HOW A SECONDARY EARNER DEDUCTION WILL REDUCE THE GENDER BIAS IN THE U.S. TAX CODE

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ABSTRACT

Congress drafted the current United States Internal Revenue Code, as it relates to marriage, in 1969, when the composition of the American family looked very different from today's family structure. The Code was structured to benefit so-called "traditional families," consisting of a stay-at-home mother and working father. Under the 1969 Code—assuming two couples earn the same amount of income—tax liability increases upon marriage if both spouses work, but decreases if a couple has only one working spouse. This increase in tax liability upon marriage for dual-earning couples is commonly known as the marriage penalty. To make matters worse, it only increases as the earnings of both spouses become more equal.

The marriage penalty still exists today, despite dramatic social changes and advances in gender equality in the United States over the past fifty years. In heterosexual couples, while some wives' salaries are beginning to exceed that of their husbands, women largely remain the secondary earners. Because the first dollar of the wife's income is taxed at the highest marginal rate established by the husband's income, joint filing tends to punish dual-earner couples and discourage the wife's employment, creating a secondary earner bias. The Code not only taxes dual-earner couples more heavily when they marry—revealing an implicit value judgment that marriages should not have two earners—but it also disproportionately imposes work disincentives on women, whose labor-force participation is much more elastic than that of men.

Since 1969, when the current rate structure was established, attitudes about the role of women in society have changed significantly. Both men and women are considerably less likely to believe the proper role for a woman is to stay at home and take care of children while the husband works. Most Americans today, in contrast to many Americans fifty years ago, believe that working women are also capable of being successful mothers. Reflecting these changed beliefs, women are obtaining more educational degrees and earning higher salaries. In order to reduce the Code's biased effects on working women, Congress should amend it to include a deduction for secondary earners. Such a deduction would

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reduce the Code's gender bias and appropriately align it with modern social views on gender equality.

INTRODUCTION

The United States Internal Revenue Code (the "Code") directly impacts more Americans, as well as tax-paying non-citizens, than any other area of government legislation or regulation.[1] While a completely efficient, ideal tax code would remain neutral regarding all personal decisions so as to avoid influencing individual choice, such an optimal code is not possible. In enacting and amending the Code, Congress inevitably makes value judgments as to which behaviors to encourage and discourage through tax policy. In fact, the Code is

1. JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 2 (3d ed. 2004).

structured to forego about $500 billion every year in tax revenue in order to provide incentives that encourage socially valued activities, such as pursuing higher education or purchasing a home.[2] For example, in 2009, Congress enacted the American Opportunity Tax Credit ("AOTC"), granting parents of children attending college, or students themselves, significant tax benefits out of a desire to ease financial burdens on college access.[3] Taxpayers hope that their elected representatives will draft the Code to achieve beneficial effects, like those stemming from the American Opportunity Credit. Unfortunately, in terms of gender equality, Congress has failed to achieve that goal.

Congress incorporated the current tax-rate structure into the Internal Revenue Code in 1969, when the picture of the American family looked very different from today's typical family. In 1969, the great majority of families with young children consisted of a working father and a stay-at-home mother.[4] At a time when this household structure was the presumed norm, few people objected to a tax code that provided benefits to couples with only one earner. Under the 1969 Code, if a working man married a non-working woman, the couple enjoyed a reduction in taxes upon marriage. This so-called "marriage bonus" was traditionally seen as a subsidy for the stay-at-home mother.[5] On the other hand, if both spouses earned an income, the couple suffered a "marriage penalty": they generally paid more in taxes when they married than they did when they were single.[6]

But in 2015—despite dramatic social changes and advances in women's equality in the United States over the past fifty years—the Code is still structured to provide these same bonuses and penalties. Given women's central role in the modern workforce, this structure has become completely indefensible. To make matters worse, the marriage penalty increases as the earnings of both spouses become more equal.[7] This burden on the income of secondary earners—the majority of whom are women in heterosexual marriages[8]—creates a powerful

2. Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Reforming Tax Incentives into Refundable Tax Credits*, 156 THE BROOKINGS INSTITUTION POLICY BRIEF 1 (Aug. 2006), *available at* http://www.brookings.edu/~/media/research/files/papers/2006/8/taxes%20orszag/pb156.pdf.

3. *See* MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., THE AMERICAN OPPORTUNITY TAX CREDIT: OVERVIEW, ANALYSIS, AND POLICY OPTIONS 1, 5 (2014), *available at* http://www.fas.org/sgp/crs/misc/R42561.pdf.

4. Adam Isen & Betsey Stevenson, *Women's Education and Family Behavior: Trends in Marriage, Divorce and Fertility* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 15725, 2010), *available at* http://www.nber.org/papers/w15725.pdf?new_window=1.

5. *See* Jason Fichtner & Jacob Feldman, *Eliminate the Marriage Tax Penalty*, U.S. NEWS & WORLD REP. (Sept. 18, 2012, 9:40 AM), http://www.usnews.com/opinion/blogs/economic-intelligence/2012/09/18/eliminate-the-marriage-tax-penalty.

6. EDWARD J. MCCAFFERY, TAXING WOMEN 17–19 (1997). Throughout this article, any reference to marriage is to heterosexual marriage. This is not to undermine the significance of same-sex couples, as the IRS has allowed married gay couples to file jointly since 2013.

7. *See* discussion *infra* Part III.A.

8. A full analysis of the impact of the secondary earner bias on same-sex couples is simply beyond the scope of this article. In 2014, thirty-seven states and Washington, D.C. allowed same-

disincentive for women to enter or rejoin the workforce.[9] Add this tax to the high costs of childcare, and the Code significantly deters women from remaining strong contributors to the workforce once they have children.[10]

Therefore, not only is the Code taxing dual-earner couples more heavily when they marry—revealing an implicit value judgment that marriages should not have two earners—but the Code is also disproportionately imposing work disincentives on women, whose labor-force participation is much more elastic than that of men. Granted, it may be impossible for the Code to remain progressive (i.e., increasing tax rates with increased earnings) while achieving neutrality (i.e., taxing singles and married couples equally) and horizontal equity (i.e., taxing equal-earning couples equally).[11] Regardless, as it currently stands, the Code is striking the wrong balance and ignoring the commitment to gender neutrality that is now part of today's jurisprudence and social values.

In order to reduce the Code's negative effects on working women, Congress should amend the Code to include a deduction for secondary earners. Such a deduction would reduce the Code's gender bias and bring it in line with modern views of gender equality. Since 1969, when the current rate structure was put into place, attitudes about the role of women in society have changed significantly.[12] Both men and women are considerably less likely to believe the proper role for a woman is to stay at home and take care of children while the husband works.[13] Additionally, people are much less likely to agree that a working woman is incapable of also being a successful mother.[14] Reflecting these changed beliefs, women are obtaining more educational degrees and

sex marriage. Recently, the Supreme Court held that the Fourteenth Amendment requires a state to license marriages between two people of the same sex and to recognize a marriage between two people of the same sex lawfully licensed and performed out-of-state. *See* Obergefell v. Hodges, No. 14-556, 2015 WL 2473451 (U.S. 2015). Approximately fifty-nine percent of same-sex couples have both partners of the household working. U.S. CENSUS BUREAU, CHARACTERISTICS OF SAME-SEX COUPLE HOUSEHOLDS (2012), *available at* http://www.census.gov/hhes/samesex/. In 2010, the Census Bureau estimated that almost 600,000 gay couples lived in the United States, an increase of 80 percent from just 10 years earlier, *Census Bureau Releases Estimates of Same-Sex Married Couples*, U.S. CENSUS BUREAU (Sept. 27, 2011), http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html. If the number of gay couples remained completely stagnant (a highly unlikely assumption considering historical trends), this means an underestimated 300,000 dual-earner couples will be added to the category of married filing jointly in the years to come. These couples will potentially face a marriage penalty. While this would clearly create more revenue for the government, it would do so at the expense of even more working couples.

9. *See* discussion *infra* Part II.B.

10. *See* discussion *infra* Part III.B.

11. *See* Daniel N. Shaviro, *Households and the Fiscal System*, 23(2) SOC. PHIL. & POL'Y 185, 199 (2006).

12. ELLEN GALINSKY, KERSTIN AUMANN & JAMES T. BOND, FAMILIES AND WORK INSTITUTE, TIMES ARE CHANGING: GENDER AND GENERATION AT WORK AND HOME 9 (2011), *available at* http://familiesandwork.org/site/research/reports/Times_Are_Changing.pdf.

13. *Id.* at 9.

14. *Id.* at 12.

earning higher salaries.[15] All of these changes make clear how antiquated the Code has become.

This article exposes the shortcomings of the existing Code and provides a viable alternative that reduces this outdated gendered bias. Part I explains how the structure of the current Code took shape—providing a history of household aggregation and joint filing—and lays the foundation for an analysis of the Code's gendered effects. Part II describes pertinent features of the current Code and how they affect both traditional one-earner couples and modern two-earner couples. Part III explains how the secondary-earner bias negates the Code's attempt at neutrality. Part IV explains why the current Code's structure is ill suited to new patterns of marriage, child-rearing, and women's educational and professional achievements. Finally, in Part V, this article suggests that Congress should implement a secondary-earner deduction to remedy the current gender-bias and restore neutrality in the Code.

I.
HISTORY OF THE GENDERED STRUCTURING OF THE U.S. TAX CODE

In its early history, the United States imposed few taxes, with most revenue collected from excise, sales, and income taxes.[16] In 1895, the Supreme Court decided that Congress' income tax scheme was unconstitutional because it improperly apportioned revenue between the states.[17] In response, Congress and the States passed the Sixteenth Amendment to the United States Constitution, authorizing the garnishment of income tax.[18] In 1913, Congress enacted the first constitutional personal income tax, adopting an individual filing scheme.[19] The new scheme required every person, regardless of marital status, to file an individual tax return. It permitted married couples to file jointly, with both incomes on one return, but the rates did not change; instead, the total tax was calculated by applying the rate structure to each spouse's income separately. The

15. *See* CLAUDIA BUCHMANN & THOMAS DIPRETE, GENDER DISPARITIES IN EDUCATIONAL ATTAINMENT IN THE NEW CENTURY: TRENDS, CAUSES AND CONSEQUENCES 3 (2013) (discussing the emergence of higher educational parity in the U.S. from the 1940s onward), *available at* http://www.s4.brown.edu/us2010/Data/Report/report07172013.pdf; WENDY WANG, KIM PARKER & PAUL TAYLOR, PEW RESEARCH CTR., BREADWINNER MOMS 12 (2013) (discussing how wives in heterosexual marriages out-earn their husbands by far greater percentages than they did in the 1960s), *available at* http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf. *See also* discussion of changing salary differentials *infra* Part IV.C.

16. U.S. Dep't of Treasury, *History of the U.S. Tax System*, ALMANAC OF POLICY ISSUES (Aug. 2003) [hereinafter *History of the U.S. Tax System*], http://www.policyalmanac.org/economic/archive/tax_history.shtml.

17. Pollock v. Farmers' Loan & Trust Co., 158 U.S. 601, 637 (1895) (holding that the un-apportioned income taxes on interest, dividends and rents imposed by the Income Tax Act of 1894 were, in effect, direct taxes, and were unconstitutional because they violated the provision requiring that direct taxes be apportioned among the states).

18. U.S. CONST. amend. XVI.

19. *See History of the U.S. Tax System*, *supra* note 16.

couple, therefore, could procedurally file together, but the tax rates applied to each individual's income. Interestingly, many modern scholars vehemently advocate for a return to this structure: one based on individual filing without regard to family relationships.[20] To analyze the history of the tax system as it relates to marriage and secondary earners, it is important to look at three distinct time periods: (A) 1913–1948, (B) 1948–1969, and (C) 1969–Present.

A. 1913–1948

In 1913, less than a quarter of all adult women, and only two to three percent of married women, worked outside the home.[21] Because progressive rates—tax rates that increase as the taxable base (income) increases and therefore tax high-income earners more heavily—were applied to each spouse separately, the individual filing scheme provided a significant tax shelter to dual-income couples. For example, suppose the 1913 rates—for purposes of simplicity—were zero percent on the first $0–10,000 of income and ten percent thereafter.[22] *See Table 1*. A married couple with a sole male earner making $20,000 would pay $1,000 in taxes. However, if $10,000 of that income were attributed to the wife and $10,000 remained attributable to the husband, the couple would pay no federal income taxes. This structure created an incentive for income shifting.[23] Because most women had little income of their own, husbands would attempt to "shift" half of their income to their wives to avoid paying higher federal income taxes.[24]

Table 1

Income	**Marginal Rate**
$0–10,000	0%
$10,001+	10%

20. *See, e.g.*, Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of the New Individualism*, 66 TAX L. REV. 695, 757 (2013) (arguing the new individualism requires a return to individual filing because marriage is no longer an appropriate proxy for ability to pay); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 95 (1971); Laura Ann Davis, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. Rev. 197, 199 (1988).

21. Walter Licht, *How the Workplace has Changed in 75 Years*, 111 MONTHLY LAB. REV. 19, 20–21 (2d prtg. 1988), *available at* http://www.bls.gov/opub/mlr/1988/02/art3full.pdf.

22. The actual rates in 1913 were: 1% on $0-20,000; 2% on $20,000-50,000; 3% on $50,000-75,000; 4% on $75,000-100,000; 5% on $100,000-250,000; 6% on $250,000-500,000; and 7% thereafter. *See* Revenue Act of 1913, ch. 16, 38 Stat. 114, 166.

23. *See* Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 273 (1988).

24. In community property states, this was simply known as income splitting because the husband and wife each would have an undivided, equal interest in all marital income and property. *See id.*

In 1930, in *Lucas v. Earl*, the Supreme Court first considered, and decided to prohibit, this shifting of income.[25] Earl was an attorney whose wife did not work. He entered into a contract with his wife stating that both parties shall own all property and earnings, which essentially shifted half of his income to her. While the Supreme Court did not question the validity of the contract, the question remained whether the Internal Revenue Service ("IRS") would be allowed to tax salaries of those who actually earned the salary, without regard to these shifting contracts. The Court ruled there was "no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it."[26] Declining to recognize the effect of this contract for federal income tax purposes, the Court found in favor of the IRS. For a short time, individual filing seemed to achieve its goal of taxing without regard to marital status, because *Lucas v. Earl* denied validation of private contracts that shifted income for the purpose of avoiding federal income taxes.

Just a few months later, though, the Court's decision in *Poe v. Seaborn* quickly undercut this potential success.[27] In similar fashion to the Earls, Mr. and Mrs. Seaborn each reported half of the household income, most of which came from Mr. Seaborn's salary.[28] While *Lucas v. Earl* arose from a dispute in California, the dispute in *Poe* arose in Washington State, a more wife-generous community property state. In a community property state, property and income of one spouse was "communal." In other words, by operation of state law, the income earned by one spouse immediately became shared marital property, equally attributed to both spouses (although husbands maintained sole control over such property).[29] The Supreme Court, in upholding community property laws, stated that "[u]nder the law of Washington, the entire property and income of the community can no more be said to be that of the husband than it could rightly be termed that of the wife."[30] This decision was consistent with the Court's concern for the economic substance of the contract as well; in Washington, married couples jointly owned the property and thus the contract

25. Lucas v. Earl, 281 U.S. 111 (1930). *See also* Alstott, *supra* note 20, at 703.

26. *Id.* at 114–15 ("[A]nd we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.").

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

28. *Id.* at 109.

29. *Id.* at 110 ("These statutes provide that, save for property acquired by gift, bequest, devise, or inheritance, all property however acquired after marriage by either husband or wife or by both is community property . . . . [W]hile the husband has the management and control of community personal property and like power of disposition thereof as of his separate personal property, this power is subject to restrictions which are inconsistent with denial of the wife's interest as co-owner.").

30. *Id.* at 113.

reflected the legal rights and obligations of the parties. The Seaborns were therefore allowed to shift income. In so ruling, the Court significantly narrowed the sweeping language of *Earl*.

These decisions created wide disparity in married couples' federal income tax liability among different states, depending on the state's community property regime. Several states quickly responded to *Poe* and enacted community property legislation, granting the benefits of income shifting to citizens of their state.[31] Congress could have easily remedied this state-by-state disparity by creating legislation requiring that income be taxed solely to the earner, but because no such legislation was passed, this discrepancy persisted until the late 1940s.[32]

The benefits of income shifting gave married couples in community property states a significant tax advantage over couples in other states. But the discrepancy concerned only *earned* income, or income from labor.[33] Therefore, even in a non-community property state, shifting incentives still existed for *unearned* income, or income from property.[34] For example, if a husband owned an apartment building netting $5,000 in rent income per year, he could simply transfer ownership of the building to his wife, and the rental income stemming from the building would legally transfer to her instead.

During this early era of income tax, husbands and wives throughout the United States used income-shifting schemes to shelter at least part of their income from higher taxes. Still, couples in community property states continued to receive the greatest benefits.

B. 1948–1969

To respond to this disparity, Congress had two choices: it could legislatively repeal the distinction between community and non-community property states, or it could grant the benefit of community property to residents of non-community states. In 1948, Congress chose the latter option when it passed legislation that introduced joint filing.[35] Congress added a joint-return tax-rate schedule to the existing rates for individuals, and doubled the income brackets.[36] The table below summarizes the new joint-return tax rates, using hypothetical rates for simplicity. *See Table 2*.

31. California, Oklahoma, Oregon, Pennsylvania, Nebraska, Michigan, and Hawaii all modified existing laws or passed new community property laws. *See* MCCAFFERY, *supra* note 6, at 46.

32. See discussion *infra* Part I.B.

33. *See* Alstott, *supra* note 20, at 703.

34. *See, e.g.*, Blair v. Comm'r, 300 U.S. 5, 11 (1937) (upholding the assignment of trust income for income tax purposes). For a general discussion, see Teschner v. Comm'r, 38 T.C. 1003 (1962) (holding that a taxpayer who generates income and designates its recipient is not taxable thereon when he has no right to receive it).

35. I.R.C. § 2(a) (1954).

36. *Id.*

Table 2

Individual Rate Schedule		**Married Filing Jointly Rate Schedule**	
Income	Marginal Rate	Income	Marginal Rate
$0–10,000	0%	$0–20,000	0%
$10,001+	10%	$20,001+	10%

This new approach solved the national disparity in a politically effortless way. It maintained the benefit to couples in community property states while granting a new tax cut to couples in common law states. For the first time, the Code recognized marital relationship status in calculating federal income tax liability, regardless of state marital property rules.

The new system also introduced two elements of tax law that remain in the Code today: income splitting and aggregation.[37] Income splitting essentially legalized the shifting of income that occurred prior to 1948.[38] All income earned in the familial unit was now attributed equally between husband and wife, as they filed a joint return. More specifically, the husband and wife were each treated as though they earned half of the household income, no matter how much each actually contributed.

Aggregation is a closely related concept to income splitting but is in fact distinct. Aggregation stems from the idea that ability to pay is measured based on the economic unity of the family because resources are generally pooled in households. With aggregation, income tax liability is determined by taxing the economic unit (the family) rather than a married individual's separate income.

Much of the bias against women in heterosexual marriages embodied in the Code stems from the combined impact of these two concepts. Because women tend to be secondary earners more often than men and are more labor elastic, when it comes to making work-life decisions, the wife's income is often viewed as discretionary. The husband's income becomes the primary income and establishes the rate at which the couple will be taxed. As a result, the woman's income is placed "on top of" the husband's, and the first dollar of her income is therefore taxed at much higher marginal rates. In other words, aggregation places her income on the margin, burdening her income much more than the primary earner's.

37. *See* Blumberg, *supra* note 20, at 50. Technically, aggregation has been a feature in the Code since 1921, but the 1948 changes made joint filing much more attractive, and couples tended to file jointly and aggregate their income only after 1948. Revenue Act of 1921, Pub. L. No. 98, § 223(b)(2), 42 Stat. 227, 250 (1921) (a husband and wife may either file returns individually, or include "[t]he income of each . . . in a single joint return, in which case the tax shall be computed on the aggregate income.").

38. *See* Blumberg, *supra* note 20, at 50–52.

Thus, the marginalization of women's income stemmed from the changes to the Code enacted in 1948. Under the new provisions, married couples now added their incomes and applied the new married joint filing rates. If thought of in terms of aggregation and income splitting, the new rate application had the same effect as calculating tax liability by aggregating household income, splitting it in two and applying the existing, individual rates. This created a significant tax advantage for unequal-earning couples. More specifically, the marriage of a sole earner to a non-earner produced a decrease in tax liability.

Consider the following: H1, making $30,000 per year, marries W1, a non-earner. For purposes of simplicity, consider the rates set out earlier (0% on $0-10,000 and 10% on $10,000+).[39] Individually, H1 would be paying $0 on his first $10,000 of income, then ten percent on the next $20,000, or $2,000 in total. When H1 marries W1, they begin to file jointly, and the tax liability is reduced to $1,000, because each spouse is taxed as if he or she earned half the household income, or $15,000 ($0 on the first $10,000, and $500 on the next $5,000).

Now consider H2, making $15,000 per year, marries W2, who also makes $15,000 per year. Prior to being married, each individual paid $500 in federal income taxes, or a total of $1,000. When the couple begins to file jointly, their tax liability will be the same as prior to marriage, or $1,000. Thus, one begins to see disparities between one-earner and dual-earner couples (specifically, a marriage bonus of $1,000 and $0, respectively). As this example demonstrates, the 1948 Internal Revenue Code gave the greatest benefit to one-earner couples, reinforcing gender-normative marriages. Meanwhile, it gave a diminishing advantage to dual-earning couples, discriminating against spouses earning equal income.[40]

Moreover, the enactment created a disparity between single and married taxpayers. It imposed an excessive tax burden on singles while providing significant benefits to certain married couples, specifically those with unequal earnings. This regime created an incentive for singles to marry, especially for earners (males) to marry people likely to become non-earners after marriage (females). Consider H1 again: As a single taxpayer, his tax liability is $2,000. When he marries a non-earner, he receives a $1,000 marriage bonus. From the singles' point of view, however, the marriage bonus was seen as a singles' penalty. Under the 1948 rates, if one compares three tax returns at the same level of income, the singles' penalty is very clear.

Using the same hypothetical rate brackets with a total income of $30,000, one sees the following results: (1) a traditional one-earner couple received a marriage bonus or a break in taxes, for a tax bill reduction from $2000 to $1,000; (2) the equal-earning couple's taxes remained constant before and after marriage, or $1,000; and (3) the single individual paid the highest amount, or $2,000 (0% on the first $10,000 then ten percent on the remaining $20,000). Singles,

39. *See supra* Table 1.

40. Blumberg, *supra* note 20, at 54–55.

therefore, paid a price for not being married. This inequity in the Code meant that one group was disproportionately burdened. Once again, Congress was called upon to remedy the disparity.

C. 1969–Present

Over twenty years later, Congress stepped in to provide some relief to single taxpayers. In 1969, Congress once again readjusted the rates, this time to lighten the burden on single taxpayers. The 1969 Tax Reform Act addressed the inequity between joint and individual rate schedules by shrinking the brackets for joint filers, which effectively raised the married filing jointly tax.[41] In other words, Congress split the difference between the 1913 and the 1948 rate schedules.[42] Using the previously mentioned hypothetical rates, the new rate schedule is demonstrated in Table 3 below.

Table 3

Individual Rate Schedule		**Married Filing Jointly Rate Schedule**	
Income	Marginal Rate	Income	Marginal Rate
$0–10,000	0%	$0–16,000	0%
$10,001–20,000	10%	$16,001–32,000	10%
$20,001+	20%	$32,001+	20%

The new regime reduced the disparity between singles and married couples, but did nothing to reduce the penalty imposed on dual-income married couples. Consider again the example of the two married couples and the single taxpayer, now each making $50,000 per year. H1, who makes $50,000, is married to W1, a non-earner. Their total tax liability is $5,200 (zero percent on the first $16,000; ten percent on the next $16,000 [$1,600]; and twenty percent on the next $18,000 [$3,600]). Before marriage, H1 paid $7,000 in taxes and therefore enjoyed a bonus of $1,800 by marrying a non-earner.

The equal-earning couple, on the other hand, must pay a marriage penalty. Prior to marriage, each spouse, earning $25,000, paid $2,000 each for a total of $4,000. Upon marriage, the couple's tax liability increased to $5,200; the couple thus suffered a $1,200 marriage penalty.

As for the individual taxpayer, he or she paid $7,000, which is much less of a disparity than the one that existed prior to the 1969 amendments. More specifically, with the new brackets, the individual taxpayer's liability is $7,000, compared to $5,200 for each of the couples. If the joint-filing brackets were simply doubled like they had been under the prior regime, at $50,000 of income,

41. Tax Reform Act of 1969, Pub. L. No. 91–172, sec. 803(a), § 1(a), 83 Stat. 487, 678–82 (codified as amended at I.R.C. § 1 (1970)).

42. For the actual rates in 1969, see *id.* at § 1(a).

the individual would still pay $7,000, but each couple would owe only $4,000. Thus, the 1969 changes, which remain in the Code to this day,[43] reduced the disparity between married couples and singles. But the 1969 compromise does not treat all marriages equally; married couples with unequal earnings remain the largest beneficiaries of the structure relative to married couples with two, more equal incomes.

II.
TODAY'S TAX CODE AND THE SECONDARY EARNER BIAS

While the rate brackets have changed to adjust for inflation and Congress has introduced many credits and deductions, much of the tax code structure from 1969 remains intact today. The Code contains different rate brackets for singles,[44] heads of household,[45] married couples filing separately,[46] and married couples filing jointly,[47] based on the notion that different household structures have different abilities to pay taxes. Married couples filing separately, however, are not taxed at the same rate as taxpayers filing individually. In fact, most married couples gain no advantage by filing separately, so almost all married couples file jointly.[48] Therefore, the schedules for singles and married couples filing jointly are most relevant to this discussion. To examine the effects of today's tax structure, one must answer two questions: (A) why is the Code structured this way?, and (B) how does the structure translate into a bias against secondary earners?

A. Why this Structure?

The disparities that arise from the rate structure, particularly the marriage penalty/bonus scheme, stem from the Code's commitment to two key concepts: neutrality and horizontal equity. A neutral tax code does not favor one choice over another; marriage neutrality refers to the idea that the amount of income tax paid by two individuals should not change upon marriage.[49] A horizontally equitable code treats equal earners equally.[50] When choosing between two activities (to work or not to work, for example), a taxpayer subject to a neutral tax code can make a choice based solely on personal incentives for achieving maximum welfare.[51]

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43. I.R.C. § 1 (2012).
44. *Id.* § 1(c).
45. *Id.* § 1(b).
46. *Id.* § 1(d).
47. *Id.* § 1(a).
48. Blumberg, *supra* note 20, at 52 n.17.
49. Shaviro, *supra* note 11, at 197.
50. *Id*.
51. *Id.* at 197.

The commitment to both concepts, however, creates a well-known conflict. According to tax scholar Boris Bittker, the Code cannot, while maintaining progressive marginal rates, achieve both neutrality and horizontal equity.[52]

As seen in the hypothetical above, the existing Code does not achieve marriage neutrality. Generally, couples with equal-earning spouses face a federal income tax penalty upon marriage, while more traditional, unequal-earning couples enjoy a large bonus upon marriage; thus, the two types of couples are discouraged and encouraged to marry, respectively. Whether or not tax liability actually affects a couple's decision to marry is debatable, but it is clear that the structure of the Code disproportionately benefits one-earner marriages.

The second concept, horizontal equity, or equal taxation of equal-earning couples—meaning two couples with the same amount of income—stems from the notion that taxes should be assessed by a household's ability to pay.[53] Thus, like couples should be treated alike. At first glance, the hypothetical above seems to show that the Code has successfully achieved equity between equal-earning couples. However, when one more closely examines the justification for this policy goal, the picture becomes murkier. Specifically, the Code currently measures ability to pay on reported income, mostly labor income.

While there are clear administrative rationales for this measure, it distorts the true equality of each couple. Returning to the example of the couples from above, H1/W1 and H2/W2, both report $50,000 in income to the IRS. As such, the ability of each couple to pay is equal, because it is measured by this reported income figure. Now suppose that each couple has two children. H1 earns $50,000, while W1 stays at home and cares for the home and children. Meanwhile, H2 and W2 also make $50,000, but spend a significant portion of that on household maintenance and childcare in order for both spouses to work. By measuring ability to pay solely on reported income, the Code ignores the imputed income of Couple 1 that stems from W1's childcare and housework.[54] From this standpoint, the hypothetical does not achieve equity between equal-earning couples either.

Because the Code cannot maintain marriage neutrality and simultaneously tax equal-earning couples equally while maintaining progressive marginal rates, it attempts to strike a fair balance between both concepts. This attempt, however, creates a strong bias against secondary earners.

B. How Does this Structure Create a Gendered Secondary Earner Bias?

How, then, does the current federal income tax result in a bias towards secondary earners? The Code has a biased effect in its application because, while

52. Boris Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 1389, 1395 (1967).

53. *Id.*

54. Imputed income refers to the accession to wealth that can be attributed, or imputed, to a person when he or she avoids paying for services by providing the services himself or herself.

the rates appear to be neutral on their face, marriage bonuses tend to go to one-earner couples, while penalties are borne by dual-earning couples.[55] To be clear, not all couples with two earners face a marriage penalty; in fact, according to the Congressional Budget Office, in 1997, 76% of families with two earners paid a marriage penalty, and 21% received a marriage bonus.[56] However, as the incomes of both spouses become more equal, the couple is far more likely to be penalized than rewarded.

One might ask: How does this affect women? Doesn't this regime just affect couples with two earners? In fact, both women and dual-earning couples are negatively affected. As of 2013, 47.4% of marriages between a man and a woman in the United States consisted of two earners.[57] Of those marriages, the wife's salary exceeded the husband's only 27% of the time.[58] Additionally, women are much more labor elastic than men,[59] which makes the wife statistically more likely to be the secondary earner. While current trends do not (and should not) support this gender normative bias (i.e., that the wife is automatically the secondary earner), properly analyzing the effects of the Code requires assessing the present reality as to which spouse more often earns less (and is therefore labeled as the secondary earner for tax purposes) and is less strongly tied to the workforce.[60] As of 2011, women were the secondary earners in approximately 75% of marriages.[61]

With joint filing, the primary earner's—most often the husband's—income will come first; he will receive the benefits of the zero-rate bracket, and each additional dollar of the household income—including the very first dollar of the

55. Notably, the marriage penalty is only part of the problem leading to the secondary earner bias. Social security taxation and childcare deductions are also applied inequitably; however, these concepts simply compound the gender inequity and are beyond the scope of this article.

56. David McIntosh, Response, *Taxes and Wedlock*, WKLY. STANDARD, Dec. 1, 1997, at 10.

57. *Employment Characteristics of Families Summary: 2013*, BUREAU OF LABOR STATISTICS (Apr. 25, 2014), *available at* http://www.bls.gov/news.release/pdf/famee.pdf. Current studies have yet to address the impact of the bias on secondary earners in same-sex couples. However, a 2004 report from the Congressional Budget Office estimated that legalized same-sex marriage could increase federal tax revenue by $500 to $700 million per year between the years of 2011 to 2014, with up to $700 million of that stemming from the impact of the marriage penalty. *The Potential Budgetary Impacts of Recognizing Same-Sex Marriage*, CONGRESSIONAL BUDGET OFFICE 1, 2–3 (June 21, 2004), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/55xx/doc5559/06-21-samesexmarriage.pdf. This tremendous bias requires further research.

58. GALINSKY, AUMANN & BOND, *supra* note 12, at 8. The authors' study only counted women whose salaries exceeded their partners' salaries by at least ten percentage points.

59. *See* Jon Gruber & Emmanuel Saez, *The Elasticity of Taxable Income: Evidence and Implications*, 84 J. PUB. ECON. 1, 4 (2002) (citing Richard Blundell & Thomas Macurdy, *Labor Supply: a Review of Alternative Approaches*, *in* 3 HANDBOOK OF LABOR ECONOMICS 1559 (Orley Ashenfelter & David Card eds., 1999).

60. *See* MCCAFFERY, *supra* note 6, at 15.

61. *See* WANG, PARKER & TAYLOR, *supra* note 15. *See also* discussion of changing salary differentials *infra* Part IV.C.

wife's income—will be taxed at the highest marginal rate established by the husband's earnings.[62]

While women's earnings are generally increasing and are beginning to exceed that of their husbands at greater rates,[63] women remain the secondary earners in most couples. Additionally, since women are more labor elastic generally, small changes in income can cause larger changes in women's workforce participation.[64] Therefore, because the first dollar of the wife's income is taxed at the highest marginal rate established by the husband, joint filing tends to punish dual-earner couples and discourage the wife's employment.[65] Making matters worse, the recent 2012 fiscal cliff legislation increased marriage penalties for high earners, by setting the 39.6% tax rate starting at almost the same level of income for married couples and singles.[66]

III.
EXAMPLES OF THE RESULTING TAX PENALTIES

By failing to achieve neutrality, the Code imposes penalties on marriage and on working arrangements within a marriage. As noted above, these effects fall disproportionately on women. Depending on the couples' personal circumstances, a woman could be choosing between going (back) to work or not, or she could be facing a larger marriage penalty simply because she does work. Both situations—a marriage with equal-earners and marriages with earning disparities—are addressed below.

A. Equal-Earning Marriages

Previous literature on marriage penalties and the secondary-earner bias tends to focus on the woman's decision whether or not to work.[67] While this is an important issue that this article addresses below, the Code also affects equal-earning couples that do not question whether or not one spouse will work. In the United States, the number of equal-earning couples has increased as gender roles have rapidly changed. As discussed above, the marriage penalty that a couple faces increases as the gap between the spouses' income decreases. Based on an initial assessment, one might argue that it makes sense to tax couples with two incomes more, because the tax system is built on an ability-to-pay theory. Even between equal-earning households, however, the spouses whose incomes are more equal will face a larger penalty.

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62. Alstott, *supra* note 20, at 705.

63. WANG, PARKER & TAYLOR, *supra* note 15, at 1.

64. *See* Gruber & Saez, *supra* note 59.

65. Alstott, *supra* note 20, at 705.

66. I.R.C. § 1(i)(3)(B) (2012) (setting the 39.6% bracket at $450,000 for married couples and $400,000 for single taxpayers).

67. *See generally* Amy McCormick, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law,* 13 J.L. & POL'Y. 241 (1997).

Let's take a simple example, using the simplified rate chart in Table 3, above. If W1 makes $10,000 per year and H1 makes $30,000, they will face a marriage penalty of $200 ($3,000 total tax before marriage, compared to $3,200 after marriage). A more equal-earning couple will face an even greater penalty. If W2 makes $18,000 and H1 makes $22,000, their marriage penalty will be $1,000 ($2,200 compared to $3,200 after marriage). As the spouses' incomes became more equal, the marriage penalty increased by $800, even though household income remained the same. Therefore, these greater taxes are not based on higher household income—they are based on the fact that the spouses' incomes are more equal.

In 1969, when the current system was originally created, women were already in the midst of taking more active, equal roles in the workforce, but the drafters of the Code were writing for a country in which men and women were not equals in the workforce. But times have changed. In fact, in 2012 alone, the percentage of families in which both spouses work increased by 7.6%.[68]

Not only are there now many more dual-earner couples, the income of the secondary earner in these couples is approaching that of the main earner. In 2012, wives contributed 37.3% of family income.[69] This figure includes those families in which the wife does not work outside the home (19% of families in 2012), so the wife's contribution in dual-earner couples is even greater. In 2008, women in dual-earner couples contributed, on average, 45% of annual family income, a significant increase from an average of 39% in 1997.[70] These increasing numbers of dual-earner couples earning equal incomes face an increasingly prohibitive marriage penalty. Meanwhile, the Code implies that a couple should not consist of two earners, and especially not two equal earners. Congress, through the Code, imposed an explicitly negative value on these couples, and while the Code may or may not affect a spouse's decision to work, it certainly is not achieving neutrality.

B. Marriages with Earning Disparities

For marriages in which the spouses do not earn equally, the Code creates a different problem. By disproportionately taxing the secondary earner, the Code places an additional burden on women, who may already be less committed to market work.[71] Many studies have shown that the labor supply of secondary

68. U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 1, 86–87 tbl.24 (2014), *available at* http://www.bls.gov/opub/reports/cps/women-in-the-labor-force-a-databook-2014.pdf.

69. *Id.* at 88 tbl.25.

70. GALINSKY, AUMANN & BOND, *supra* note 12, at 8.

71. *See* Shaviro, *supra* note 11, at 202. *See also* NASRIN DALIRAZAR, U.S. CENSUS BUREAU, REASONS PEOPLE DO NOT WORK 2004 3 (2007), *available at* http://www.census.gov/people/laborforce/publications/p70-111.pdf ("For nonworkers 25 to 44 years of age, taking care of children or others was the main reason for not working at a paid job (44 [± 1.5] percent), reflecting

earners is highly elastic.[72] In other words, since secondary earners are more likely to be women, taxing them at higher marginal rates reduces their incentive to work and encourages them to stay at home.[73] Recently, an increase in women's labor participation may have led to a decline in the elasticity of the labor supply of women.[74] But women's participation in the workforce, measured both in hours worked and labor-force participation rates, is closely tied to changes in taxation of married women. Those changes affect women's labor participation more significantly than they affect married men's participation.[75] Moreover, while some recent studies show a decreasing elasticity for women, it is important to view employment over a lifetime: there are points in the life cycle when responses to tax disincentives differ. Specifically, employment is particularly responsive to taxes for mothers with young children.[76]

The greater the elasticity of labor supply, the greater employment effect in response to a change in tax rate.[77] To achieve an efficient tax system with a higher elasticity of labor supply for women, the optimal marginal tax rate should be lower.[78] Instead, secondary earning women face much higher marginal tax rates, as their first dollar of income is taxed the rate at which their husbands' income placed the couple.[79] A high elasticity combined with high marginal rates creates significant disincentives for women to enter and/or re-enter the workforce. Thus, far from remaining neutral, the tax system has the potential to play a strong role in women's work decisions.

Adding to this disincentive, the cost of childcare is a major expense for families in which both spouses work. Beyond the high marginal rates, a couple incurs childcare expenses when the woman decides to go to work, as she can no longer stay home to care for her children full-time. While the childcare credit was created to ease this burden, the benefit of the credit is too small to have any real effect on labor force participation.

To demonstrate, imagine a couple earning $57,000 a year, the national median income for families with children.[80] This example uses the actual 2013

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the importance of this reason among women, who made up nearly three-fourths (71 [± 1.2] percent) of the nonworkers in this age group.").

72. *See* Gruber & Saez, *supra* note 59.

73. Yair Listokin, *Taxation and Marriage: A Reappraisal* 20 (Yale Law Sch., Pub. Law Working Paper No. 247, 2012), *available at* http://ssrn.com/abstract=2070171.

74. *See generally* Bradley T. Heim, *The Incredible Shrinking Elasticities: Married Female Labor Supply, 1978–2002*, 42 J. HUM. RESOURCES 881 (2007).

75. *See* MCCAFFERY, *supra* note 6, at 180–81.

76. Richard Blundell, *How Responsive is the Labor Market to Tax Policy?*, IZA WORLD OF LABOR 2014:2 (2014), *available at* http://wol.iza.org/articles/how-responsive-is-the-labor-market-to-tax-policy-1.pdf.

77. *See* MCCAFFERY, *supra* note 6, at 179–82, and sources cited therein.

78. LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC ECONOMICS 338 (2008).

79. Shaviro, *supra* note 11, at 202.

80. WANG, PARKER & TAYLOR, *supra* note 15, at 1.

tax rates, reproduced in Table 4 below. Because a wife's average contribution to the dual-earner household income is approximately 40%,[81] one can further assume that about $22,000 of that income would come from the salary of a wife who re-enters the workforce after having a child.

According to a 2012 report on the cost of childcare, the average cost of center-based childcare for an infant ranges from almost $4,600 in Mississippi to $15,000 in Massachusetts.[82] In nineteen states and the District of Columbia, the average annual cost of infant care exceeded $10,000.[83] Let us assume, using conservative numbers, that this hypothetical couple would spend approximately $8,000 on childcare each year.

The Code creates powerful disincentives for a woman in this situation to return to the workforce. If the wife stays home, the couple's taxable income does not increase or decrease, because the Code does not tax the imputed income from her household care. If the wife chooses to work outside the home, her first dollar of income will be taxed at 25%. This means that she will face $5,500 in additional tax liability due to her $22,000 income. Add this to the cost of childcare, and she faces $13,500 in fixed expenses simply for choosing to work.

In comparison to this figure, the savings offered by the childcare credit are not significant. The childcare credit ranges from a high of 35% of eligible expenses (limited to no more than $3,000 or $6,000 of expenses, depending on the number of children) to a low of 20%.[84] Because the applicable percentage of expenses allowed for the tax credit drops to 20% as the family income approaches $43,000,[85] this hypothetical family would receive a credit of $600, or twenty percent of the $3,000 cap. So even before considering expenses for commuting, meals, clothes, housework, and other work-related expenditures that are not deductible,[86] the wife's return to work will result in an increased annual

81. KRISTA PAYNE & LARRY GIBBS, NATIONAL CENTER FOR FAMILY & MARRIAGE RESEARCH, ECONOMIC WELL-BEING AND THE GREAT RECESSION: DUAL EARNER MARRIED COUPLES IN THE U.S., 2006 AND 2011 (2013), *available at* http://wwwtest.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/FP-13-05.pdf.

82. CHILD CARE AWARE OF AMERICA, PARENTS AND THE HIGH COST OF CHILD CARE, 15 (2012), *available at* http://www.naccrra.org/sites/default/files/default_site_pages/2012/cost_report_2012_final_081012_0.pdf.

83. *Id.*

84. 26 U.S.C. § 21 (2012). The Earned Income Tax Credit would also factor into this calculation but for purposes of simplicity and to ensure general applicability to all households, this calculation is not included as it is beyond the scope of this article.

85. *See* 26 U.S.C. § 21(a)(2) (2012). The percentage of the credit is reduced by one percentage point for each $2,000 by which the taxpayer's adjusted gross income exceeds $15,000. Thus, for those with incomes of $15,000 or less, the credit is 35% of the child-care expenses. Above $15,000, the credit drops by one percentage point for every $2,000 of extra income, hitting a minimum of 20% for those who earn $43,000 or more in adjusted gross income.

86. Blumberg, *supra* note 20, at 61.

income of only $9,100 after taxes.[87] The family will benefit from less than half of her $22,000 salary.[88]

Table 4

Individual Rate Schedule		**Married Filing Jointly Rate Schedule**	
Income	**Marginal Rate**	**Income**	**Marginal Rate**
$0–8,925	10%	$0–17,850	10%
$8,925–36,250	15%	$17,850–72,500	15%
$36,250–87,850	25%	$72,500–146,400	25%
$87,850–183,250	28%	$146,400–223,050	28%
$183,250–398,350	33%	$223,050–398,350	33%
$398,350–400,000	35%	$398,350–450,000	35%
$400,000+	39.6%	$450,000+	39.6%

An optimal tax system would place lower tax rates on a highly elastic group. Instead, the Code places additional expenses on secondary earners making the choice to return to the workforce. By doing so, it discourages women—especially those with children—from working and remains far from neutral.

IV.
WHY CHANGE IS NEEDED NOW

In an era in which activists have fought for equality in the workplace and recognition of women's rights, the Code trails far behind other areas of U.S. law. While scholars hotly debated changing the Code from the 1970s to the 1990s,[89]

87. Recent estimates under the current federal tax and transfer system, assuming standard child-care costs, suggest that a family headed by a primary earner making $25,000 a year will take home less than thirty percent of a spouse's earnings. *See* MELISSA KEARNEY & LESLEY TURNER, THE HAMILTON PROJECT, GIVING SECONDARY EARNERS A TAX BREAK: A PROPOSAL TO HELP LOW- AND MIDDLE-INCOME FAMILIES (2013), *available at* http://www.hamiltonproject.org/files/downloads_and_links/THP_Kearney_DiscPaper_Final.pdf.

88. One should also consider the loss of the intangible benefit that a secondary earner would get from staying home and spending time with her children.

89. *See generally* MCCAFFERY, *supra* note 6 (discussing the gender inequity of the current Code, which penalizes working women); Boris Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975) (discussing fundamental questions of taxation of the family unit); Blumberg, *supra* note 20 (observing and criticizing work disincentives for married women that are embedded in the Code); Davis, *supra* note 20; Louis Kaplow, *Tax Treatment of Families, in* ENCYCLOPEDIA OF TAXATION AND TAX POLICY (Joseph J. Cordes, Robert D. Ebel & Jane Gravelle, eds. 1999) (arguing that the appropriate income tax treatment of families involves allocating burdens between single individuals and married couples and adjusting burdens to account for the number of dependents); Louis Kaplow, *Optimal Distribution and the Family*, 98 SCANDINAVIAN J.

suggestions for reform in the last ten years have been far less frequent. As a result, the Code has not kept up with developments in equality in this country, including the decreasing salary differential between men and women, the increasing desire of women to participate in the workforce, and the greater equality of professional opportunities for men and women.[90]

In mid-twentieth-century America, joint filing and the Code's structure of marriage bonuses and penalties fit in nicely with the realities of society, including traditions of marriage and expectations for women. Over the last forty years, however, so much has changed in American life that a structure drafted in 1969 no longer corresponds to the characteristics of America's families. This is not to say that the Code was correct when drafted in 1969, but it has become completely indefensible in today's world, where values and views of equality have changed for the better. By maintaining the bias against secondary earners and equal-earner couples, the Code makes an implicit value judgment that secondary earners, mainly women, are not necessary in the workforce and should not be earning as much as men. The following section details many of the social developments of the last forty-plus years that have made the Code ill suited to the realities of today's society.

A. Attitudes About Women in the Workforce

Since the mid-twentieth century, U.S. attitudes about women in the workforce have changed dramatically.[91] If one believes that a tax code should be drafted to reflect society's ideals, then the Code severely fails.

First, seventy-nine percent of Americans do not believe that women should be constrained in traditional gender roles.[92] Both male and female employees were less likely to agree that it is better for all involved if "the man earns the money and the woman takes care of the home and children," in 2008 compared to 1977.[93] Interestingly, the change in opinion over the last thirty years was more dramatic for men than for women.[94] In 2008, the attitudes of men and women regarding traditional gender roles were inconsequentially different. The Code was drafted in a time when the majority of the population believed that it was

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ECON. 75 (1996) (questioning the "ability-to-pay" approach and using a utilitarian welfare function to derive the equitable distribution of income for different family configurations); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993) (discussing the validity of income pooling and resource allocation as a foundation for income tax).

90. *See* discussion *infra* Part IV.A–E.

91. *See generally* GALINSKY, AUMANN & BOND, *supra* note 12.

92. WANG, PARKER & TAYLOR, *supra* note 15, at 3.

93. GALINSKY, AUMANN & BOND, *supra* note 12, at 9.

94. *Id.* 74% of men in 1977 agreed with the statement, compared to 40% of men in 2008, more than double the change in women's perceptions. 52% of women agreed with this statement in 1977 and 37% of women in 2008.

better for a woman to stay home than to work,[95] and yet, even though now many women make the opposite choice and are publicly supported for doing so, Congress has not made any significant adjustments to reflect this widespread change in beliefs.

Notably, the public is more conflicted as to the effects a working mother has on her children and marriage. While most Americans recognize the economic benefits to families having a working mother, 74% of people believe that it is harder to raise children when a mother works outside the home.[96] However, this figure has decreased from 82% in 1997.[97] Similarly, between 1997 and 2013, the number of people who believe that marriages with a working mother are less likely to be successful has decreased by seventeen percentage points, from 67% to 50%.[98] Over the past three decades, the percentage of employees who agree that "a mother who works outside the home can have just as good a relationship with her children as a mother who does not work," has increased significantly, from 58% in 1977 to 74% in 2008.[99] Again, the difference was starkest among men, whose agreement increased nineteen percentage points during that period.[100] In addition, younger Americans are less likely to hold negative opinions of dual-income couples and working mothers. According to the PEW Research Center:

> Young adults (those ages 18-29) are less likely than older adults to see negative consequences from this trend and more likely to see positive effects. For example, while 78% of adults aged thirty and older say having more women in the workforce has made it harder for parents to raise children, only 60% of those ages 18-29 agree with this assessment. Similarly, while more than half (54%) of adults ages 30 and older say the rising share of women in the workplace has made it harder for marriages to be successful, only 36% of young adults agree.[101]

Given these generational differences in opinions about working women, public opinion will continue to change in the coming years. The traditional attitude—that it is more important for a mother to stay home and raise children instead of work in the labor market—is widely changing. Thus, a code that discourages women from participating in the workforce is becoming more and more inconsistent with popular opinion in today's society.

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95. *See* MCCAFFERY, *supra* note 6, at 21–22.

96. WANG, PARKER & TAYLOR, *supra* note 15, at 2.

97. *Id.* at 7.

98. *Id.*

99. GALINSKY, AUMANN & BOND, *supra* note 12, at 12.

100. *Id.* Men's agreement with this statement increased from 49% in 1977 to 68% in 2008. Women's agreement increased ten percentage points during the same period, from 71% to 81%.

101. WANG, PARKER & TAYLOR, *supra* note 15, at 8.

Changing attitudes among young people are also reflected in new patterns of marriage. A traditional marriage used to be defined by a high-earning man marrying a woman with little to no earnings, an understanding reflected in the Code. Today, however, one high-earner is "increasingly likely to marry another."[102] Additionally, high-earning women are more likely to marry than their lower-earning peers, as women's earnings have become more important for marriage formation.[103] As many high-earning women become the secondary-earner in marriages, the Code still penalizes these earners.

The attitudes of women themselves are changing as well. Previously, many women's desire to obtain a job with greater responsibility would drop off as she had children.[104] But in 2008, the percentage of women with children who desired jobs with higher responsibility was at its highest point since 1992 and had increased steadily from 2002 to 2008.[105] No longer is it the norm for a woman to leave the workforce or decrease her workload upon having children. In fact, in 2013, nearly 68% of married mothers were in the workforce compared to nearly 59% of all married women.[106] These trends indicate that most women competitively participate in the workforce, whether they are single, married without children, or married with children.

B. Educational Achievements of Women

Over three decades ago, in 1969–1970, men far outnumbered women when it came to earning higher education degrees. Women in mid-twentieth century America experienced greater academic success throughout grade school and high school, but college was predominately an option for men only.[107] In the recent past, however, women have achieved equality or surpassed men in all levels of education. By 1960, only 15% of all U.S. men and 8% of women earned bachelor's degrees.[108] Over the next decade, the percentages of male and female

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102. Alstott, *supra* note 20, at 719.

103. Megan M. Sweeney, *Two Decades of Family Change: The Shifting Economic Foundations of Marriage*, 67 AM. SOC. REV. 132, 143–44 (2002).

104. GALINSKY, AUMANN & BOND, *supra* note 12, at 1.

105. *Id.* at 2. The percentage of women with children who desire higher responsibility jobs increased from 58% in 2002 to 67% in 2008.

106. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES SUMMARY (2014), *available at* http://www.bls.gov/news.release/famee.nr0.htm; U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK (2014).

107. In 1960, men were nearly twice as likely to finish four years of college than their female counterparts. *See* U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT, Table A-1, *Years of School Completed by People 25 Years and Over, by Age and Sex: Selected Years 1940 to 2012*, *available at* http://www.census.gov/hhes/socdemo/education/data/cps/historical/index.html.

108. Thomas DiPrete & Claudia Buchmann, *Gender Disparities in Educational Attainment in the New Century: Trends, Causes, and Consequences*, *in* DIVERSITY AND DISPARITIES: AMERICA ENTERS A NEW CENTURY 375, 376 (John Logan ed., 2014).

degree recipients both increased.[109] As more women entered college, however, women ultimately surpassed men in educational achievement.

In 2010, the percentage of women earning bachelor's degrees soared to 36%, while the percent of men earning bachelor's degrees grew by only eight percentage points to 28%.[110] Similar trends can be seen in the earning of master's degrees. Mid-century, more men earned master's degrees than women,[111] but women have outpaced men since 1980. By 2010, women were awarded roughly fifty percent more master's degrees than men.[112]

In terms of professional degrees—such as medical, dental, or law degrees—and doctoral degrees, almost no gap exists in the achievement of men and women. In 2010, women earned 47% and 52% of professional and doctoral degrees, respectively.[113] Compare this to 1970, when men earned sixteen times more professional degrees and eight times more doctoral degrees than women.[114] If these trends continue, women will soon outpace men not only in number of bachelor's degrees but also in all advanced degrees.

In addition to these high numbers of degrees awarded to women, women of all ages are also surpassing their male counterparts in terms of grades. A gap in performance can be seen as early as kindergarten; early on, girls tend to have better average social and behavioral skills than boys, and these skills translate into girls' higher average grades at each stage of school.[115] Women's focus and engagement during school is unmatched by men at similar stages; it is this focus, rather than differences in ability, that accounts for the gender gap in achievement.[116] These differences remain evident among college graduates: at Harvard, 55% of the women graduated with honors this spring, compared with barely half the men. At Florida Atlantic University in Boca Raton, a public university, women made up 64% of this year's graduates, they received 75% of the honors degrees and 79% of the highest honors, summa cum laude.[117] The growing educational attainment of women makes the secondary earner bias especially troubling, as it pushes these highly skilled and accomplished women out of the workforce.

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109. *Id.*

110. *Id.* at 377.

111. In 1969–1970, men earned 143,083 master's degrees, while women earned 92,481. *See id.*

112. In 2010, women earned 417,828 master's degrees, while men earned 275,197. *See id.*

113. *Id.* at 380.

114. In 1969–1970, men earned 58,137 doctoral degrees versus 6,861 earned by women. *Id.* at 378.

115. THOMAS DIPRETE & CLAUDIA BUCHMANN, THE RISE OF WOMEN: THE GROWING GENDER GAP IN AMERICAN EDUCATION AND WHAT IT MEANS FOR AMERICAN SCHOOLS 114 (2013).

116. *Id.*

117. Tamar Lewin, *At Colleges, Women are Leaving Men in the Dust,* N.Y. TIMES, July 9, 2006, at A1.

C. Salary Differential and Contribution to Family Income

A recent Pew Research study made waves in 2013 with the headline, "Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children; Public Conflicted about the Growing Trend."[118] However, the study's statistics are misleading as to how many married women with children are out-earning their husbands. Specifically, the study begins by stating that "[a] record 40% of all households with children under the age of 18 include mothers who are either the sole or primary source of income for the family."[119] This number, however, includes both single mothers and married mothers, and because single mothers clearly have fewer options as to whether to work or not, the reality for married mothers is much different. While the percent of married mothers who out-earn their husbands has also risen significantly since 1960,[120] husbands still out-earn their wives in 75% of married couples with children (in which case the woman is the secondary earner).[121] In families in which the mother out-earns the father—less than one quarter of all families—the mother is the sole earner only 22% of the time.[122] Compare this to families in which the father out-earns the mother: in 41% of these families, the father is the sole breadwinner.[123] In other words, mothers are still significantly less likely to be the sole earner in the family, and fathers rarely opt out of the workforce.

When the mother is the primary provider, however, the household realizes significant benefits. Among married couples with children, when the mother is the primary provider, the total family income is higher than in those families in which the father is the primary breadwinner or where both parents earn the same income.[124]

The higher family income can be partially attributed to the increase in women's earning potential. In the 1960s and 1970s, women between the ages of thirty-five and forty-four earned approximately 60% of men's earnings. By 2011, however, women in this age group earned just over 80% of what their male counterparts earned.[125] The increase in women's salaries has also led them to contribute more significantly to family income. In 2008, employed women in

118. WANG, PARKER & TAYLOR, *supra* note 15.

119. *Id.* at 1.

120. *Id.* at 12. About 4% of mothers out-earned their husbands in 1960, compared to 23% in 2011.

121. *Id.*

122. *Id.* at 15.

123. *Id.*

124. *Id.* According to the Pew Research Center, "[i]n 2011, the median family income is nearly $80,000 for couples in which wife is the primary breadwinner, about $2,000 more than it is for couples in which the husband is the primary breadwinner and $10,000 more than it is for couples in which the spouses' incomes are identical." *Id.*

125. U.S. DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, WOMEN'S EARNINGS 1979–2011 (2012), *available at* http://www.bls.gov/opub/ted/2012/ted_20121123.htm.

dual-earner couples contributed an average of 45% of annual family income.[126] Opportunities have clearly expanded for women, who now have the potential to out-earn their husbands and contribute a greater share of the family income in dual-income families. Instead of encouraging women to seize these new opportunities, the Code discourages women from working.

D. Parental Roles

While women still spend more time on housework and childcare than men, fathers are quickly catching up and contributing at home, with approximately half of all mothers and fathers saying that they share childcare equally with their spouse.[127] Similar patterns can be seen regarding sharing housework responsibilities.[128] Additionally, by 2008, employed fathers reported spending significantly more time with their children than they did thirty years ago.[129] As men and women assume equal roles in the household, the traditional assumption that women stay at home caring for their children while men earn a living is undermined. The stay-at-home mom who is solely responsible for housework and childcare is no longer the reality for most American families.

E. Number of Women in the Workforce

As evidenced by the achievements of women outlined above, the United States has made tremendous progress in terms of gender equality over the last forty years. With legal and societal developments making it easier for women to maintain professional careers, women are more likely to enter the workforce. In fact, since 1950, the labor force participation rate of women has increased, while that of men has decreased.[130] In 2012, the difference in labor force participation between men and women was only 12.5%.[131] When the Code was drafted,

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126. GALINSKY, AUMANN & BOND, *supra* note 12, at 8 ("In 2008, employed women in dual-earner couples contributed an average of 45% of annual family income.").

127. KIM PARKER & WENDY WANG, PEW RESEARCH CTR., MODERN PARENTHOOD: ROLES OF MOMS AND DADS CONVERGE AS THEY BALANCE WORK AND FAMILY 43 (2013), *available at* http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf (Fifty-three percent of fathers and 44% of mothers say that they share childcare responsibilities equally with their partner.).

128. *Id.* (Sixty percent of fathers and 40% of mothers say that they share household responsibilities equally with their partners).

129. GALINSKY, AUMANN & BOND *supra* note 12, at 14.

130. *Id.* at 3. *See also* U.S. DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, CHANGES IN MEN'S AND WOMEN'S LABOR FORCE PARTICIPATION RATES (2007), *available at* http://www.bls.gov/opub/ted/2007/jan/wk2/art03.htm.

131. In 2012, 70.2% of men over age sixteen participated in the labor force, compared to 57.7% of women ages sixteen and over. U.S. DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, CIVILIAN LABOR FORCE PARTICIPATION RATES BY AGE, SEX, RACE, AND ETHNICITY (2013), *available at* http://www.bls.gov/emp/ep_table_303.htm.

approximately forty years ago, that differential was over 35%.[132] If the disincentive for secondary income did not exist, one can imagine that women would be even more fully represented in the workforce, which in turn would result in even greater equality.

Even more relevant to this discussion is the number of married mothers who opt out of the work force. "In 1970, among women with children under the age of 5, the majority, 70%, were out of the labor force, presumably full-time homemakers. In the ensuing decades, labor market participation became the norm for mothers with young children and only 36% were out of the labor force in 2007."[133] While these statistics indicate progress, complete neutrality and individual choice continue to be undermined by the bias embedded in the Code. In fact, studies show that both highly educated professionals and less educated, lower-earning mothers are still opting out.[134]

The opting out trend is not limited to the highly educated;[135] in fact, low-income, employed women may be even more likely to opt out of employment.[136] In 2012, only 48% of women with children under the age of eighteen with a high school degree or less were working.[137] As one study suggests, "many moms who are younger, less educated, Hispanic and/or caring for very young children could be left out because they can't get a job that pays well enough to cover hefty child-care costs."[138] Thus, a significant number of women of all income and education ranges still opt out of the formal labor force.

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132. U.S. DEP'T OF LABOR, LABOR FORCE PARTICIPATION RATES BY SEX AND RACE OR HISPANIC ETHNICITY, 1972–2012, *available at* http://www.dol.gov/wb/stats/LForce_Race_Hispanic_Ethnicity_72_12_txt.htm.

133. Adam Isen & Betsey Stevenson, *Women's Education and Family Behavior: Trends in Marriage, Divorce and Fertility* 2 (Nat'l Bureau of Econ. Research, Working Paper No. w15725, 2010), *available at* http://www.nber.org/papers/w15725.pdf?new_window=1.

134. While upon first glance there seems to be little remaining concern about women's participation in the labor force, women that have the choice to opt out are, in fact, doing so. *See* Joni Hersch, *Opting Out Among Women with Elite Education*, 11 REV. ECON. HOUSEHOLD 468, 471–72 (2013) ("[a]lthough graduates of elite institutions marry later, are more likely to earn graduate degrees, and have higher expected earnings, the labor market activity of elite graduates with children is substantially lower than that of elite graduates without children . . . . Labor market exits among highly educated mothers are often interpreted as a response to inflexible workplaces that make combining family and career incompatible.").

135. *See generally* Maureen Perry-Jenkins, *The Challenges to and Consequences of "Opting Out" for Low-Wage, New Mothers*, *in* WOMEN WHO OPT OUT: THE DEBATE OVER WORKING MOTHERS AND WORK-FAMILY BALANCE 104 (2012) (finding that many women with relatively low incomes opt out of the labor force to stay home when they are able to do so).

136. Lydia Saad, *Stay-at-Home Moms in U.S. Lean Independent, Lower-Income*, GALLUP (Apr. 19, 2012), http://www.gallup.com/poll/153995/stay-home-moms-lean-independent-lower-income.aspx.

137. *Id*.

138. Allison Linn, *Opt Out or Left Out? The Economics of Stay-at-Home Moms*, CNBC (May 12, 2013), http://www.cnbc.com/id/100727292. *See also supra* Part III.B (average childcare costs are $10,000 a year).

One must also be careful not to underestimate the number of women exiting the workforce by comparing all single and married women. For example, since 1950, the difference in labor force participation for single and married women has decreased by 20%.[139] This statistic, however, includes both single mothers (who almost always must work) and married women without children, inflating both numbers for present purposes. Instead, what is relevant to the discussion of the effects of the Code is the number of mothers *who have the option* to exit the workforce and choose to do so. As the studies above show, many women from all income levels continue to opt out upon having children. The bias that exists in the Code, therefore, limits the full realization of gender equality.

V. SUGGESTION FOR REFORM: THE SECONDARY EARNER DEDUCTION

In order to ease the burden placed on secondary earners, Congress should implement a secondary earner deduction. In order for the Code to advance complete gender equality, the United States could mandate separate filing, which would treat everyone as an individual for tax reporting, regardless of marital status. Although this approach may invite tax-avoidance schemes and ignore the fact that pooling of resources is relevant to measuring a household's ability to pay, it would be better on balance than the current scheme. In fact, the majority of developed nations have chosen to adopt this approach despite such concerns.[140]

Such a system of individual filing, however, due to the numerous concerns it carries with it, is not necessary to achieve a goal of greater gender equality in the Code. While many scholars argue persuasively for a return to mandatory individual filing,[141] implementing a secondary earner deduction is a more realistic and politically achievable goal. The following summarizes the United States' history of providing relief to secondary earners, explains why the change should be implemented as a deduction instead of a credit, and outlines the suggested structure of the secondary earner deduction.

A. History of Secondary Earner Relief

Relief for secondary earners has been discussed and formally proposed several times over the last thirty years. In 1981, Congress first provided some

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139. Alstott, *supra* note 20, at 718 (63.3% versus 61% in 2010, compared with 46.3% versus 23% in 1950).

140. Howard Gleckman, *As Marriage Changes, Should Joint Filing Go the Way of Ozzie and Harriet?*, FORBES (June 11, 2013), http://www.forbes.com/sites/beltway/2013/06/11/as-marriage-changes-should-joint-filing-go-the-way-of-ozzie-and-harriet/. The U.S. is one of only eleven countries out of thirty-four studied by the OECD in 2011 that used joint filing; the majority—including Australia, Austria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, Hungary, Iceland, Israel, Italy, Japan, Korea, Mexico, Netherlands, New Zealand, Portugal, Slovak Republic, Slovenia, Sweden, Turkey, and the United Kingdom—required individual annual filings. *See* OECD, TAXING WAGES 2011 (2012), *available a*t http://www.oecd-ilibrary.org/taxation/taxing-wages-2011_tax_wages-2011-en.

141. *See* sources cited *supra* note 20.

relief to secondary earners by enacting a secondary earner deduction, Internal Revenue Code Section 221 of the Economic and Tax Recovery Act of 1981.[142] The deduction was intended to reduce the marriage penalty imposed on couples when both spouses worked outside the home, as well as to lessen the labor market disincentives for women.[143] After considering three plans that arose from Congressional discussions regarding the marriage penalty, Congress adopted the deduction, arguably because it was the least expensive option.[144]

The 1981 deduction, outlined in Section 221, allowed a limited deduction[145] of the secondary earner's income, capped at $3,000.[146] The deduction resulted in limited relief for secondary earners: even at the highest marginal rate bracket, the capped deduction had a maximum after-tax savings of $1,500, and for most American dual-earner families it resulted in a much lower savings of only a few hundred dollars.[147] Despite the provision of only modest relief, the secondary earner deduction still had the effect of increasing the labor force participation rate of women with children.[148]

Unfortunately, the secondary earner deduction was a short-lived victory for women: Congress repealed it in 1986. Leading up to the repeal, traditional women's groups and social conservatives began protesting the deduction, claiming it granted an unfair advantage to working women.[149] During debates over the deduction, Helen M. Coyne, president of Mothers at Home, Inc., testified before Congress that "America's families want a Tax Code which is career neutral; that is, a code which does not create an unfair economic advantage for either two-career families or families choosing to have one spouse stay home."[150] This selective use of neutrality, however, is misplaced, as it fails to recognize how far from neutrality the Code is. In fact, the "unfair economic advantage" the Code currently creates flows to one-earner couples. In reaction to

142. Economic Tax Recovery Act of 1981, Pub. L. No 97-34, 95 Stat. 172; Tonya Major Gauff, *Eliminating the Secondary Earner Bias: Lessons from Malaysia, the United Kingdom, and Ireland*, 4 NW. J. L. & SOC. POL'Y 424, 435–36 (2009). *See also* MCCAFFERY, *supra* note 6, at 74.

143. BETTY W. TAYLOR, SHARON RUSH & ROBERT JOHN MUNRO, FEMINIST JURISPRUDENCE, WOMEN AND THE LAW: CRITICAL ESSAYS, RESEARCH AGENDA, AND BIBLIOGRAPHY 213 (1998).

144. MCCAFFERY, *supra* note 6, at 74–76.

145. The Section 221 deduction was limited to 5% in 1982 and 10% from 1983 and beyond. *See* I.R.C. § 221 (1981).

146. I.R.C. § 221(b)(2) (1981). *See also* Gauff, *supra* note 142.

147. The highest marginal rate was 50% in 1982. Economic Tax Recovery Act of 1981.

148. Bruce Bartlett, *The Marriage Penalty: Origins, Effects and Solutions*, 80 TAX NOTES 1341, 1345 (1998) (citing Daniel Feenberg, *The Tax Treatment of Married Couples and the 1981 Tax Law,* (Nat'l Bureau of Econ. Research, Working Paper No. 872, April 1982), *available at* http://www.nber.org/papers/w0872.pdf) (Specifically, the secondary earner deduction increased the number of hours married mothers with children worked in the labor market).

149. MCCAFFERY, *supra* note 6, at 80.

150. *Id.*

this political pressure, Congress repealed the secondary earner deduction in 1986.[151]

Since 1986, Congress has not enacted any measure to provide relief to secondary earners. During the 2000 presidential campaign, George W. Bush proposed a secondary earner deduction, structured exactly the same as the 1981 deduction.[152] However, the proposal failed. Likewise, President Obama's 2016 budget proposal included a credit for two-earner families, but the credit did not make it into the law.[153]

B. Credit Versus Deduction

An income tax deduction, rather than a credit, can most directly and accurately correct the secondary earner bias of the current Code. The majority of tax incentives in the Code—especially those intended to encourage socially beneficial behavior—operate through deductions, exemptions, and exclusions, rather than credits.[154] The size of a tax break resulting from a deduction depends on the individual's highest marginal rate. For example, a taxpayer reaching the 35% bracket will realize an after-tax gain of thirty-five cents for every $1 of the deduction. A credit, on the other hand, reduces taxes dollar-for-dollar and therefore is worth the same to households in different rate brackets.

While refundable tax credits can also be an effective tool for broadly promoting socially valued behavior,[155] a deduction more accurately responds to the realities of the secondary earner bias for reasons discussed below. The main advantage of a credit is that it would potentially benefit a larger number of families, including the many families that have no federal tax liability because they are below the minimum income subject to federal income tax.[156] By offering relief to more families, a uniform, refundable credit[157] would create a larger incentive to women participating in the workforce and therefore could have a greater impact on labor force participation rates.

However, while encouraging women to work is certainly socially valuable, the goal of reform should not be to use the Code to incentivize secondary earners to work; rather, Congress should aim to ease the burden that the Code already imposes on these secondary earners, and to move closer to a genuinely neutral

151. *Id.*

152. *See* Bruce Bartlett, *The Marriage Penalty: A Tax on Working Couples*, NAT'L CENTER FOR POL'Y ANALYSIS (Apr. 23, 2001), http://www.ncpa.org/pub/ba358.

153. *FACT SHEET: A Simpler, Fairer Tax Code That Responsibly Invests in Middle Class Families*, THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY (Jan. 27, 2015), https://www.whitehouse.gov/the-press-office/2015/01/17/fact-sheet-simpler-fairer-tax-code -responsibly-invests-middle-class-fami.

154. Batchelder, Goldberg, Jr. & Orszag,, *supra* note 2, at 2.

155. *Id.* at 3–4.

156. More than one-third of households do not have income tax liability. *See id.* at 4.

157. A refundable credit is not limited by an individual's tax liability and therefore can be paid out, or refunded, to the individual if the credit exceeds total liability.

system. While a credit would provide an equal benefit to all families, it would not proportionately reduce the bias faced by secondary earners. If the goal of the relief is to accurately measure the family's ability to pay, a uniform credit fails to achieve that goal.

An above-the-line deduction, therefore, provides a more precise and narrowly tailored form of relief, because it would grant a larger tax break to those whose second income is more heavily burdened—those at higher marginal rate brackets.[158] The deduction would reduce the amount of secondary income taxed at the highest marginal rate bracket established by the primary earner, thus directly easing the burden on secondary-earner income. This approach takes into account the fact that higher income earners tend to opt out more than lower income earners.[159] Under this proposal, the first dollar of the secondary earner's income would not be taxed at the rate established by the primary earner's income but would be excluded up to the amount of the deduction, lowering the effective tax rate on her earnings.

In order to have a significant impact, the deduction must be "above the line." Generally, if a deduction is below the line, it could fail to reach a majority of households. A below-the-line deduction (also known as an itemized deduction) can be taken only if a household does not opt to take the simpler standard deduction. According to the IRS, nearly two-thirds of all taxpayers take the standard deduction every year.[160] This means that those families would not realize the benefit of the secondary earner deduction, even though they would feel the burden of the secondary earner bias. Additionally, families that take the standard deduction tend to be lower income earners without significant assets, and therefore a below-the-line deduction would fail to relieve the taxpayers who most need the second income. The secondary earner deduction, therefore, must be structured as an "above-the-line" deduction, or one that can be taken regardless of the standard deduction.

C. Structure of the Secondary Earner Deduction

While the 1981 secondary earner deduction had significant impact on working mothers, it had only a modest effect on labor market participation.[161] Capped at $3,000, the deduction saved only hundreds of after-tax dollars for

158. For example, assume H1 earns $100,000 per year, and W1 earns $30,000 per year, and H2 earns $250,000 while W2 still earns $30,000. Using 2013 rates, Couple 1's tax liability would be approximately $24,000, and couple 2's would be approximately $68,000. A 10% credit (uncapped) for the secondary earner would reduce both couple's tax liability by the same amount, $3,000. On the other hand, a deduction would reduce Couple 1's liability by about $500, whereas it would reduce Couple 2's liability by about $1,000.

159. *See supra* Part IV.E.

160. *In 2012, Many Tax Benefits Increase Due to Inflation Adjustments*, IRS (Oct. 20, 2011), http://www.irs.gov/uac/In-2012,-Many-Tax-Benefits-Increase-Due-to-Inflation-Adjustments.

161. Feenberg, *supra* note 148, at 39.

many families.[162] With many women seeing over half their income spent on taxes and work-related expenses, the deduction was simply not enough.[163] To counteract the bias currently in the Code, the deduction must grant greater benefits to secondary earning spouses.

It is important that the deduction be structured as a percentage of secondary income, rather than a set dollar amount, so that it does not disproportionately subsidize families who have lower secondary earnings. If the first dollar of the secondary earner's income provided a set dollar benefit, the deduction would encourage women to work outside the home, but would not necessarily encourage full-time labor force participation. Instead, when structured as a percentage of earnings, the deduction is designed so that the more a woman earns, the more relief the household receives. For example, assume H1 earns $120,000 per year and W1 has a part-time job, earning $30,000, whereas H2 earns $75,000 per year and W1, who works full-time, also earns $75,000. If the deduction were to be structured as a set dollar amount of $5,000, both couples would receive a reduction in tax liability of approximately $1,300, regardless of the secondary earner's income. If, however, the deduction were structured as a percentage of secondary earnings, the results would encourage full-time participation. If, for example, the deduction were limited to 20% of secondary earnings, Couple 1's tax liability would be reduced by $1,700, whereas Couple 2's liability would be reduced by almost $4,000.

This design, therefore, directly responds to the historical trends in labor elasticity of women: previous secondary earner relief impacted the number of hours women worked more than their overall labor force participation. The progressivity of the Code will be maintained, though, because the deduction should phase out above a certain level, and therefore it will not afford relief to the very highest earning taxpayers.

That said, the optimal percentage for the deduction depends on women's behavioral responsiveness to incentives, which can only be determined by further study. At a minimum, the 10% deduction should be reinstated with an increased cap. Indexing for inflation alone, the $30,000 cap that existed in 1982 would be equal to almost $73,000 in 2013.[164]

Critics will surely argue against this deduction on the grounds that implementing it will decrease federal tax revenue. Not only does this argument overlook the low overall cost of the deduction, but it also fails to recognize that under the current Code, the government is profiting by maintaining a bias against secondary earners. The federal income tax revenue will decrease, but the current revenue levels are only so high because the Code is far from neutral. In addition, estimates for the federal cost of the deduction vary, but most are severely inflated. For example, when former President George W. Bush proposed a 10%

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162. I.R.C. § 221(b)(2) (1981).

163. KEARNEY & TURNER, *supra* note 87, at 20–21.

164. *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm (last visited May 31, 2015).

deduction capped at $30,000, it was projected to cost $112 billion over ten years, or an average of $11.2 billion per year.[165] This estimate, however, does not account for the increased federal earnings—income and payroll—that result from greater labor force participation and greater working hours of women.[166] One study suggests that these factors could reduce the revenue loss by 30%.[167]

Even assuming the highest cost estimates, implementing a secondary earner deduction would decrease individual income tax revenue by less than 0.02%—a small price to pay for moving closer to neutrality, restoring gender equality in the Code, and encouraging many of the most highly educated and skilled workers to participate in the labor force.[168]

CONCLUSION

The 1948 introduction to the Code of joint filing—and therefore income aggregation and income splitting—based tax liability on the household's, rather than the individual's, income. While neutral on its face, the Code has a substantially biased effect in its application. In the mid-twentieth century, the household income almost always meant the husband's income, while the wife stayed at home or only worked part-time. To this day, women earn a fraction of what men earn, causing wives to be labeled as secondary earners in the majority of marriages. As the secondary earner, a woman's first dollar of earnings is taxed at the highest marginal rate established by the husband's earnings. The high marginal taxes combined with work-related expenses, especially childcare expenses, cause a significant bias against secondary earners. Additionally, as the earnings of the spouses become more equal, the penalty that the couple pays upon marriage increases, reflecting a belief that marriages do not need two earners.

While this has always been an important and significant problem, attention to the secondary earner bias in the past decade has decreased. Meanwhile, the United States has achieved major progress in other areas of gender equality and justice. Most Americans no longer believe that women should be stay-at-home mothers while men should work. Women are more educated than they have ever been, and they are also earning more than ever, both numerically and relative to the earnings of men. Many women want to work, and those who do so are often tremendously successful. Unfortunately, some of the most educated and skilled women in the U.S. are still opting out of the workforce upon having children. Assuming these women are weighing the economic costs and benefits of

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165. JANE GRAVELLE, THE MARRIAGE TAX PENALTY 50 (2006).

166. Martin Feldstein & Daniel R. Feenberg, *The Taxation of Two Earner Families*, *in* EMPIRICAL FOUNDATIONS OF HOUSEHOLD TAXATION 37–38 (1996), *available at* http://www.nber.org/chapters/c6236.pdf.

167. *Id.*

168. As a percentage of 2011 federal revenue, estimates are closer to 0.0102%. *See Federal Revenue By Source,* THE HERITAGE FOUNDATION, http://www.heritage.org/federalbudget/federal-revenue-sources.

choosing whether or not to return to work after children, the Code places a disincentive on choosing to return to work.

The federal tax code is therefore ill suited to society in 2015. To achieve better effects more aligned with today's values, the Code needs to move closer to being career-neutral. Implementing a secondary earner deduction will work to reduce the gender bias embedded in the Code. While it is certainly not a perfect fix, it is a small, realizable step towards neutrality.