses in caring for a child are inherently personal in nature and thus are nondeductible. 40 B.T.A. 1038, 1039 (1939); but see McCAFFERY, supra note 8, at 111-14 (describing and critiquing Smith's holding and reasoning). See infra notes 76-82 and accompanying text for a discussion of limited childcare tax breaks initiated by Congress.

76. I.R.C. § 21(a)-(c). Congress responded to Smith with section 21 in 1954, which initially allowed a limited deduction for childcare expenses, McCAFFERY, supra note 8, at 114-15, and now functions as a credit for household and childcare expenses, see I.R.C. § 21(b)(2), if the household has at least one child under 13 or other dependent as statutorily defined, see I.R.C. § 21(b)(1), and the expenses are necessary for employment, see I.R.C. § 21(b)(2). The credit decreases from 35% to 20% by 1% for every $2,000 income increase between $15,000 to $45,000, see I.R.C. § 21(a)(2), and the benefit cannot exceed the salary of either a single parent (if the household consists of only one parent and children), or the lesser earning spouse (if the household consists of a married couple and children), see I.R.C. § 21(d)(1).
are deductible regardless of a business's profit level,\textsuperscript{77} the DCTC begins to phase out at incomes over $15,000.\textsuperscript{78} At its maximum, the credit is worth up to $1,050 for one child and $2,100 for two or more children, but because it is nonrefundable, it does not benefit the poorest families.\textsuperscript{79} The section 129 deduction allows taxpayers who pay into employer-based childcare programs to exclude those costs from their income.\textsuperscript{80} Though section 129 allows couples to deduct up to $5,000 (thus it is worth a maximum of $1,750 for those in the highest 35% rate bracket), it is used much less widely than the credit because it is limited to taxpayers with access to employer-sponsored plans.\textsuperscript{81} Even if a family were to benefit from the maximum credit or deduction, the tax break likely would not cover childcare expenses of families with two working parents in today's world.\textsuperscript{82}

Though the limited deductions for childcare and other costs of working in the paid labor market are technically gender neutral (like the joint return) they have the practical effect of deterring married women's entry into the workforce. The costs of a secondary earner entering the workforce are higher than the primary earner's entry. When only one spouse is working the secondary earner can absorb the nonmarket work that the primary worker has sacrificed such as housekeeping, preparing meals, and caring for children, but the same is not true for secondary earners who must replace their own nonmarket work with after-tax dollars.\textsuperscript{83} Moreover, to the extent that exemptions and progressive tax rates are intended to alleviate some of the expenses of entering the work force, they are essentially "used up" by the primary

\textsuperscript{77} See I.R.C. § 162 (omitting business profitability threshold).

\textsuperscript{78} See I.R.C. § 21(a)(2); Staudt, supra note 8, at 1602 ("Tax scholars . . . point out that Congress has limited the childcare deduction provisions, unlike other business expense provisions found in the Code.").

\textsuperscript{79} See McCaffery, supra note 8, at 117 (explaining that less than 10% of joint filers making less than $75,000 in 1994 claimed the credit); McCaffery, UCLA, supra note 8, at 1017-18 ("[S]ince the credit is non-refundable, it can only offset whatever income tax is generated when . . . [the lower income family] enter[s] the 15% bracket . . . ").

\textsuperscript{80} McCaffery, supra note 8, at 118. Congress implemented section 129 in 1981 to sanction employer dependent care programs. Id. It allows employees to take up to $5,000 for childcare expenses off of their pay. See I.R.C. § 129(a). Like the section 21 credit, the deduction cannot exceed the income of the lesser earning spouse, if filing jointly, or the single parent, if filing separately, thus it is only available to two earner married couples. I.R.C. § 129(b); Erin L. Kelly, The Strange History of Employer Sponsored Child Care: Interested Actors, Uncertainty, and the Transformation of Law in Organizational Fields, 109 Am. J. Soc. 606, 607 n.2 (2003).

\textsuperscript{81} See McCaffery, supra note 8, at 118 (finding in 1992 that the dependent-care deduction cost the government forty-six times less than the childcare credit).

\textsuperscript{82} A recent study found that the average cost of childcare for an infant ranges from $3,803 to $13,480 annually and for a four year old from $3,016 to $9,628. Hannah Matthews, Center for Law and Social Policy, Child Care Assistance Helps Families Work 2 (2005), http://www.clasp.org/publications/ccassistance_employment.pdf.

\textsuperscript{83} See Johnson, supra note 51, at 2300-01.
Minimal tax breaks for childcare or other costs necessarily expended in order for both spouses to work exacerbate this problem.

D. Social Security

Though distinct from the income tax burden, social security taxes are an important contributor to distortions facing secondary earners. All workers are taxed a combined 7.65% on the first $90,000 of their income by social security taxes, and 1.45% thereafter, regardless of whether they are primary or secondary earners. Employers are also taxed at the same levels, but the employer is generally assumed to pass this tax onto the employee, so effective social security tax rates for workers begin at 15.3% and decrease to 2.9% once income exceeds $97,500. The regressive nature of this tax exacerbates the secondary earner bias by increasing the marginal tax rates the secondary earner faces on her first dollar of income. Moreover, for high income families, the social security tax makes participation by the primary earner more tax effective than participation by the secondary earner once the primary earner has income exceeding the benchmark; at that point the primary earner faces social security taxes of only 2.9% while the secondary earner faces a rate of over 15%.

But perhaps a more meaningful critique of the social security system from a gender perspective derives from the distribution of social security benefits. At the time of retirement, a secondary earner is entitled to 50% of the primary earner’s benefits, even if she never worked in the paid labor market nor contributed to the social security system; if her spouse dies before she does, the secondary earner is entitled to 100% of his benefits. Because of these generous spousal benefits, many women who do work and pay into the social security system find that they are entitled to more distributions by claiming benefits under their husband’s contributions than their own. As a result, it is possible that all of the money that these secondary earners pay into the system rewards them with absolutely no benefits at retirement.

84. Id. at 2300.
85. See I.R.C. § 3101(a)-(b) (for the first $97,500 of wage income individuals are taxed at 6.2% for social security and 1.45% for Medicare).
86. The social security contribution phases out at $97,500 in 2007, so taxpayers with income over that amount face only the 1.45% Medicare tax. See Social Security Online, Contribution and Benefit Base (Oct. 18, 2006), http://www.socialsecurity.gov/OACT/cola/dob.html (listing taxable amounts by year).
87. See I.R.C. § 3111(a)-(b).
88. See McCaffrey, supra note 8, at 91 (stating that ‘[t]he employer knows full well about the social security payroll tax, and he calculates it into the offered wage.’).
89. Johnson, supra note 51, at 2302.
90. McCaffrey, supra note 8, at 95; Gokhale & Kotlikoff, supra note 8, at 4.
91. Women cannot claim benefits in their own right as well as spousal benefits. See Gokhale & Kotlikoff, supra note 8, at 4.
92. See id.
IV. PROPOSALS FOR REFORM AND COMPETING GOALS

The joint return, nontaxation of imputed income, limited childcare or other secondary earner deductions, and the structure of the social security system all serve to discourage secondary earners from entering the paid labor market. Legal scholars have argued for change in the tax system for many years, and have proposed a variety of reforms. Among these, the most prominent are: the adoption of a mandatory or optional individual filing system, a secondary earner deduction or more generous childcare allowance, taxation of imputed income, social security reform, and a lower rate structure for secondary earners.

Instead of examining these reforms in detail independently, I instead consider each of them in the context of various goals. While eliminating bias may be the broad aim of any gender-based reform of the tax system, scholars have consistently invoked three narrower and more nuanced goals in favor of such reform: equal treatment, efficiency, and fairness. In the following sections, I examine these objectives and consider which proposals for reform each goal supports, and look at the potential effects of new data on women’s labor supply and elasticity upon these aims where relevant. I then describe the political history surrounding various gender-based reforms to the tax code, and use that history in an attempt to discern the political viability of each reform.

A. Equal Treatment

From one feminist perspective, equal treatment demands that the law treat men and women equally in order “to eliminate legal biases that . . . reinforce traditional gender roles.” Though the current tax system is facially gender neutral, the income stacking effect of joint filing, in conjunction with the nontaxation of imputed income, minimal childcare (or other work related) expense relief, and a skewed social security benefit system means that married women generally face higher marginal rates than men.
married men. Consequently, feminists argue that the tax code impermissibly treats women differently than men.100

Principles of equal treatment are often invoked in support of adoption of individual filing.101 Under a single filing system, men and women would be treated equally; the secondary earner bias would be eliminated because each spouse would be taxed on his or her own earnings and benefit from separate exemptions and lower rate brackets at lower income levels. While progressive taxation and nontaxation of imputed income would still provide disincentives to work in the paid market, those disincentives would exist equally for men and women.102

Other proposed reforms could also advance the goal of equal treatment. For example, at least one version of social security reform is supported on equal treatment principles.103 The current social security system creates disincentives for secondary earners to enter the labor force by imposing regressive taxes and distributing benefits based on spousal contributions.104 A system that features proportional tax rates and repeals the spousal benefit, basing distributions only upon each earner's own contributions to the labor market, would achieve equal treatment goals by applying the same legal rules to both men and women.105 Taxation of imputed income might

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100. See Blumberg, supra note 8, at 95 ("The pattern of work disincentive embodied in the Internal Revenue Code is entirely inconsistent with the principle of sexual equality enunciated in Title VII and further expanded by the federal and state judiciaries. The aggregation of spousal income should be abandoned in favor of individual taxation for all wage earners . . . .").

101. See generally McCaffery, supra note 8, at 278; Blumberg, supra note 8, at 95; Davis, supra note 8, at 236 ("Assuming as we have that it is appropriate for the tax system to achieve gender equality, this Part suggests an individual filing system which implements a policy of marriage neutrality and is tailored explicitly to the goals of the women's movement."). Whether the single filing system is mandatory or optional does not have a significant impact on the equal treatment argument, because both systems would eliminate the secondary earner bias for most two-earner couples. See Gann, supra note 8, at 67-68. However, a mandatory system would be preferable because under an optional system the secondary earner bias would still exist for one-earner couples, and for couples with disparate earnings who still benefit from the joint filing status, which is not ideal. Id. at 67-69. The optional system would also still allow one-earner couples to benefit from marriage and essentially "penalize" single taxpayers, see id., but this does not necessarily have implications for the equal treatment of men and women. It does have fairness implications, see infra note 175 and surrounding text.

102. See Alstott, supra note 99, at 2012.

103. Id. at 2059-63.

104. Id. at 2059-61.

105. McCaffery proposes a different type of social security reform which would involve an exemption for secondary earners until their contribution resulted in a marginal benefit in the form of additional distribution. McCaffery, supra note 8, at 102. This might be defended on equal treatment grounds (analysis would be similar to a secondary earner deduction or credit as described in the text above), but repealing spousal benefits is a much more direct approach to treating men and women equally.
also be defended on equal treatment principles, just as women as secondary earners face the stacking effect as a result of joint returns, women as primary homemakers face the disincentives of paid work because of the nontaxation of imputed income. Taxing imputed income would put women on equal footing with men, who face less of a distortion from the nontaxation of housework because they perform less of it.

In contrast to the above reforms, a proposal for a secondary earner or childcare deduction or credit might conflict with equal treatment principles. Providing a benefit to secondary earners who enter the workforce by allowing them to deduct or credit some of their income or expenses would treat secondary earners differently, albeit more preferentially, than primary earners. Nonetheless, "the boundaries of equal treatment are nebulous," and it is possible that a secondary earner or childcare deduction or credit would still be consistent with the goals of equal treatment when viewed in light of the system it seeks to alter. Whereas joint filing replaced an unbiased separate filing system with one that de facto favored men and reinforced traditional gender roles, the secondary earner deduction would merely seek to mitigate the existing unequal impact of the current system, not create an absolute benefit for either sex.

106. See Staudt, supra note 8, at 1590 ("[Various scholars]... have all argued that Congress's failure to tax household labor makes it relatively cheaper from a tax perspective for women to work in the home than in the market. Feminist scholars conclude that Congress, in effect, encourages women to undertake a financially insecure and subordinate role in the household by failing to tax these services.").

107. See Alstott, supra note 99, at 2002 & n.1 (women are still responsible for much household work despite major increases in female labor force participation); Staudt, supra note 8, at 1579-85 (discussing division of household labor along gender lines). See also Porter, supra note 3 (in 2003, women who worked outside of the home spent 12 hours on childcare, one hour more than stay at home mothers spent on housework in 1975). Though somewhat outdated, see also ARNIE RUSSELL HOCHELD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME (1989) (the seminal work on the "second shift" of work that working women encounter at home).


109. Though this logic seems at odds with the equal treatment argument in favor of single filing, this is not necessarily so. The equal treatment argument for single filing is that a seemingly neutral code provision of joint filing affects the sexes differently and should be altered to treat them precisely the same. Similarly, one could argue that a secondary earner or childcare deduction, while technically gender neutral, would have the effect of benefiting women only and thus treat the sexes unequally. Nonetheless, because the goal of the secondary earner or childcare deduction is to counteract the existing unequal treatment created by the joint filing system, whereas the joint filing system replaced a perfectly unbiased system with one that reinforced traditional gender roles, a secondary earner or childcare deduction or credit does not violate equal treatment norms in the same way as the joint filing system does.

Also, note that general secondary earner relief might be viewed as better advancing the goal of equal treatment than childcare relief since it applies to all women who experience the secondary earner bias, whereas childcare relief only benefits secondary earners who also happen to be parents,
For the same reasons, however, McCaffery’s proposal for a separate, lower rate structure for married women, discussed in Part III.B below, cannot be justified on equal treatment grounds, even under a broader view of the doctrine. Because McCaffery’s reform involves the adoption of a single filing system and a lower rate schedule for secondary earners, the latter part of the proposal would impermissibly treat men and women differently. The secondary earner bias would be completely eliminated by single filing, rendering the second part of the proposal gratuitous and unrelated to the goal of equal treatment.\textsuperscript{110}

The new data on women’s labor supply and elasticity has no bearing on the equal treatment argument. While advocates of laws that treat the sexes equally are certainly concerned with the effect of biased laws on behavior, they would support reform of the tax code to the extent that it treats men and women differently regardless of whether it actually deterred women from working.\textsuperscript{111} Thus, while the recent stagnation in women’s labor force participation and new data on women’s labor supply elasticity might lead to a renewed interest in gender-based tax reform for proponents of equal treatment,\textsuperscript{112} it does not benefit or detract from the strength of the equal treatment argument.\textsuperscript{113}

B. Efficiency

Though efficiency is not per se a feminist goal, it has been used to justify a number of reforms to the tax system that would promote gender equality.\textsuperscript{114} Edward McCaffery writes extensively on the efficiency argument from an explicitly feminist perspective,\textsuperscript{115} and I focus on his work here. However, it is important to note that and in its current form extends to all parents, regardless of whether they experience the secondary earner bias.

\textsuperscript{110} This is not surprising, given that McCaffery’s goal in creating this system is to increase efficiency, not achieve equal treatment. See infra notes 115-154 and surrounding text.

\textsuperscript{111} See Davis, supra note 8, at 213 (“Those who question the existence of the married woman’s disincentive point out that more women are in the labor force now than ever before. However, an increase in the percentage of working wives does not deny the existence of the disincentive, it merely indicates that the disincentive may have been overcome to some extent by economic need and/or a change in attitude about married women working outside the home.”).

\textsuperscript{112} Certainly, the new data on women’s labor supply has led a number of economists to investigate the situation. See supra notes 21-42. One might expect that it would also generate interest in discussing various reforms to increase women’s labor force participation.

\textsuperscript{113} Of course, if the new data somehow suggested that women were no longer secondary earners at all, then the feminist equal treatment argument would no longer apply because the tax code does not technically discriminate between men and women, but between primary and secondary earners.

\textsuperscript{114} McCaffery, UCLA, supra note 8, at 1041-43.

\textsuperscript{115} See id. at 1035-46; McCaffery, supra note 8, at 163-201; McCaffery, YALE, supra note 8, at 657-64. Other feminist tax scholars have also discussed the efficiency argument. See, e.g., Komhauser, supra note 8, at 109 (“Separate taxation also would be more efficient than joint taxation.
reforms to the tax code that would benefit women have also been supported by supply side conservatives on efficiency grounds.\(^\text{116}\)

1. The Efficiency Argument

Simply put, McCaffery’s basic argument is that married women should be taxed at lower rates than married men because they are more sensitive to changes in wage rates.\(^\text{117}\) McCaffery bases his argument on optimal tax theory, which attempts to minimize the distortions in behavior caused by a tax in order to limit “deadweight loss.”\(^\text{118}\) Optimal tax literature argues that taxes should be imposed in an inverse relationship to a good’s elasticity where highly inelastic goods—like cigarettes, gasoline or medicine—should be taxed at high rates because consumers will not be able to substitute other goods very easily and will purchase those goods regardless of their price as increased by the tax.\(^\text{119}\) In contrast, highly elastic goods should be taxed at low rates in order to minimize the behavior distortions.\(^\text{120}\) When translated to the labor supply arena, this suggests that those with highly elastic labor supply curves should be highly taxed, because minimal distortions will result, whereas those with inelastic labor supply should be taxed at low rates to avoid changes in behavior that are extremely sensitive to taxes.\(^\text{121}\)

For example, the joint return discourages the second earner from working by placing her in a higher marginal bracket. Studies show that the wages of the second earner, usually the wife, are sensitive to the tax rate, whereas the wages of married men and singles are relatively insensitive.”); Gann, supra note 8, at 39-46.

116. Like feminists, supply side conservatives have noticed that the joint filing system’s stacking effect discourages married women from entering the workforce. They argue that lower tax rates on married women would increase their labor force participation, therefore increasing productivity. See, e.g., Morgan, supra note 55, at 9 (supply side conservatives have favored reform to the tax code to remove tax barriers to women’s increased labor supply); Bruce Bartlett, The Marriage Penalty, Feb. 9, 1998, at 12-13, http://www.heartland.org/Article.cfm?artID=5276; Michael J. Boskin & Eytan Sheshinski, Optimal Tax Treatment of the Family: Married Couples, 20 J. PUB. ECON. 281, 291 (1983). See also Bankman & Griffith, supra note 68, at 1925-29; David R. Henderson, Nat’l Center for Pol’y Analysis, Child Care Tax Credits: A Supply Side Success Story (1989) http://www.ncpa.org/studies/s140/s140.html Many of these sources rely upon the female labor supply elasticity estimates from the 1970s and 1980s, which were much higher than current estimates. See supra note 36-42.

117. See McCaffery, UCLA, supra note 8, at 1040-42; McCaffery, Yale, supra note 8, at 657-64; McCaffery, supra note 8, at 163-201.

118. Id. at 657.

119. Id. at 658-59; McCaffery, UCLA, supra note 8, at 1037.

120. This concept has been used to justify a regressive rate system since higher earners are thought to have more elastic labor supply curves. The seminal work in this area is J.A. Mirrlees, An Exploration in the Theory of Optimum Income Taxation, 38 REV. ECON. STUD. 175 (1971).
However, the story is more complex in the labor context than in the goods context.\(^\text{122}\) Taxes on goods create only a substitution effect, leading the consumer to replace the taxed good with an untaxed good, but taxes on labor result in both a substitution and income effect. The substitution effect induces workers who previously would have worked a certain number of hours to work less once their income is taxed, substituting labor for leisure instead of apples for oranges in the goods context. For example, if a worker values leisure at $9 an hour she will work if compensated $10 an hour. However, if a tax is imposed to reduce her wages to $8 an hour, her leisure is now worth more to her than an hour of work, so she will reduce her work hours accordingly.\(^\text{123}\) The income effect accomplishes the opposite because a reduction in compensation may lead a worker to increase her hours to maintain the same level of pay she received before the tax was imposed.\(^\text{124}\) The more the substitution effect dominates for a worker, the more elastic his or her labor supply curve is, and the more the income effect dominates, the less elastic the labor supply is.

Relying on the data that suggests that primary earners have a relatively inelastic supply as compared to secondary earners, McCaffery argues that an income tax system seeking optimal taxation should tax secondary earners at lower marginal rates than primary earners in order to minimize distortions. His ideal system would tax primary workers highly because they have proven to have inelastic labor supply curves, predicting that a tax will not reduce their labor effort. In contrast, he would impose lower tax rates on secondary earners because they are more likely to substitute leisure or home work for labor when wages decrease as a result of taxes.\(^\text{125}\)

2. What Reforms Does Efficiency Support?

McCaffery's efficiency argument can be advanced in support of several proposals for reform. It most clearly endorses separating schedules for primary and secondary earners and instituting a lower rate schedule for secondary earners, a proposal for which McCaffery is well known.\(^\text{126}\) This system could guarantee lower marginal rates for secondary earners at each level of income. A transition to a single

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122. McCaffery, supra note 8, at 176.
123. Id. at 177. See also McCaffery, UCLA, supra note 8, at 1036. As discussed above, for women in particular, the choice is often not simply between labor and leisure, but between market labor and nonmarket labor (a more perfect substitute for market labor than leisure), thus strengthening the substitution effect. See supra notes 68-69 and surrounding text.
124. McCaffery, supra note 8, at 177-78.
125. McCaffery, Yale, supra note 8, at 661-62. See also Zelenak, supra note 8, at 366.
126. See McCaffery, UCLA, supra note 8, at 1041 ("The policy prescription of the optimal income tax literature [is] to tax primary earners at a higher rate than secondary earners . . ."); Zelenak, supra note 8, at 368 (describing McCaffery's proposal. Zelenak comments that "[e]ven if separate returns were used to implement optimal tax policy, a taxpayer's status as a wife would have special tax consequences: The rate schedule for wives would be more favorable than the rates for other taxpayers.").
filing system, without a separate rate schedule for secondary earners might also be consistent with efficiency goals because it would lower the rates on secondary earners to make them equivalent to those facing primary earners. However, tax scholars have noted that this reform does not fully advance the efficiency goal because secondary earners would face the same, not lower, rates as primary earners.

Efficiency objectives may also be approached within the joint filing system, though not as robustly. For example, McCaffery argues that reinstituting the secondary earner deduction, enlarging the current childcare credit for secondary earners, or reforming social security would also result in lower marginal rates for secondary earners. While all of these might increase efficiency from its current levels, in order for these proposals to be optimal, the deduction or credit must lower marginal rates for secondary earners below the rates facing primary earners at all income points, which will only occur if the deduction or credit is sufficient in size.

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127. A mandatory system would probably be preferable here because it would eliminate the secondary earner bias for all couples, but even an optional single filing system that reduced marginal rates on secondary earners in most dual earning couples would advance efficiency.

128. See Zelenak, supra note 8, at 368 (“Separate returns, although not the optimal tax solution, would be a great improvement over current law in optimal tax terms . . .”).

129. Id. at 368-69 (Separate returns would present working wives with the same marginal tax rates as husbands, whereas optimal tax theory would favor lower rates on wives—perhaps even negative rates on the first dollars of earned income); Alstott, supra note 99, at 2013 (“Individual filing may promote efficiency, but it arguably does not go far enough.”).

130. McCaffery, Yale, supra note 8, at 663. McCaffery’s version of social security reform, which creates an exemption for secondary earners, could increase efficiency by decreasing marginal rates on secondary earners, but note that social security reform that eliminated the spousal benefit rule would not increase efficiency because it would have no effect on marginal rates for secondary earners. See supra note 105 and accompanying text.

131. Consider the following figures as an example (using 2006 rate schedules):
Assume a husband earns $39,400 and his wife earns $30,000, and the couple views the husband as the primary earner. Viewing the husband’s income as primary, he would benefit from the standard deduction and the lower rate brackets. In 2005, he would pay no tax on his first $10,000 of income due to the standard joint exemption; he would pay 10% on the next $14,600 of income, and 15% on his remaining $14,800. This amounts to a total tax liability of $2,220, and an effective tax rate of 9%. The wife would not benefit from the exemption or lower rate schedule, so she would pay precisely 15% on her entire $30,000, for a tax liability of $4,500 and an effective tax rate of 15%. (I purposely chose the husband’s income at $39,400 to avoid the couple entering the next rate bracket which occurs at $59,400 of non-exempt income).

Assume now that there is a secondary earner or childcare credit of 30% of income or childcare expenses, up to $3,000. This would allow her to credit 30% of her income or expenses, so that she would be taxed only at 10.5%, instead of 15%, until the credit is used up. This credit would max out at exactly the $20,000 mark, when her tax savings equals precisely $900 (she would have spent $3,000 at this income point under the original system (15%*20,000, and pays exactly $2,100 with the credit, 10.5%*$20,000). After the $900 credit was spent, she would pay the full 15% marginal rate on her remaining $10,000 of income. Her tax liability would be reduced by $900, making her total tax charge $3,600, and her effective tax rate 12%.
Moreover, whether we are discussing a credit, deduction, or social security exemption, it is unlikely that the tool could reduce the secondary earner’s marginal rates below those of the primary earner at each level of income. This is because the husband’s income falls into several different rate brackets due to the standard deduction and the progressive rate system, a phenomenon that simply cannot be duplicated by anything other than McCaffery’s proposal for a single filing system with a separate, lower rate schedule for the secondary earner. Even if the credit or deduction could guarantee lower effective rates for the secondary earner, it could not guarantee lower marginal rates at each income level. Additionally, the credit or deduction would probably have to vary with the income of both the primary and the secondary earner in order to even ensure that all secondary earners face lower effective tax rates.

The efficiency goal is rarely advanced in support of taxing imputed income as a solution. Indeed, McCaffery notes that one of the benefits of optimal tax theory regarding income tax is that it makes discussions of imputed income unnecessary because elasticities reflect any distortions caused by the nontaxation of imputed income. Although taxation of imputed income could encourage women to engage

The analysis would be slightly different with a deduction. Assume the wife can deduct her first $3,000 of income or childcare expenses. On the first $3,000 of income she would pay no taxes at all, but she would still pay 15% on the remaining $27,000, making her total tax liability $4,050 and her effective tax rate 13.5%. Note that the deduction reduces her tax liability by exactly half what the credit accomplishes, because her effective tax rate is 15%, meaning the deduction benefits her by precisely that much, whereas the credit is worth 30%.

Because the deduction and credit are limited in size, we see that the secondary earner still faces a higher tax rate than the primary earner at an even income level. But, as with the single filing system, any reform that reduces marginal rates on secondary earners is more efficient than the current system because it allows the secondary earner to push some income into a lower bracket. See App. A. for a table correlating with this footnote.

132. See id.

133. For example, while a deduction would provide the secondary earner with a zero rate bracket for a certain amount of income, it would have to be large enough to encompass both the standard deduction and the lower rate brackets enjoyed by the primary earner in order to guarantee a lower rate schedule for the secondary earner at the lower income levels. The credit is even less useful because it does not ever result in a zero rate bracket, thus the secondary earner would always face a higher rate level for the income that would otherwise fall into the standard deduction bracket, even if the credit resulted in lower rates at all other income levels.

134. In the example above, the credit would have to be worth approximately 30% of $6,000, and the deduction approximately $12,000 just to equalize effective husband and wife rates. But even this would not guarantee lower marginal rates at all income levels.

135. This is because the benefit of either a credit or deduction is a function not only of the size of the credit or deduction, but of the husband’s income (the higher his income, the higher the marginal tax rate facing the wife, making credits less valuable and deductions more valuable) and the wife’s income (the higher her income, the less either a credit or deduction will reduce her total tax liability and effective rate).

136. See McCaffery, UCLA, supra note 8, at 1040.
in market work by eliminating preferential treatment of unpaid labor,\textsuperscript{137} supporters of taxing imputed income do not generally invoke efficiency goals.

3. Is the Efficiency Argument Compromised?

The fact that new data suggesting that women's labor supply is not as elastic as earlier believed may compromise the strength of the efficiency goal. In the 1970s and 1980s, numerous economists found that women's labor supply was highly elastic, notably distinct from the inelastic nature of men's labor supply.\textsuperscript{138} Looking specifically at tax policy, Economist Nada Eissa found that the labor supply of married women with high incomes increased substantially after tax rates were reduced in the Tax Reform Act of 1986,\textsuperscript{139} and estimated very high labor supply elasticity for those women. McCaffery relied on this kind of data to support his arguments for lowering the marginal tax rates facing women.\textsuperscript{140}

As discussed earlier, however, recent research suggests that women's labor supply is becoming much less elastic, decreasing by as much as 50% in the last 20 years.\textsuperscript{141} These new findings may undermine the efficiency arguments in favor of tax reform to eliminate gender bias. If women's labor supply elasticity is converging with that of men, then eventually there will be no optimal tax justification for providing women with more favorable rates. To be fair, however, it is important to note that McCaffery acknowledged that relying on optimal tax theory to further his argument left him open to criticism.\textsuperscript{142} Commenting that "elasticities are a tricky and treacherous business,"\textsuperscript{143} McCaffery recognized that it was nearly impossible to predict how an individual worker would respond to changes in after tax wage rates.\textsuperscript{144} Additionally, he realized that observed elasticities were higher among low income and working women than among nonworking women,\textsuperscript{145} and that new research even

\textsuperscript{137} See supra notes 65-70 and accompanying text.
\textsuperscript{138} See McCaffery, YALE, supra note 8, at 616 & n.74; Bankman & Griffith, supra note 68, at 1926 & n.86; BLAU & KAHN, supra note 1, at 4 (describing various studies estimating women's labor supply as highly elastic and men's labor supply as highly inelastic).
\textsuperscript{140} See McCaffery, supra note 8, at 180-84. Research on Sweden and Germany in the early 1990s also suggested that eliminating joint filing increased the labor force participation of women, and the German joint filing system continues to pressure women not to enter the paid labor force. MORGAN, supra note 55, at 8.
\textsuperscript{141} See supra notes 36-42 and accompanying text.
\textsuperscript{142} McCaffery, UCLA, supra note 8, at 1041.
\textsuperscript{143} Id. at 1038.
\textsuperscript{144} Id. ("[Elasticities] vary among the short and long terms, are difficult to measure, incorporate numerous expectations regarding the future, and are highly particularistic.").
\textsuperscript{145} Id. at 1039 ("Recent studies are beginning to suggest that the elasticity of working women may be quite close to that of men, but that the elasticity of nonworking women is much
in the late 1990s suggested that women's labor supply was less elastic than earlier thought. Because the optimal tax implications of this data presented problems for his thesis, McCaffery very carefully concluded that optimal tax theory "provide[d] an important, if not decisive, reason to consider" various tax reforms that would also have the effect of achieving gender justice, and noted that optimal tax theory is not the only method to be used to resolve gender-based tax issues, but instead must be taken into consideration along with other theories. Nonetheless, to the extent that the new data considerably diverges from the studies upon which McCaffery relied, it may detract from the strength of the proposal for a lower rate schedule for secondary earners, as well as from what some view as a unique and particularly powerful argument in favor of individual filing, secondary earner deductions or credits, or social security reform.

However, there may be still some subsets of the population for which McCaffery's argument continues to support gender based reform. For example, both Goldin and economists from the Federal Reserve Bank of Boston found that children were a major determinant of women's labor supply participation, correlating with a decreased attachment to paid labor. Conversely, researchers also found that men with children were more attached to the labor force. Although Blau and Kahn argue that their elasticity findings are generally consistent across groups of women, they do note that the cross wage elasticity of women with young children actually increased from 1990 to 2000, while the same benchmark for married women as a whole decreased. This data is consistent with McCaffery's argument that women
are more likely to leave the labor force when children are added into the picture,\textsuperscript{154} while men are more likely to increase their participation.\textsuperscript{155} Though these findings alone cannot support McCaffery's proposal for lower tax rates for all secondary earners, they do suggest that tax cuts targeted at mothers with young children could have a positive effect on the labor supply of that group.

Additionally, it is worth noting that while the new research on elasticities undermines McCaffery's efficiency argument, the new research on women's labor supply may similarly minimize the persuasiveness of some of his critics. For example, Nancy Staudt argued in 1996 that women may not be as sensitive to after tax wages as McCaffery suggested by pointing to the growing number of women in the workforce.\textsuperscript{156} To bolster her argument, Staudt noted that the number of women in the labor force was expected to grow by over 25\% by 2005.\textsuperscript{157} To the contrary, women's labor force was stagnant during this period.\textsuperscript{158} This provides reason for pause when faced with the proposition that taxes have no effect on women's labor force participation; the argument that women's labor supply is insensitive to taxes simply because the labor force is growing does not hold once the five decade increase has ground to a halt.

\textbf{C. Fairness}

Our income tax system is built upon fairness principles that determine tax liability based upon each individual's "ability to pay."\textsuperscript{159} Tax scholars have argued that the current tax code is unfair because it treats equal earning couples equally even when they are economically different.\textsuperscript{160} It also treats all married couples as if they

\textsuperscript{154} See McCaffery, UCLA, \textit{supra} note 8, at 1040 ("[M]others are especially elastic . . . .").

\textsuperscript{155} See Goldin, \textit{supra} note 2, at 17.

\textsuperscript{156} Staudt, \textit{supra} note 8, at 1600 ("[W]omen's labor decisions seem less sensitive to taxation than many think. More than forty-five percent of women participate in the market force . . . ."). \textit{See also id.} at 1613 ("Although the joint return provisions impose costs upon women and provide tax benefits to men, labor trends since the adoption of the provisions are exactly the opposite of what we would predict. The labor force participation rate of men has decreased, while the rate for women has sharply risen."). This statement is no longer accurate given changes in the last ten years; though men's labor force participation has decreased slightly, women's labor force participation is no longer rising. \textit{See} Boushey, \textit{supra} note 5, at 5.

\textsuperscript{157} Staudt, \textit{supra} note 8, at 1600.

\textsuperscript{158} \textit{See supra} notes 11-20 and accompanying text.

\textsuperscript{159} \textit{See KLEIN ET AL., supra} note 52, at 6-7 (explaining that "ability to pay" is an attribute of the federal income tax system). \textit{See also} Kornhauser, \textit{supra} note 8, at 92 ("Our income tax is premised on the principle that the burdens of tax ought to be distributed according to relative ability to pay.").

\textsuperscript{160} Gann, \textit{supra} note 8, at 30-31 (taxing equal earning couples equally as under joint filing system is unfair because does not take account of real differences between one and two earner couples).
pool their income and all unmarried couples as if they do not pool their income, therefore imposing tax liability in a manner inconsistent with one's ability to pay.  

The tax system's failure to take account of imputed income also offends notions of fairness because it allows certain activities from which one derives income to escape taxation, while other activities are fully taxed.

Notions of fairness often conflict with efficiency principles. Optimal tax theory dictates that goods with inelastic demand be taxed highly and those with elastic demand be taxed minimally. Taken to its natural limit, this doctrine could lead to the extremely high taxation of goods that people desperately need—such as life saving medications—a concept most would view as patently unfair. Though in the labor supply context it is hard to imagine such a dramatic example, a myopic focus on efficiency might favor a tax system that levies high costs on low income single parents for whom the income effect might far outweigh the substitution effect. Fairness concerns would certainly suggest that one should not be subjected to very high tax rates solely because she lacks the luxury of exhibiting an elastic labor supply.

Fairness may also be inconsistent with goals of equal treatment. For example, fairness might dictate a deduction or credit for secondary earners to rectify a system that creates social and economic barriers to women entering the workforce, but because such a reform treats women more preferentially than men, it may not be justified under principles of equal treatment, though this depends on how strictly one adheres to the basic logic of the doctrine.

While it is clear that fairness can collide with other goals, it is less clear which particular reforms are more or less fair than others, partly because one can always argue that any costly reform should be abandoned in favor of a more worthwhile goal. Nonetheless, a reform that eliminated the nontaxation of imputed income would probably be justified on fairness grounds because it would redress the privilege for nonmarket work and would actually increase revenue, notwithstanding the many

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161. Zelenak, supra note 8, at 358 ("Separate returns are consistent with a system that determines ability to pay by the income one controls; joint returns are not."); Komhauser, supra note 8, at 105 ("In short, the empirical evidence on pooling refutes the basic assumption underlying the joint return. The evidence highlights the unfairness of the current joint filing system, which is both under-inclusive (barring some unmarried poolers from its benefits) and over-inclusive (bestowing its benefits on nonpooling married couples.).").

162. See KLEIN ET AL., supra note 52, at 62 ("[F]ailure to include [imputed income] in income produces some serious problems."). See also supra notes 67-69 and accompanying text.

163. See McCaffery, YALE, supra note 8, at 658-59.


165. See Zelenak, supra note 8, at 368.

166. See supra note 109 and accompanying text.
practical and political difficulties of actually taxing such benefits. Adoption of mandatory single filing also appears consistent with fairness principles because it treats like individuals alike, regardless of their marital status. A system that required all taxpayers to file individually would eliminate the benefit that some couples receive—particularly, married couples with unequal earnings—at the expense of other taxpayers—married couples with near equal earnings and unmarried families who would benefit from the income splitting of joint filing but do not have the option. Moreover, a mandatory single filing system would likely be close to revenue neutral.

Despite these apparent advantages, some respected tax scholars believe that the family is the appropriate unit of taxation because family members pool their incomes and enjoy economies of scale, and argue that the tax code should treat equal earning couples equally, regardless of the division of income within the couple. The first two arguments are undermined by Marjorie Kornhauser’s findings that many married couples do not pool income, and that many nonmarried couples or nontraditional families do pool income and yet are not treated as a combined taxable unit. With respect to the third point, there is a strong argument that equal earning couples should be treated differently than one eamer couples because one eamer couples benefit from a spouse staying at home to care for the house and children—

167. See KLEIN ET AL., supra note 52, at 62 (“Nonetheless it can be demonstrated that failure to include these benefits in income produces serious problems of fairness . . . . [T]he reason why we seem to be stuck with these problems is that inclusion of the benefits in the calculation of individual income is assumed to be impractical.”).

168. See supra note 161; see Kornhauser, supra note 8, at 107 (“A system that treats each person as a separate taxable unit is more equitable, more consistent with basic tax principles, more efficient, and ultimately better able to accomplish social family goals.”).

169. See MORGAN, supra note 55, at 6. In 1999, the last year with available data, the marriage penalty cost individuals $28.3 billion, whereas the marriage bonus cost the government $26.7 billion. Id. at 12. Note, though, that in 1980 when Congress separately considered 1) mandatory single filing, 2) optional single filing, and 3) a secondary earner deduction, they allocated the following costs to each: 1) $29.5 billion; 2) $8.3 billion; and 3) $3.5 billion. Tax Treatment of Married, Head of Household, and Single Taxpayers: Hearings Before the Committee on Ways and Means, 96th Cong. 13 (1980) (statement of Emil M. Sunley, Deputy Assistant Sec’y for Tax Pol’y, Dep’t of Treasury). This is because the Treasury assumed that to avoid penalizing all the taxpayers who benefited from joint filing, an adoption of a mandatory single filing system would include each individual filing under the joint return rate schedule. See Gann, supra note 8, at 69 n.217.


171. Bittker, supra note 160, at 1392-93; see also MORGAN, supra note 55, at 9.

172. See Kornhauser, supra note 8, at 106 (“The number of families who keep some or all of their income separate is substantial.”).

173. Id. at 107.
valuable untaxed work—whereas two-earner couples must pay for those services with after-tax dollars.\textsuperscript{174}

An optional single-filing system would not have the same benefits as a mandatory system. While it would help dual-earner married couples, it would still allow one-earner married couples the option of benefiting from pooling their incomes while denying that benefit to unmarried couples or nontraditional families.\textsuperscript{175} Moreover, an optional single-filing system would be very costly, because it would eliminate the marriage penalty while retaining the marriage bonus.\textsuperscript{176} Fairness concerns might dictate that the funds used to enact an optional system should instead be directed to groups that we think have less ability to pay than couples who face the marriage penalty, such as single parents, who are not affected, positively or negatively, by the joint-filing system at all.

Both childcare and secondary earner relief suffer from the same weaknesses as the optional single-filing system from a fairness standpoint—they fail to eliminate the marriage bonus, and would entail the use of limited funds that could be spent elsewhere. Nonetheless, childcare credits or deductions advance fairness to the extent that they seek to align a taxpayer’s liability with his or her ability to pay, taking into account the additional expenses of childcare. Secondary earner credits or deductions might be slightly less justifiable from a fairness standpoint because they do not directly account for additional out-of-pocket costs, but they are nonetheless rooted in fairness concerns because they seek to counteract the high tax burden faced by secondary earners as result of joint filing. Whether considering secondary earner or childcare relief, credits would be fairer than deductions because they apply equally across all income levels, as opposed to skewing benefits towards those facing higher marginal tax rates.\textsuperscript{177} Similarly, refundable credits are preferable to nonrefundable credits because they do not discriminate based on the amount of taxes the potential recipient pays.

\textsuperscript{174} See Morgan, supra note 55, at 10; Gann, supra note 8, at 30-31.

\textsuperscript{175} See Kornhauser, supra note 8, at 107; Gann, supra note 8, at 67-69 (also arguing that optional single-filing is unfair because it would allow two-earner couples who have disproportionate incomes (and thus would not benefit from filing as individuals) to pay the same taxes as one-earner couples, even though the two couples have differing abilities to pay because of imputed income).

\textsuperscript{176} See Morgan, supra note 55, at 6 (eliminating the marriage penalty and not the marriage bonus could cost $28.3 billion).

\textsuperscript{177} See Staudt, supra note 8, at 1602 (“[B]ecause section 129 provides a deduction to taxpayers, the provisions benefit high-income households more than low-income households.”). Note, though, that it is possible that the deduction could be very valuable to some low-income taxpayers who face very high marginal tax rates if it were refundable. See Gokhale & Kotlikoff, supra note 8, at 3 (low-income secondary earners can face very high marginal tax rates).
A change in the social security system repealing the current spousal benefit regime might actually decrease government costs and promote fairness to a degree, but it may still be viewed as unfair by some because it would burden women who have spent their lives engaged in non-market work. McCaffery’s proposal for a separate, lower rate schedule for secondary earners may be the most problematic of all of the reforms from a fairness perspective because it involves both the adoption of a single filing system—which would on its own eliminate fairness concerns stemming from joint filing—and a lower rate structure for particular workers who may not necessarily warrant such relief because of their ability to pay.

There may also be a larger fairness problem inherent in all proposals for reform of the tax code that focus on increasing women’s market work. Nancy Staudt persuasively argues that “market-oriented” approaches to gender-based tax reform may be misguided. Staudt notes that market work does not necessarily equate with economic independence nor does nonmarket labor necessarily imply dependence. Numerous workers remain financially vulnerable despite working full time, especially as fewer employers offer healthcare and other benefits and as inequality in this country continues to grow. To the contrary, many nonworking women may

178. It could promote fairness because it would tax and distribute based upon the individual, not the family unit; each worker would benefit from money that he or she contributes to social security.

179. McCaffery’s proposal for social security reform would pose the same cost problems as single filing or a secondary earner deduction; fairness principles might suggest the money would be better spent elsewhere. See supra note 105 and accompanying text.

180. See Zelenak, supra note 8, at 368. Once single filing is instituted, there would be no reason why secondary earners would in particular have a lesser ability to pay than other groups.

181. All of the reforms described above might be described as encouraging women’s market work. Though Staudt argues for the taxation of imputed income without focusing on the goal of increasing market work, even this reform could be consistent with increased market work to the extent that it minimizes distortions that incentivize women to remain in unpaid work. See supra notes 65-70 and surrounding text.

182. Staudt, supra note 8, at 1615.

183. Id. Staudt also points out that many studies have shown that women who work in the paid labor market do not decrease the number of hours they devote to unpaid work, thus proposals to increase women’s paid work may actually burden women even more. Id.


be financially secure.\textsuperscript{186} Anne Alstott echoes this point when she comments that market focused policies "could create long-term gains in professional status and wages for higher-wage and skilled jobs but may have far less upside potential for married women qualified only for low-wage work."\textsuperscript{187} To the extent that many of the proposed reforms to eliminate gender bias from the code ignore the value of household work and focus exclusively on market work, they may implicate fairness concerns by benefiting only a small subset of women.

Like the equal treatment argument, the fairness argument is not affected by the new data on women's labor supply and elasticity. Fairness concerns do not depend on behavioral consequences, but on normative beliefs about ability to pay and horizontal and vertical equity.

D. Political Viability

1. History of Gender-Based Tax Reform

America's commitment to the joint filing system despite the dramatic changes in the sixty years since it was instituted is remarkable. The number of Americans living in a family setting has decreased significantly in the last thirty years,\textsuperscript{188} and the number of married women in the labor force has nearly doubled since 1950.\textsuperscript{189} Moreover, the composition of taxpayers in the United States is the opposite of what it was in 1960: nearly 60\% of filers are single, while roughly 40\% are married.\textsuperscript{190} Among thirty-two OECD member countries,\textsuperscript{191} only seven, including the United States, require mandatory joint taxation.\textsuperscript{192} Most countries use the individual, rather than the family, as the primary unit of taxation, and seven countries have transitioned from joint taxation to individual taxation since 1970.\textsuperscript{193} Despite these demographic changes and international developments that might suggest an individual filing system would be appropriate, as well as strong scholarly support for a single filing

\textsuperscript{186} Many women who are married to wealthy men may be financially secure even if they do not work, which supports the arguments in favor of joint filing described supra notes 170-171 and accompanying text.

\textsuperscript{187} See Alstott, supra note 99, at 2025.

\textsuperscript{188} See U.S. Census Bureau, U.S. Dep’t of Commerce, America’s Families and Living Arrangements 3 (2000).

\textsuperscript{189} See Sepielli & Palumbo, supra note 12, at 39.


\textsuperscript{191} See James Alm, Thinking About the Marriage Penalty, President's Advisory Panel on Tax Reform (2005), http://www.taxreformpanel.gov/meetings/docs/alm.ppt#1. OECD stands for Organisation for Economic Co-operation and Development.

\textsuperscript{192} Id.

\textsuperscript{193} Id.
system, the United States continues to use the family as the primary unit of taxation.

There are three potential solutions to the marriage penalty: 1) re-institute the separate filing system which existed pre-1948 (or at least allow optional single filing); 2) enact a secondary earner deduction or credit to benefit the two earner families that are actually burdened by the marriage penalty; and 3) broaden the rate brackets for all married couples to their pre-1969 levels, at double the rate brackets for single filers. The first two of these reforms would be consistent with eliminating gender bias from the Code; both would address the secondary earner bias facing working wives as well as the marriage penalty. The third reform is not consistent with gender-based reform. Though broadening rate brackets might slightly lessen the secondary earner bias by lowering tax rates for all workers, it is not designed to alleviate the disincentives facing working women. Moreover, while it would eliminate the marriage penalty for equal earning couples, it would also increase the marriage bonuses benefiting one earner couples.

Analyzing how each of these reforms has fared politically tells an interesting story. The first reform—a return to a single filing system, whether mandatory or optional—has not met with success. Even after the 1970s when concerns about the unfair treatment of employed married women were prominent, both mandatory and optional single filing proposals fell flat. Instead, Congress implemented a secondary earner deduction—the second reform—a less costly and systematic change. The secondary earner relief was repealed in President Reagan's 1986 tax cut, which lowered taxes for both dual and single earner families and thus reflected the goals of the third reform—lower rates for all married couples. Since 1986, support for this third reform, advocated by socially conservative groups which have been critical of working mothers, has continued. President Bush's 2001 tax cut

194. See supra note 8.
196. See McCAFFERY, supra note 8, at 68-69.
197. See MORGAN, supra note 55, at 12-14 (describing that the debates in 1980 preceding Reagan's 1981 tax cut expressed concern for working mothers, probably a result of the dramatic increase in women's labor supply in the 1960s and 1970s).
198. Id. at 14. The mandatory single filing option was seen as politically infeasible because it would substantially increase taxes for one earner families. See also President's Tax Relief Proposals: Tax Proposals Affecting Individuals: Hearing Before the Committee on Ways and Means, 107th Cong. 157 (2001) (testimony of Bruce Bartlett, Senior Fellow, Nat'l Ctr. for Pol'y Analysis) ("Eliminating existing marriage bonuses from the Tax Code . . . is never going to happen for obvious political reasons."). The optional filing proposal was taken more seriously, but still failed. See MORGAN, supra note 55, at 14.
199. MORGAN, supra note 55, at 14; see also McCAFFERY, supra note 8, at 74-78.
201. Id. at 2; see also McCAFFERY, supra note 8, at 68 ("Talk of marriage penalties can come from—and, I am arguing, does come primarily from—traditional families.") (emphasis in original).
increased joint filing brackets for the 15% range and standard deductions for married couples, "eliminating marriage penalties for people in the middle-income bracket . . . [but also directing] a substantial amount of tax relief to one-earner married couples who had never paid such a penalty to start with."\textsuperscript{202} In contrast, proposals for optional single filing reappeared briefly in the late 1990s, but were vociferously opposed by social conservative groups and failed to pass.\textsuperscript{203} While the secondary earner deduction has not been reinstated, conservative groups appear more amenable to this reform than to single filing. For example, the 1994 Contract with America, proposed by the Republican-controlled Congress, actually included a secondary earner deduction, and social conservatives did not mobilize on this issue, instead focusing on the positives of the Contract, such as the $500 per child credit.\textsuperscript{204} Even President Bush's original 2001 tax bill included a secondary earner deduction, in addition to "flattened tax rates [and] a doubling of income allowed in the lower brackets . . . ."\textsuperscript{205} Though President Bush's final tax cut did not include a secondary earner credit,\textsuperscript{206} the fact that it appeared even as a proposal is telling.

The tax treatment of childcare exhibits more concern for dual earner families than the tax treatment of marriage. Like marriage penalty relief, child tax breaks can come in forms that benefit all families or two earner families only. Per child credits benefit any family with children,\textsuperscript{207} whereas childcare deductions or credits (like the Section 21 DCTC or the Section 129 deduction) are based on actual expenses for childcare and benefit only families who pay out-of-pocket.\textsuperscript{208} Only the latter provisions are consistent with eliminating gender bias from the tax code because they target the particular expenses facing working mothers and effectively reduce their marginal tax rates. Childcare tax credits, like relief for secondary earners, have been embraced by supply-side conservatives as generating increases in productivity.\textsuperscript{209} In contrast, per child tax credits are criticized as being too close to "a direct government handout."\textsuperscript{210} President Reagan's 1981 tax cut liberalized the credit working families...
could claim for childcare costs and included the initial implementation of the section 129 employer-based childcare deduction. While the DCTC was not expanded for the next twenty years, President Bush's 2001 Act substantially increased the credit amounts and the phase out income level. The 2003 Act only offered per child tax relief.

2. Political Viability of Reforms

The political history described above suggests that the adoption of an individual filing system is not currently politically feasible. While legal scholars and economists have been advocating the adoption of the individual as the taxable unit for over thirty years, and both demographic changes and a shift towards single filing internationally suggest that a single filing system would be appropriate, the United States remains firmly committed to joint filing. Optional single filing reforms have not made it far in the political arena either, even though they would retain the tax-favored status of one earner families.

While the secondary earner credit has certainly not garnered as much support as eliminating the marriage penalty by lowering tax rates across the board, it benefits from having existed in this country in some form for five years in the 1980s, whereas neither mandatory nor optional single filing has existed since 1948. Moreover, the secondary earner deduction has surfaced in more than one conservative tax proposal for reform. Childcare credits may be even more

211. See MORGAN, supra note 55, at 15; HENDERSON, supra note 116 ("The tax reform act of 1981 (ERTA) created a more generous child care tax credit . . . ").

212. Section 129 is much less commonly relied upon than the credit because it is limited to taxpayers who have access to employer-based childcare. See I.R.C. § 129; supra notes 80-81 and accompanying text.

213. Economic Growth and Tax Relief Reconciliation Act § 204.


215. Note that these reforms were proposed—and failed—when concern for working mothers was at its peak. See MORGAN, supra note 55, at 11-14 (beginning with the section entitled "Reagan I: Tax Breaks for Working Mothers"); HENDERSON, supra note 116 ("An implicit goal of the Reagan Administration was to encourage wives and mothers to participate in the labor market.").

216. A secondary earner deduction, not credit, existed, but I consider them similar enough to be treated the same from a political viability perspective.

217. See supra notes 199, 205 and accompanying text.
politically feasible, as they currently exist in limited form and were increased as recently as 2001.\textsuperscript{218}

Though neither McCaffery's proposal for a more favorable marginal rate schedule for secondary earners nor Staudt's "taxing housework" concept have been seriously considered for implementation, it goes without saying that political opposition to these two proposals would be far more difficult to overcome than resistance to single filing. Given the already hostile attitude toward reforms that would aid working mothers, McCaffery's proposal, which would both adopt a single filing system and treat working mothers more favorably than working fathers or non-working mothers, is not likely to gain much political support.\textsuperscript{219} Staudt's proposal, which would require placing monetary value on household work, would likely be even less popular.\textsuperscript{220} Social security reform that would repeal the spousal benefit may not be as dramatic as McCaffery or Staudt's proposals, and might benefit from its status as a cost-saver, but the burden it would place on nonworking spouses at retirement would not be taken lightly. Social security reform that would provide an exemption for working wives until they gained some marginal benefit from their contributions might be more appealing because it does not decrease benefits for stay-at-home spouses, but it would also be costly and difficult to advocate in light of current social security funding issues.\textsuperscript{221}

V. A BALANCING ACT

A. An Exercise in Elimination

Any proposal to address gender bias in the code can be criticized on one of the four fronts: equal treatment, efficiency, fairness, or political viability. One must weigh the relative value of each of these goals in order to put forth a workable proposal. This paper argues that a combination refundable secondary earner/childcare credit, while not the ideal solution from all standpoints, best serves the competing goals discussed above.

To begin with, taxation of imputed income, McCaffery's proposal for a lower rate schedule for secondary earners, and both versions of social security reform are

\textsuperscript{218} See supra notes 211-13 and accompanying text. Though the recent focus on per child tax relief in the 2003 Act suggests that a focus on families who pay for childcare may be less popular now. See Press Release, The White House, supra note 214.

\textsuperscript{219} See Zelenak, supra note 8, at 368 ("My view is that, for better or worse, society is not ready to accept the tax policy implications of McCaffery's arguments.").

\textsuperscript{220} See, e.g., KLEEN ET AL., supra note 52, at 66 ("Overwhelming considerations of practicality, privacy, public comprehension, and enforcement make any suggestion that we tax [imputed income] seem patently unsound."); Ayla A. Lari, Sharing Alike: French Family Taxation as a Model for Reform, 37 DUQ. L. REV. 207, 226 (1999) ("Taxation of imputed income is... extremely controversial and... assumed not to be a viable alternative.").

\textsuperscript{221} See supra note 105 and accompanying text.
simply too problematic from a political perspective. McCaffery's proposal also suffers because it essentially only furthers the efficiency goal, not equal treatment or fairness.

That leaves us with single filing, a secondary earner deduction or credit, or a childcare deduction or credit. Mandatory single filing arguably best advances goals of equal treatment and fairness; it treats men and women exactly the same, and is a more powerful reform from a fairness perspective because it eliminates marriage bonuses as well as the marriage penalty. Secondary earner and childcare relief fail to eliminate marriage bonuses or fully advance the equal treatment goal, but these very weaknesses are precisely what make these reforms more politically viable alternatives; mandatory single filing has not been seriously considered because of the toll it would take on one earner families, and even optional single filing has been met with considerable hostility. Thus, although single filing probably best advances fairness, efficiency, and equal treatment goals, I propose that a secondary earner or childcare credit is a preferable proposal because it would address equal treatment and fairness concerns sufficiently, and is at the same time far more politically realistic.

Choosing between these reforms is difficult. On the one hand, it seems unfair to limit tax relief only to those who pay money for childcare. This leaves out not only childless married women, but also married women who may not pay out-of-pocket for childcare, both of whom suffer from the secondary earner bias. On the other hand, fairness concerns might dictate directing greater relief to working women with children because they have additional expenses for childcare that decrease their ability to pay taxes.

From an equal treatment standpoint, neither reform is particularly well-suited to the goal; only a broad version of the doctrine could support secondary earner or childcare relief. Still, secondary earner tax breaks better advance the goal since they apply to all women who experience the secondary earner bias, whereas childcare relief only benefits secondary earners who also happen to be parents.

The efficiency goal provides a compelling reason to consider tying any reform to childcare costs. Though new research shows that married women have experienced significant declines in their labor supply elasticities, undermining the argument in favor of significant tax breaks for all secondary earners, it also demonstrates that married women with children have experienced the steepest declines in labor force participation, and that the number of children a woman has is the strongest factor in determining out-of-work spells. Moreover, even the decrease in labor supply elasticity was less substantial for mothers with young children than for women as a

222. See supra note 109 and accompanying text.
223. See MORGAN, supra note 55, at 14.
224. See supra note 109 and accompanying text.
225. See supra notes 36-40 and accompanying text.
226. See supra note 25 and accompanying text.
227. See supra notes 31-33 and accompanying text.
While more research is certainly needed, these studies suggest that targeting reform to secondary earners with children is preferable, from an efficiency standpoint, to a broader tax cut for secondary earners. While Staudt cautioned against putting too much emphasis on market effects of tax reforms, the potential labor supply effects of a proposal must at least remain a consideration because they have important cost ramifications. If child tax credits have the potential affect of increasing employment, then the cost of the program must be considered in light of the boost to the economy from the additional workers.

B. A Specific Proposal

The ideal proposal to eliminate gender bias from the Code includes targeted tax breaks for secondary earners, with additional relief for childcare costs. This could be accomplished by introducing a secondary earner work expense credit that accounts for childcare costs. This proposal would differ from the secondary earner deduction that existed from 1981-86 in that it would be a credit based on the costs of the secondary earner entering the workforce, as opposed to a deduction tied to the income of the secondary worker. The benefit of this system is that the tax relief reflects ability to pay because it is tied to the taxpayer’s actual expenditures in entering the workforce, as opposed to income which may not necessarily align with the costs of entry.

In form, this credit would not differ significantly from the section 21 childcare credit, which allows workers to credit against their tax liability a portion of their household and childcare costs necessary to employment. Instead of only applying to taxpayers who have a qualified dependent, my suggested reform would apply to all taxpayers who are secondary earners. This will promote equal treatment by addressing the secondary earner bias faced by childless women or women who do not pay out-of-pocket for childcare costs. Because the costs of entering the workforce would substantially increase with the number of dependents, however, credit percentages and limits would increase with each child; this is necessary both for fairness reasons (ability to pay decreases with childcare expenses) and may also be justified on efficiency grounds (married women with children are more likely to be

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228. See supra note 41 and accompanying text.
229. See Henderson, supra note 116 (arguing that the dependent care tax credit increases productivity). But see Staudt, supra note 8, at 1604 ("Many women make the decision to enter the market independent of the financial incentives found in the Code. . . . [L]ow-income women and women of color of all income levels have had high market participation levels despite the limited childcare provisions. In addition, . . . [b]ecause many women view their nurturing and caretaking responsibilities to be of primary importance, they will stay home regardless of the tax benefits available to them by entering the market workforce.").
230. See Staudt, supra note 8, at 1615.
231. See Henderson, supra note 116.
out of the workforce than childless married women and have experienced less of an elasticity decline).\textsuperscript{233}

My proposal would phase out like the current DCTC, but it would not begin to phase out until incomes of at least $25,000.\textsuperscript{234} This would allow more middle income families to benefit from the credit at its maximum levels. Unlike the current tax credit, which never fully phases out, and has thus been criticized as regressive,\textsuperscript{235} my proposed reform would continue phasing out past the 20% mark until it reaches zero, at $105,000 or above.\textsuperscript{236} Limiting the credit to families that do not fall into the upper echelons of income will help offset some of the costs of expanding the credit.\textsuperscript{237} My proposed secondary earner credit would also be refundable,\textsuperscript{238} in order to allow low income families with minimal tax liability to benefit,\textsuperscript{239} and indexed to inflation.\textsuperscript{240}

\textsuperscript{233} As a purely hypothetical example, for a secondary earner with no children, the credit might be something like 30% of up to $2,500 in expenses, which would include housekeeping services, out of home meals, dry cleaning, and commuting. Though this might create some administrability problems, they should not be any greater than those embedded in the current section 21 (which already allows a credit for household expenses) nor any greater than calculation issues facing commuting individuals who work away from their principal place of business (who must determine travel expenses), or facing individuals who wear uniforms (who deduct clothing costs). Once children are introduced into the picture, the credit should increase, within reason, to a level where it covers about one-half of the cost of childcare for one or two children. Therefore, the credit might increase to something like 50% of $4,000 for one child, and $7,000 for two. A recent study on the average childcare costs found that they ranged from $3,803 to $13,480 annually for an infant, and from $3,016 to $9,628 for a four year old. See Matthews, supra note 82, at 2.

\textsuperscript{234} It could then phase out by 1% per $2,000 in additional income, as in the current provision. See I.R.C. § 21(a)(2).

\textsuperscript{235} See Douglas J. Besharov & Paul N. Tramontozzi, Child-Care Credit is Test of Bush's 'Kindness', Los Angeles Times, Nov. 11, 1988, at 7 (arguing in favor of a more progressive child credit); but see Amy Dunbar & Susan Nordhauser, Is the Child Care Credit Progressive?, 44 Nat'l Tax J. 519, 519, 527 (1991) (responding to criticisms that the child tax credit is regressive and concluding that it was progressive during the years 1979-1986).

\textsuperscript{236} This dollar amount might vary depending on locality.

\textsuperscript{237} Even though this would reduce costs, it could make the credit less politically popular. See Besharov & Tramontozzi, supra note 235 (advocating capping the credit at $40,000 to free up funds, but noting that any attempt to do so would likely face significant political opposition).


\textsuperscript{239} See supra note 79 and accompanying text. See also Jonathan Barry Forman, Beyond President Bush's Child Tax Credit Proposal: Towards A Comprehensive System of Tax Credits to Help Low-Income Families with Children, 38 Emory L.J. 661, 684 (1989) ("[I]n order to provide for the childcare needs of low-income families, the current child and dependent care credit should be made refundable.").

\textsuperscript{240} The current provision is not indexed to inflation. See I.R.C. § 21.
There are certainly a number of drawbacks to this proposal. It could be expensive, and earlier attempts to make the childcare credit refundable have failed, even though commentators have advocated this shift for years. Though funding for my proposal could come from a variety of sources—increased tax rates on the highest earners, returning brackets and standard deductions to their pre-2001 levels, or scaling back the per child tax credit—none of these moves would be politically popular, even if justifiable from a policy standpoint. Moreover, it is unclear whether the increased childcare credits should benefit all parents, or only secondary earners.

Nonetheless, given the competing goals addressed above, and the new data on women’s labor supply, this proposal could go a long way towards ameliorating the gender bias in the code. It would effectively reduce the marginal and effective tax rates for all secondary earners, therefore addressing the secondary earner bias and furthering equal treatment goals, and it reflects fairness concerns because it ties tax relief to actual dollars spent on entering the workforce or childcare. While it is unwise to make any predictions about tax rate changes on labor force participation, the new research suggests that targeting relief to secondary earners with children is more efficient than a broader tax cut for all secondary earners regardless of childcare costs. This proposal may not be politically popular, but it is more realistic than other commonly advocated gender-based tax reforms.

241. In 2005, only one bill in Congress proposed making the credit refundable. See H.R. 2249.

242. See Forman, supra note 239, at 684; see also McCaffery, supra note 8, at 115-17 (“In all income ranges, the child-care credit is rare in its occurrence and limited in its generosity. Among the poorest couples, in particular, it is virtually nonexistent.”).

243. The latter two funding options would ostensibly be reasonable considering that my proposal would alleviate the marriage penalty, secondary earner bias, and childcare expenses, all of which the larger rate brackets, exemptions, and per child credits purport to accomplish. Of course, opponents will quickly realize that while the larger brackets, exemptions, and per child credits benefit all families, my proposal only benefits two earner families.

244. The goal of this paper is to identify a realistic proposal for reform to alleviate the gender bias in the code. Because single parents do not file jointly, they do not experience the stacking effects of the joint return leading to the secondary earner bias, thus extending the reform to this group does not advance equal treatment goals. Similarly, because single parents often exhibit high attachment to the labor force, benefiting this group cannot be justified on efficiency grounds. Extending the benefit to single parents would also increase the costs of the proposal dramatically. On the other hand, fairness concerns weigh heavily against granting benefits only to married couples because such a policy ignores both single parents and nontraditional families, and a policy that conditions a tax benefit on marriage borders on moralistic. From a political standpoint, it is unclear whether leaving single parents out would make the proposal more or less viable; conservatives might prefer not to aid single parents and to keep costs low, but liberals—the most likely supporters of this proposal—might be offended if the benefit were limited to married couples.

245. Albeit not substantially. See supra note 131 (example showing that even a 30% $3,000 credit does not decrease marginal or effective rates significantly for secondary earners).
VI. Conclusion

Claudia Goldin’s retrospective paper demonstrates the immeasurable progress women have made in the last half-century. Beginning in the 1970s, women began expanding their expectations of future employment, altering their identities to include careers as well as marriage, and seeking out more lucrative occupations. These evolving attitudes have not only dramatically changed the social and cultural landscape of this country, but have led to an increased commitment to the workforce, and a corresponding decrease in sensitivity to wages.

And yet, the gendered division of labor that occurs with bearing and raising a child continues to stump feminists and economists alike. The media frenzy over women “opting out” of work, has focused almost exclusively on women with children, who often find it simply too difficult to maintain a career and a family when they are the primary caretaker. The joint filing tax system exacerbates this problem by encouraging couples to look at one income as primary and the other as secondary. The secondary worker is often faced with the choice between work and staying home to care for the children, and the tax system ensures that the cost of entering the workforce is difficult to overcome due to high marginal tax rates at the point of entry, and the nontaxation of the substitute nonmarket work.

While tax should not be used as a tool to change behaviors, neither should it create disincentives for particular groups. Instituting secondary earner relief, adjusted for childcare costs, would not only advance the goals of fairness and equality, but it would alleviate the financial constraints of childcare that, combined with other aspects of the tax code, make entering the workforce a losing financial proposition for many women.

246. See Goldin, supra note 2, at 6-13.
247. See id. at 16-19.
248. See Blau & Kahn, supra note 1, at 6-7.
249. See, e.g., Belkin, supra note 3; Porter, supra note 3.
## APPENDIX A

<table>
<thead>
<tr>
<th></th>
<th>Husband</th>
<th>Wife</th>
<th>Wife w/30%</th>
<th>Wife w/3k 3k credit</th>
<th>deduc</th>
</tr>
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<tbody>
<tr>
<td>Total Income</td>
<td>$39,400</td>
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<td>$30,000</td>
<td>$30,000</td>
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<tr>
<td>Amt. of Income at Lowest Marginal Rate</td>
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<td>$20,000</td>
<td>$3,000</td>
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<tr>
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<td>10.5%</td>
<td>0.0%</td>
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<td>Reason for Rate</td>
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<td>30% SE or</td>
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<tr>
<td>Tax Liability in this bracket</td>
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<td>$4,500</td>
<td>$2,100</td>
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<tr>
<td>Amount of Income at Next Marg. Rate</td>
<td>$14,600</td>
<td>$0</td>
<td>$10,000</td>
<td>$27,000</td>
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<tr>
<td>Marg. Rate</td>
<td>10.0%</td>
<td>25.0%</td>
<td>15.0%</td>
<td>15.0%</td>
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</tr>
<tr>
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<td>low rate</td>
<td>low rate</td>
<td></td>
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<td>Tax Liability in this bracket</td>
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<td>$1,500</td>
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<tr>
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<td>$0</td>
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</tr>
<tr>
<td>Marg. Rate</td>
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<td>25.0%</td>
<td>25.0%</td>
<td></td>
</tr>
<tr>
<td>Reason for Rate</td>
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<td>Total Effective Tax Rate</td>
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<td>15.0%</td>
<td>12.0%</td>
<td>13.5%</td>
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