

Race, Class, and Gender Essentialism in Tax Literature: The Joint Return

Dorothy A. Brown*

Table of Contents

I. Introduction	1471
II. The Literature's Focus on Married Women as Marginal Wage Earners	1474
A. Introduction	1474
B. Employment Experiences of Married Men and Women .	1474
C. The Federal Tax Laws Penalize Married Women Who Are Marginal Wage Earners	1477
1. The Joint Return Penalizes Married Women in the Paid Labor Force	1477
2. The Failure to Tax Imputed Income Encourages Married Women to Work at Home	1481
3. The Limited Deductibility of Work-Related Expenses Penalizes Married Women Who Work in the Paid Labor Force	1482
4. Summary	1483
D. Solutions: Federal Tax Laws Must Encourage Married Women to Increase Their Participation in the Paid Labor Force	1484
1. Abolish Joint Return	1485
2. Tax Imputed Income	1486
3. Provide Tax Incentives for Wives in the Paid Labor Force	1486

* Professor, University of Cincinnati College of Law, Cincinnati, Ohio. B.S. 1980, Fordham University; J.D. 1983, Georgetown University Law Center; L.L.M. 1984, New York University. I would like to thank Professors Anne Alstott, David Brennan, Richard Briffault, Karen Brown, Karen Burke, Paul Caron, Charlotte Crane, Mary Louise Fellows, Jonathan Forman, Michael Graetz, Gwen Handelman, Ron Krotoszynski, Jr., Bradford Mank, Donna Nagy, Joel S. Newman, Daniel Shaviro, Elizabeth Wilborn, the participants at the Second Annual Northeastern People of Color Legal Scholarship Conference, the students in my Fall 1996 Tax Policy class, and Irene Segal-Ayers for their helpful comments on earlier drafts. A heartfelt thanks to Mr. Mark Carozza of the University of Cincinnati's Institute for Policy Research. © 1997 Dorothy A. Brown.

4.	Subsidize Employers that Hire Wives	1487
5.	Replace Progressive Rate Structure with Flat Tax . .	1487
III.	Unmasking the Race, Class, and Gender Bias in the Federal Tax Laws	1488
A.	Introduction	1488
B.	The Race, Class, and Gender Bias in the Waged Labor Force	1488
C.	Analysis of Spousal Contributions to Household Income by Race, Class, and Gender	1490
1.	Household Contributions by African-American Husbands and Wives	1490
2.	Household Contributions by White Husbands and Wives	1495
D.	The Tax Consequences of Spousal Contributions to Household Income by Race, Class, and Gender	1498
1.	The Literature Most Accurately Describes Upper-Income White Households	1499
2.	Federal Tax Laws Penalize Equal Wage-Earning Couples	1501
a.	African-American Households Pay the Greatest Marriage Penalty	1501
b.	In White Households, Middle-Income Families Pay the Greatest Marriage Penalty	1504
3.	Low-Income Wives Are Equally Likely to Be the Sole Wage Earner	1506
4.	Summary	1507
IV.	Tax Literature Solutions Perpetuate Class, Race, and Gender Biases	1508
A.	Introduction	1508
B.	The Literature's Solutions Perpetuate Race, Class, and Gender Bias	1508
1.	Abolish Joint Return	1508
2.	Tax Imputed Income	1509
3.	Provide Tax Incentives to Wives in the Paid Labor Force	1510
4.	Subsidize Employers that Hire Wives	1511
5.	Replace Progressive Rate Structure with Flat Tax . .	1511
V.	Conclusion	1512

[T]ax-law decisions are cultural artifacts – understood as a part of a larger societal structure and, simultaneously, revealing of that culture.¹

I. Introduction

The current literature discussing the federal tax laws' gender bias ignores all racial differences among women.² Even the few authors who have acknowledged class distinctions similarly ignore racial differences among women.³ This Article demonstrates how the literature's gender essentialism masks the bias in the federal tax laws based upon race, class, and gender in ways previously ignored.

For example, the literature focuses exclusively on the tax consequences of married women as marginal or secondary wage earners.⁴ The literature

1. Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 296 (1988).

2. See generally Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993); Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773 (1989); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994); Laura A. Davis, Note, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197 (1988). But see Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA 45 (Karen B. Brown & Mary Louise Fellows eds., 1996) (arguing that, under federal tax law structure, black taxpayers are more likely to pay marriage penalty, and white taxpayers are more likely to receive marriage bonus).

3. See Blumberg, *supra* note 2, at 94 (noting that "[i]f children on A.F.D.C. are likely to benefit from the dignity their mother derives from gainful employment, there is no reason to believe that middle class children, particularly girl children, would not also benefit from a gainfully employed mother"); Edward J. McCaffery, *Equality, of the Right Sort*, 6 UCLA WOMEN'S L.J. 289, 293-94 (1996) (providing gender wage gap information only for white workers); McCaffery, *supra* note 2, at 1014-29 (organizing couples by "economic class, because matters vary quite a bit with income level. Three couples are posited as follows: the Lovers, where the husband earns \$10,000; the Mids, where the husband earns \$25,000; and the Uppers, where the husband earns \$60,000"); Robinson & Wenig, *supra* note 2, at 850-51 (observing that "marital status tax problems . . . may be more likely to hurt the pocket books of the poor and to benefit the better-off").

4. See Bittker, *supra* note 2, at 1433 ("In a society that takes the husband's job for granted and views the wife as the secondary wage earner, however, it is reasonable to describe the existing state of affairs as biased against women."); Blumberg, *supra* note 2, at 49 ("Thus, the American working wife should properly be understood as a secondary family earner for the purpose of determining the work disincentive effect of various Code provisions."); Gann, *supra* note 2, at 43 ("Today, the wife typically continues to be the secondary worker; therefore, this bias in the tax system is most likely to affect her."); Kornhauser, *supra* note 2, at 64 ("By

concludes that the gender bias of federal tax laws operates to encourage women to remain at home and out of the waged labor market.⁵ The literature's solutions, therefore, are designed to encourage women to work more in the waged labor market.

The literature's gender bias analysis can be correct only if all married women are marginal wage earners. This Article examines never before published Census Bureau data to show that many married women are not marginal wage earners.⁶ Accordingly, an analysis of the gender bias in the federal tax laws from a non-essentialist perspective is needed. This Article provides such an analysis.

This Article demonstrates that the married women most likely to be marginal wage earners, namely those who are the exclusive focus of the literature, are upper-income and white. In addition, the married women least likely to be marginal wage earners, namely those who were previously ignored by the literature, are most likely to be African-American. By constructing all families as homogeneous, the literature successfully masks any race, class, or gender bias that may be embedded in the operation of the federal tax laws. As Professor Fellows notes, "the hallmark of successful subordination is when subordinating actions and beliefs become so accepted that they become indisputable and widely accepted as reflecting fairness and objective truth."⁷ This Article unmaskes the race, class, and gender biases in the federal tax laws previously ignored by questioning the "indisputable and widely accepted truth" articulated in the gender bias tax literature that all married women are marginal wage earners.

'penalizing' the second worker, the joint return discourages married couples from having a second earner (usually the wife), putting both psychological and economic stress on these families, on the wife in particular"); McCaffery, *supra* note 2, at 994 ("Historically, of course, wives have usually been the marginal earners Regardless of the historical pattern, the realities of childbirth tend to make the married mother a marginal employee."); Zelenak, *supra* note 2, at 365 (noting that "a couple [may] view[] the wife as the marginal wage earner (in the sense that the husband's job is a given, and the decision to be made is whether the wife should also take a job)"); Davis, *supra* note 2, at 198 (describing wife as "typically the discretionary worker"). *But see* Michael J. McIntyre, *Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion*, 58 N.C. L. REV. 469, 484 (1980) ("If a married woman, because of a stereotyped view of marriage, views herself as the marginal worker, we might bemoan the social conventions that have encouraged that perspective, but we have no cause for complaint against the tax system.").

5. See *infra* notes 71-77 and accompanying text.

6. Cf. Michele Ingrassia & Pat Wingert, *The New Providers*, NEWSWEEK, May 22, 1995, at 36, 36 ("A new study finds that in nearly half of American households, women earn about as much as men.").

7. Mary Louise Fellows, *The Antisubordination Principle in Tax Policy Discourse (A Case Study on the Tax Treatment of Child-Care Expenses)* 5 (July 1996) (unpublished manuscript, on file with author).

Part II provides a summary of the existing gender bias tax literature.⁸ It begins with the literature's treatment of all husbands as primary wage earners and all wives as marginal wage earners.⁹ It then describes three federal tax provisions and policies that the literature suggests interact to penalize married women and their families when married women are marginal wage earners, namely: (1) the operation of the joint return which is designed to treat a married couple as a single taxable unit;¹⁰ (2) the exclusion from income of the value of services contributed by a spouse to their household;¹¹ and (3) the deductibility of child care expenses.¹² Part II concludes by describing the literature's suggested solutions to the gender bias found in the federal tax laws.¹³

Part III examines Census Bureau household income data to show how the literature's treatment of all married women as marginal wage earners is over-inclusive.¹⁴ Many married women are not marginal wage earners, but contribute significant amounts to household income.¹⁵ Once differences among married women are recognized, the federal tax laws must be re-examined for race, class, and gender biases previously ignored by the literature. For example, the federal tax laws penalize households in which spouses contribute roughly equal amounts to household income.¹⁶ This Part shows that African-American households are more likely to pay a penalty under the federal tax laws because African-American spouses are more likely to contribute roughly equal amounts to household income.¹⁷

8. See *infra* Part II.

9. See *infra* Part II.B.

10. Only a husband and wife can file a joint return. I.R.C. § 6013(a) (1994). Joint returns, however, are not mandatory. Married couples can also file separate returns, but there is rarely a tax advantage to doing so. See Bittker, *supra* note 2, at 1431 (arguing that rate and schedule for married filing separate returns category "is deliberately designed to prevent separate returns from reducing their aggregate tax burden"); see also Anne Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2009 (1996); Brown, *supra* note 2, at 46 (noting that same-sex couples cannot file joint tax returns); McCaffery, *supra* note 2, at 993. See *infra* notes 41-69 and accompanying text for an analysis of the joint tax return's impact on married women's incentive to work in the paid labor force.

11. The value of services provided by a spouse to his or her household is referred to as "imputed income" and is not taxable. See *infra* notes 71-77 and accompanying text.

12. Certain child care expenditures are deductible or excluded from gross income calculation. See I.R.C. §§ 21 and 129 (1994); see also *infra* notes 78-87 and accompanying text.

13. See *infra* Part II.D.

14. See *infra* Part III.

15. See *infra* notes 137, 141 and accompanying text.

16. See *infra* note 57 and accompanying text.

17. See *infra* notes 203-17 and accompanying text. Although a richer examination would also include an inspection of household income for Hispanic-Americans, Asian-Americans, and Native-Americans, this Article is a first step in the process.

Part IV examines the solutions previous literature has designed to address the gender bias found in the federal tax laws.¹⁸ It shows how those suggested solutions address only the problems of upper-income white women. Those solutions ignore the race, class, and gender biases observed herein that apply to the vast majority of women in this country. This Article concludes by observing that the gender bias in the federal tax laws cannot be solved until the literature examines racial and class distinctions among women.¹⁹

II. The Literature's Focus on Married Women as Marginal Wage Earners

A. Introduction

This Part describes the literature's treatment of married women as marginal wage earners and the resulting federal income tax consequences. It begins by describing the very different employment experiences of married men and women which result in married men being the primary wage earners and married women being the marginal or secondary wage earners. It then describes the resulting tax consequences that penalize families in which wives are marginal wage earners and afford tax benefits to families in which married women work in the home while their husbands work in the paid labor force.²⁰ The literature argues that the federal tax laws encourage married women to work in the home. It concludes by describing the literature's solutions that are designed to encourage married women to enter the paid labor force.

B. Employment Experiences of Married Men and Women

Several authors acknowledge that married women suffer from wage discrimination,²¹ although the literature does not uniformly discuss or agree on the causes of that discrimination. For example, Professor McCaffery informs us that wage discrimination is more a function of marital status than

18. See *infra* Part IV.

19. See *infra* Part V.

20. See McCaffery, *supra* note 2, at 1035 (noting "behavioral biases of the tax laws against marriage in general, against two-earner marriages in particular, and in favor of 'all-or-nothing' labor decisions of secondary earners"); cf. Tamar Lewin, *Americans Attached to Traditional Roles for Sexes, Poll Finds*, N.Y. TIMES, Mar. 27, 1996, at A15 (stating "[n]early half of the Americans surveyed said the ideal family structure was one in which only the father earned the living and the mother stayed home with the children").

21. See Blumberg, *supra* note 2, at 90 (describing "prevalent pattern of wage discrimination"); McCaffery, *supra* note 2, at 1030 (noting that data demonstrate that "ever married women (women who were married at some time, whether they are now divorced, widowed, or still married) are discriminated against in terms of wage levels, whereas never married women are not, and that women are especially underrepresented in high-level, managerial positions"); Davis, *supra* note 2, at 211 ("[T]he jobs available to women are generally among the lowest paid positions . . .").

gender,²² and states that "never married women have virtual wage parity with men."²³ However, Professor Zelenak does not acknowledge the existence of wage discrimination.²⁴

Married women suffer from wage discrimination in the following manner. The labor market pays married men the most and married women the least.²⁵ Two consequences flow from that fact.

First, married men become more committed to the workplace because they are compensated for their commitment, while married women become less committed to the workplace because they are not compensated for their commitment.²⁶ The labor elasticity for secondary workers, such as married women, is high and for primary workers, such as husbands, is low.²⁷ Accordingly, as the husband's income increases, the participation rate of the wife decreases.²⁸ Married women who can rely upon their husbands' income choose to stay home and not be subjected to wage discrimination.²⁹

Second, the resulting wage gap between husbands and their wives minimizes the wives' contribution to household income.³⁰ Wives earn on average less than half of what their husbands earn.³¹ Wives who can rely upon

22. McCaffery, *supra* note 2, at 1058.

23. *Id.* at 1039.

24. See Zelenak, *supra* note 2, at 371 ("Having been drawn into the labor force by the lure of relatively good wages, many women found that they liked the challenge, stimulation, and psychic rewards of work . . .").

25. In the hierarchy of wages, married men are paid the highest, followed by never-married men and women who have virtual wage parity with each other, and bringing up the rear are the ever-married women. See Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 621 (1993).

26. See McCaffery, *supra* note 2, at 1039-40.

27. See Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1925-26 (1987) ("Nearly all studies of the labor supply find that married women in general, and married women with young children in particular, are much more responsive to changes in the tax rate than are men or single women."); Gann, *supra* note 2, at 43-44 ("The labor supply elasticity of husbands, on the other hand, remains much lower than that of wives. Accordingly, their labor supply response to changes in real net wages is much less substantial than that of wives."); McCaffery, *supra* note 2, at 1038-39 ("But a good deal of evidence supports the proposition that the labor elasticity for secondary earners in general, and married women in particular, is higher than it is for primary earners, or husbands.")

28. See Gann, *supra* note 2, at 44 ("The participation rates of husbands in the labor force generally are higher than those of wives.")

29. Cf. McCaffery, *supra* note 2, at 1058 (observing that unmarried women suffer much less labor market discrimination than married women).

30. See *id.* at 994 ("The wage gap between men and women makes the wife's income less important . . ."); see also Blumberg, *supra* note 2, at 90 (noting existence of "prevalent pattern of wage discrimination").

31. See McCaffery, *supra* note 2, at 994 ("[M]arried working women earn, on average,

their husbands' more highly compensated wages only work if their after-tax wages are attractive.³²

Although the gender bias literature varies in many respects, each article contains the same fundamental premise that married men can financially support their families without their wives working in the paid labor force.³³ Professor Bittker, in a frequently cited article, observed over twenty years ago that "society . . . takes the husband's job for granted."³⁴ In a more recent article, Professor Zelenak suggests that "the wife as marginal wage earner" exists because her "husband's job is a given."³⁵ Although Professor McCaffery suggests that "[t]here is no *a priori* reason to assume the wife should be the marginal earner,"³⁶ his article is built around three examples, all of which include husbands as the primary wage earners.³⁷ Further Professor McCaffery notes that "[h]istorically, of course, wives have usually been the marginal earners."³⁸ Thus, the literature claims that the families' economic

forty-six percent of what their husbands do.").

32. See *id.* at 1039 ("[H]usbands tend to work no matter what, but wives do so only if their after-tax wages are attractive."); see also Alicia H. Munnell, *The Couple Versus the Individual Under the Federal Personal Income Tax*, in *THE ECONOMICS OF TAXATION* 247, 264 (Henry J. Aaron & Michael J. Boskin eds., 1980) (explaining that "[a]vailable evidence suggests that the labor supply of primary earners, male or female, is less sensitive to variations in the net wages than that of secondary workers, wives, and teenagers"). Professor Munnell also states that "[s]tudies of the labor force activity of males generally have concluded that factors other than money play the most important role in work motivation and that the labor force participation of males is affected little by the income tax." *Id.* at 264.

33. See Bittker, *supra* note 2, at 1433 (indicating that "society . . . takes the husband's job for granted and views the wife as the secondary wage earner"); Blumberg, *supra* note 2, at 49 ("Thus, the American working wife should properly be understood as a secondary family earner for the purpose of determining the work disincentive effect of various Code provisions."); Gann, *supra* note 2, at 43 ("Today, the wife typically continues to be the secondary worker . . ."); Kornhauser, *supra* note 2, at 64 ("By 'penalizing' the second worker, the joint return discourages married couples from having a second earner (usually the wife) . . ."); McCaffery, *supra* note 2, at 994 ("Historically, of course, wives have usually been the marginal earners."); Zelenak, *supra* note 2, at 365 (stating that "couple views the wife as the marginal wage earner (in the sense that the husband's job is a given . . .)"); Davis, *supra* note 2, at 198 (describing wife as "typically the discretionary worker").

34. Bittker, *supra* note 2, at 1433.

35. Zelenak, *supra* note 2, at 365.

36. McCaffery, *supra* note 2, at 993. Professor McCaffery also acknowledges that "it is certainly possible, for example, that both spouses might be equally marginal . . ." *Id.* Apparently Professor McCaffery cannot conceive of women as the primary wage earners. See *infra* note 137 and accompanying text.

37. See McCaffery, *supra* note 2, at 1014 (hypothesizing on effect of tax laws on lower-, middle-, and upper-class married couples, and explaining that "[i]n each case, the salary of the husband is fixed in order to focus on the marginal decision facing the wife as she decides whether or not to enter the work force, and at what level of activity").

38. *Id.* at 994.

survival is not dependent upon wives working outside the home, but upon husbands working outside the home and wives working inside the home.

Given that husbands earn considerably more in the paid labor force, they are the primary wage earners. Given that wives earn considerably less in the paid labor force than their husbands, they are the marginal wage earners. Labor force discrimination encourages wives to work at home and husbands to work in the paid labor force. Next, the literature observes how the federal tax laws similarly encourage wives to work at home and husbands to work in the paid labor force.

C. The Federal Tax Laws Penalize Married Women Who Are Marginal Wage Earners

This subpart focuses on three tax policies and provisions that penalize married women: first, the joint return provision of the Internal Revenue Code of 1986 ("Code"), as amended,³⁹ second, the exclusion from income of the value of services contributed by wives to their households; and third, the limited deductibility of work related expenses, such as child care expenditures.⁴⁰

1. The Joint Return Penalizes Married Women in the Paid Labor Force

Congress enacted the Revenue Act of 1948 which permitted the filing of joint returns.⁴¹ The existing tax literature suggests that the joint tax return was "put in place at a time when traditional families – meaning households with men working outside the home and women working inside the home – were dominant."⁴² When Congress enacted the joint return provisions in 1948, eighty percent of all American families were single-income

39. I.R.C. § 6013 (1994).

40. Although numerous commentators have described other Code provisions that penalize married women, this Article will only focus on the three described in the text. See, e.g., James E. Maule, *Tax and Marriage: Unhitching the Horse and the Carriage*, 67 TAX NOTES 539, 544-46 (1995) (explaining phase-outs and other limitations that increase marriage penalty); McCaffery, *supra* note 2, at 996-1001, 1010-13 (examining behavioral effects of social security taxation and describing behavioral effects of fringe benefit taxation rules).

41. Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 110 (codified as amended in scattered sections of 26 U.S.C.); see Stanley Surrey, *Federal Taxation of the Family—the Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1106 (1948). For an excellent discussion of how the larger societal assumptions about women and income splitting became part of the Code when Congress permitted the joint return, see generally Jones, *supra* note 1.

42. McCaffery, *supra* note 2, at 987-88; see also Bittker, *supra* note 2, at 1413 (arguing that "enactment of the income-splitting joint return meant that the political credit for reducing taxes was concentrated on Congress rather than dispersed among the State legislatures"); Jones, *supra* note 1, at 296 (stating that income splitting joint return "was viewed as a way of conserving traditional gender roles and power relationships"); Zelenak, *supra* note 2, at 347 (positing that joint return "legislation was essentially a historical accident – a response to the geographic discrimination and legal confusion resulting from the [Supreme Court's decisions]").

households.⁴³

The joint return treats married couples as a single taxable unit.⁴⁴ It was designed to tax two married households with the same total wage income equally regardless of whether one or both spouses were in the paid labor force in each household.⁴⁵ Accordingly, two married couples with the same total wage income will be taxed equally even though one couple has a sole wage earner and the other couple has two wage earners.⁴⁶

The filing of a joint return means the second wage earner's income is added to the primary wage earner's income and is taxed at a higher rate than if the second wage earner filed individually.⁴⁷ That higher rate is due to the progressive tax rate structure.⁴⁸ The progressive tax rate structure benefits the primary wage earner whose first dollar of earnings is taxed at the lower rate and penalizes the second wage earner whose first dollar is taxed at the highest tax rate at which the primary wage earner's last dollar was taxed.⁴⁹ The literature also states that men are more than five times more likely to be the single earner in single-earner households.⁵⁰

43. Richard L. Elbert, Comment, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 CONST. L.J. 1171, 1180 (1995). This author has unsuccessfully attempted to obtain the racial breakdown of the 80% figure.

44. I.R.C. § 6013(a) (1994).

45. See Bittker, *supra* note 2, at 1395 ("Since 1948, however, the Internal Revenue Code has imposed the same liability on all equal-income married couples, whether the combined income is generated by the earnings or investments of one spouse or both and without regard to the division of ownership between them.").

46. This concept is commonly referred to as "equal taxes for equal-income married couples." Bittker, *supra* note 2, at 1395. *But see* Jones, *supra* note 1, at 261 (stating that "equal taxes for equal income" argument for joint return was articulated "in a more sophisticated form" after the fact); Zelenak, *supra* note 2, at 342-43 (noting that joint return legislation "was an ad hoc response to tax discrimination between residents of community property and separate property states, caused by two Supreme Court opinions"). Professor Bittker further states that the principle of "equal taxes for equal-income married couples" was "almost universally accepted" by tax theorists Bittker, *supra* note 2, at 1395 (quoting JOSEPH A. PECHMAN, FEDERAL TAX POLICY 87-88 (rev. ed. 1971)). What Professor Bittker ignores is the argument that those two couples do not have equal economic income because the tax laws do not tax the value of services provided by a spouse for the benefit of other household members, making the one wage-earning couple economically better off because it receives the spouse's services without incurring any taxable income. See Zelenak, *supra* note 2, at 362 (arguing that "one-earner couple is significantly better off because of its greater imputed income from self-performed services and its lesser nondeductible work-related expenses").

47. See Zelenak, *supra* note 2, at 339-40 (noting that spouses report their combined income on joint returns and calculate their tax liability on that combined income).

48. See *id.* at 339.

49. See Kornhauser, *supra* note 2, at 64 ("By 'penalizing' the second worker, the joint return discourages married couples from having a second earner (usually the wife) . . .").

50. See McCaffery, *supra* note 2, at 994.

Single-income households benefit most from joint filing because they receive a marriage bonus.⁵¹ The marriage bonus is greater the more unequal the household income split, with the greatest bonus to the household in which one taxpayer earns 100% of the income.⁵² The literature provides that today, in contrast to conditions in 1948, fewer than ten percent of Americans live in the "traditional" family, with a husband working in the paid labor force and a wife working solely in the home.⁵³

Joint filing penalizes two income households by subjecting them to a marriage penalty.⁵⁴ The marriage penalty operates to add the first dollar of the wife's salary to her husband's last dollar of salary which will be taxed at the husband's marginal tax rate.⁵⁵ Two-earner married couples, therefore, pay a higher total tax than two single individuals with the same earnings. Generally, the marriage penalty does not begin until one spouse earns twenty percent of what the other does.⁵⁶ The marriage penalty is greatest when the household income is divided evenly.⁵⁷ Table 2.1 below describes the marriage penalty and bonus afforded by the joint return.⁵⁸

Proportionately, however, the marriage penalty is greatest for low-income individuals due to the operation of the earned income tax credit ("EITC").⁵⁹

51. See Brown, *supra* note 2, at 46; Zelenak, *supra* note 2, at 340-41; Elbert, *supra* note 43, at 1182 n.52; see also Mary L. Heen, *Welfare Reform, Child Care Costs, and Taxes: Delivering Increased Work-Related Child Care Benefits to Low-Income Families*, 13 YALE L. & POL'Y REV. 173, 210 n.216 (1995) (defining marriage bonus).

52. See *infra* Table 2.1, at p. 1480 (demonstrating that marriage bonus is greatest when household has single wage earner).

53. See McCaffery, *supra* note 2, at 985-86.

54. See Zelenak, *supra* note 2, at 340-41; Elbert, *supra* note 43, at 1182.

55. See Bittker, *supra* note 2, at 1431 ("[T]he second salary is added to the first in computing their combined taxable income, with the result that the first dollar of the second salary is taxed at the marginal rate applicable to the last dollar of the first salary."); Zelenak, *supra* note 2, at 343 ("The current system strongly discourages a married woman from seeking employment by stacking her income on top of her husband's, so that even her first dollar of income is taxed at a high marginal rate.").

56. See McCaffery, *supra* note 2, at 1016. Professor McCaffery additionally notes that this is not true for low-income taxpayers otherwise eligible for the earned income credit. *Id.*

57. John Brozovsky & A.J. Cataldo II, *A Historical Analysis of the "Marriage Tax Penalty"*, 21 ACCT. HISTORIANS J. 163, 166 (1994); see *infra* Table 2.1, at p. 1480 (demonstrating that greatest marriage penalty falls upon households in which income is contributed evenly).

58. See *infra* Table 2.1, at p. 1480.

59. See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 559-64 (1995); McCaffery, *supra* note 2, at 995; see also Philip Jagolinzer & John M. Strefeler, *Marital Status and the Taxes We Pay*, 161 J. ACCT. 68, 74 (1986) (stating that "[t]he earned income credit may produce one of the most extreme instances of marital discrimination"); Ellen E. Schultz, *Living in Sin to Cut Tax Bill Would Look Even Better to Some Under Clinton Plan*, WALL ST. J., Mar. 9, 1993, at C1 ("Calculations

Table 2.1
THE MARRIAGE TAX (PENALTY)/BONUS BY INCOME
& ALLOCATION BETWEEN SPOUSES (1993)⁶⁰

INCOME ALLOCATION						
INCOME	0%/100%	10%/90%	20%/80%	30%/70%	40%/60%	50%/50%
\$20,000	728	428	128	(173)	(180)	(180)
\$30,000	968	278	(173)	(180)	(180)	(180)
\$40,000	2,268	1,148	321	(180)	(180)	(180)
\$50,000	3,282	1,882	1,075	425	(226)	(466)
\$60,000	3,296	1,602	815	35	(746)	(1,285)
\$70,000	3,596	1,568	555	(356)	(1,266)	(1,285)
\$80,000	3,896	1,708	428	(746)	(1,285)	(1,285)
\$90,000	4,196	1,848	408	(1,032)	(1,285)	(1,285)
\$100,000	4,497	1,990	390	(970)	(1,270)	(1,284)
\$125,000	4,695	1,590	(411)	(1,195)	(1,570)	(1,857)
\$150,000	5,945	1,887	(970)	(1,420)	(1,857)	(1,859)
\$200,000	5,990	882	(84)	(3,364)	(4,312)	(4,312)
\$500,000	6,164	(4,203)	(8,789)	(11,642)	(13,442)	(15,024)

The EITC marriage penalty is a function of its phase-out provisions being identical for single and married individuals.⁶¹ The basic rate structure marri-

prepared for The Wall Street Journal by KPMG Peat Marwick show that the marriage penalty has the greatest impact on the lowest wage earners with children.⁶¹ See I.R.C. § 32 (1994) for the definition of and the rules applicable to the EITC.

60. John Brozovsky & A.J. Cataldo II, *The Marriage Tax Penalty: Inequities and Tax Planning Opportunities*, OHIO CPA J., Dec. 1993, at 21, 22 (table reprinted with permission of publisher). This chart describes the marriage bonus (or penalty) paid by married couples when compared with what they would have paid had they remained single. For example, a sole wage earner household (0%/100%) earning \$20,000 of income would receive a marriage bonus of \$728.00. The chart ignores the EITC's marriage penalty or marriage bonus.

61. See Alstott, *supra* note 59, at 561-62; Jonathan Barry Forman, *Simplification for Low-*

age penalty does not begin until incomes are 20% apart, while the EITC marriage penalty begins with the first dollar earned by the second wage earner.⁶² The marriage penalty for low-income individuals has been estimated to be as high as 9% of total income in certain instances.⁶³ The marriage penalty created by the EITC is a greater percentage of income than the penalty created by the progressive rate structure coupled with the joint return.⁶⁴

The EITC is generally unavailable to the lesser-earning spouse.⁶⁵ In 1996, a single individual with two children and \$10,000 of earned income would be eligible for an EITC of \$3,556.⁶⁶ If that person married another with \$10,000 of earned income and two children (who would have been eligible for the EITC of \$3,556 but for the marriage), as a couple, they could claim an EITC of \$1,789.⁶⁷ That results in a total marriage penalty of \$5,323.⁶⁸ Alternatively, a marriage bonus can result in the operation of the EITC in the following manner. If a childless worker earning \$10,000 marries a nonworker with two children, the couple could claim an EITC of \$3,556.⁶⁹ Neither would be eligible for the EITC before they married.⁷⁰

2. *The Failure to Tax Imputed Income Encourages Married Women to Work at Home*

The value of services a wife performs for herself or her family, commonly referred to as imputed income, is not taxable to the family unit.⁷¹ The

Income Taxpayers: Some Options, 57 OHIO ST. L.J. 145, 184 (1996); Zelenak, *supra* note 2, at 364.

62. See McCaffery, *supra* note 2, at 1016.

63. *Middle-Income Tax Proposals: Hearing Before the Senate Comm. on Finance*, 104th Cong. 48 (1995) (statement of Deborah H. Schenk) (describing following hypothetical: "[U]sing 1994 rates, two single taxpayers each earning \$13,000 would be entitled to a \$1,174 EITC or a combined \$2,348. If they married, they would have no EITC. Their marriage penalty is \$2,348 or 9% of their total income."); see also Alstott, *supra* note 59, at 562; McCaffery, *supra* note 2, at 1015-16 (suggesting that earned income tax credit "marriage penalty" can be as high as \$2,878).

64. See Zelenak, *supra* note 2, at 364; see also Forman, *supra* note 60, at 184.

65. See McCaffery, *supra* note 2, at 1017.

66. See Jonathan Barry Forman, *What Can Be Done About Marriage Penalties?*, 30 FAM. L.Q. 1, 8 (1996).

67. *Id.*

68. The EITC of \$3,556 for each single person totals \$7,112 if they do not marry. As a couple, their EITC is \$1,789. They lose \$5,323 in tax benefits under the EITC as a result of marriage.

69. See Forman, *supra* note 66, at 8; see also Alstott, *supra* note 59, at 562 n.116 (stating that if childless worker marries nonworker with children, couple may receive higher EITC than if individuals remain single).

70. Forman, *supra* note 66, at 8-9.

71. JOSEPH M. DODGE ET AL., *FEDERAL INCOME TAX: DOCTRINE, STRUCTURE AND POLICY*

value of services performed by a wife outside of her home in return for wages is taxable income.⁷² The failure to tax imputed income creates a tax incentive for women to work in the home and not in the paid labor force.⁷³ By performing housekeeping and child care services herself, the wife obtains a tax benefit for her family.⁷⁴

Wives, therefore, are forced to compare the after-tax costs of paid labor with nontaxable imputed income.⁷⁵ The exclusion of imputed income, coupled with the marriage penalty, encourages marginal wage earners to work inside the home, and not in the paid labor force.⁷⁶ In many instances, such a calculation will influence the wife to work at home and will result in a single-earner household.⁷⁷

3. *The Limited Deductibility of Work-Related Expenses Penalizes Married Women Who Work in the Paid Labor Force*

Work-related expenses that are not deductible by working mothers include commuting, job training, clothing, and child care.⁷⁸ Although all workers face the non-deductibility issue, the literature suggests that the limited deductibility of work-related expenses compounds the Code's gender bias by ignoring the unique circumstances faced by working mothers.⁷⁹ The literature focuses primarily on the limited deductibility of child care expenses. As a result, the balance of this section will be so confined.

55-57 (1995) ("It has always been assumed that Congress has never intended to tax imputed income from services or property."); LAURIEL MALMAN ET AL., PROBLEMS, CASES AND MATERIALS ON FEDERAL INCOME TAXATION 322-23 (1994); *see also* 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS § 5.3.1 (2d ed. 1992) (stating that congressional silence indicates that Congress never intended to tax imputed income).

72. *See* I.R.C. § 61(a)(1) (1994); *see also* Gann, *supra* note 2, at 40.

73. *See* McCaffery, *supra* note 2, at 1001; Zelenak, *supra* note 2, at 363, 372.

74. *See* McCaffery, *supra* note 2, at 1003.

75. *See id.* at 1004; Zelenak, *supra* note 2, at 372.

76. *See* Gann, *supra* note 2, at 41.

77. *See* McCaffery, *supra* note 2, at 1004.

78. *See id.* at 1009. Housekeeping services are only deductible if they relate to child care. Zelenak, *supra* note 2, at 373 ("And housekeeping expenses not related to child care are not eligible for any tax benefit.").

79. *See* McCaffery, *supra* note 2, at 1009 (noting three responses to argument that all employees, not just working wives, incur such costs: first, married women may incur higher entry costs into paid labor force including child care and loss of nonmarket time spent on family; second, typical employee benefits from standard deduction that second wage earner wife does not; third, there is no reason to equate married working mothers with all other employees). *But see* Zelenak, *supra* note 2, at 373-74 (noting that limited deductibility of work-related expenses is not problem caused by joint returns.)

The limited deductibility of child care expenses penalizes the working mother in the paid labor force.⁸⁰ When married mothers decide to enter or re-enter the paid labor force, they incur child care expenses, which the courts have held are nondeductible.⁸¹ Currently the Code has two provisions, Sections 21 and 129, which afford limited tax relief to families that incur child care expenses.⁸²

Section 21 is a tax credit that cannot exceed the earned income of the lesser earning spouse.⁸³ This provision permits a credit based on an applicable percentage of child care expenses, with limits. Section 21 is helpful, but does not equal the benefit of a full deduction.⁸⁴

The exclusion of Section 129 is only available when a dependant care plan is provided by an employer.⁸⁵ Only one-third of full-time employees at private firms were eligible for such plans in 1991.⁸⁶ Taxpayers must choose between the provisions of Sections 21 and 129 – they cannot take advantage of both.⁸⁷

4. Summary

If a wife decides to enter the paid labor force, she will have to take into account several factors. Her wage income will be depressed as a result of labor force discrimination.⁸⁸ She will be taxed on her wage income at her husband's highest (marginal) tax rate.⁸⁹ If she is a mother, child care expenses will be paid out of her wages.⁹⁰

80. See *Smith v. Commissioner*, 40 B.T.A. 1038 (1939), *aff'd per curiam*, 113 F.2d 114 (2d Cir. 1940); Zelenak, *supra* note 2, at 363, 372-73.

81. See McCaffery, *supra* note 2, at 1006 (citing *Smith*, 40 B.T.A. at 1039-40). For a more complete discussion of the decision, see Blumberg, *supra* note 2, at 63-66; Fellows, *supra* note 7, at 113-20.

82. See I.R.C. §§ 29, 129 (1994); see also McCaffery, *supra* note 2, at 1007-10; Zelenak, *supra* note 2, at 372-73 & n.166.

83. See I.R.C. § 21 (1994); McCaffery, *supra* note 2, at 1007.

84. See McCaffery, *supra* note 2, at 1007; Zelenak, *supra* note 2, at 372-73 ("Child care expenses are eligible for a credit, but for many taxpayers the credit falls far short of equaling the benefit of a full deduction.").

85. See I.R.C. § 129 (1994); McCaffery, *supra* note 2, at 1008.

86. See Heen, *supra* note 51, at 191-92; cf. Zelenak, *supra* note 2, at 373 ("The exclusion, however, has not been made widely available by employers. The revenue cost of the exclusion for 1993 has been estimated at only \$635 million, compared with \$2.955 billion for the child care credit.").

87. See Heen, *supra* note 51, at 192.

88. See *supra* notes 21-25 and accompanying text.

89. See *supra* notes 47-50 and accompanying text.

90. See *supra* notes 80-82 and accompanying text.

The tax consequences of a wife's decision not to enter the paid labor force are decidedly different. She will not be subjected to depressed wages as a result of discrimination.⁹¹ Her family will receive a marriage bonus – not a penalty.⁹² By performing services for her family, she does not incur expenditures for which deductions may be limited and such services are not taxable income.⁹³

The literature concludes that tax and labor policies encourage married marginal wage earners to remain at home and out of the paid labor market.⁹⁴ The current system reinforces job discrimination and gender role stereotypes and keeps women out of the labor force who would otherwise be effective role models.⁹⁵ Encouraged to work at home, married women become increasingly dependent upon their husbands for their economic survival.⁹⁶ The next section describes the literature's solutions to the gender bias found in the federal tax laws.

D. Solutions: Federal Tax Laws Must Encourage Married Women to Increase Their Participation in the Paid Labor Force

Implicit in the literature's proposed solutions is the idea that tax laws influence behavior. Whether taxes change behavior requires an empirical analysis of the specific tax law in question.⁹⁷ There is, however, widespread support for the proposition that taxes influence behavior.⁹⁸

91. See *supra* notes 29-32 and accompanying text.

92. See *supra* notes 51-52 and accompanying text.

93. See *supra* notes 73-77 and accompanying text.

94. See Blumberg, *supra* note 2, at 92-93 ("The national social policy reflected in disincentive provisions is simply expressed: a married woman ought to stay at home unless her family is virtually destitute, that is, in danger of becoming or presently a public charge."); Gann, *supra* note 2, at 41 ("The aggregation of market income under a progressive tax rate structure discourages the spouse considered by the couple to be the secondary worker (typically the wife) from working outside the home . . ."); McCaffery, *supra* note 2, at 1028 ("Encouraging upper income women to stay home deprives women of powerful, and symbolically important, roles. The evidence of discrimination against women in upper management continues to be pervasive."); Davis, *supra* note 2, at 214 ("By encouraging married women to remain at home, the current system reinforces job discrimination and sexual stereotypes abhorrent to the goals of the women's movement."). Professor Blumberg makes the further point that because welfare mothers are told to work and "[i]f children on A.F.D.C. are likely to benefit from the dignity their mother derives from gainful employment, there is no reason to believe that middle-class children, particularly girl children, would not also benefit from a gainfully employed mother." Blumberg, *supra* note 2, at 94.

95. See Blumberg, *supra* note 2, at 94.

96. See Zelenak, *supra* note 2, at 363.

97. As Professor Alstott has noted, there is empirical evidence that the marriage penalty has a small impact on the decision to marry. See Alstott, *supra* note 10, at 2011 (citing James Alm & Leslie A. Whittington, *Does the Income Tax Affect Marital Decisions?*, 48 NAT'L TAX

1. Abolish Joint Return

The most popular solution the literature proposes is the abolition of the joint return.⁹⁹ If individuals were required to file separate returns, the Code would be marriage neutral. Tax liability would not change when one's marital status changed. There would be neither marriage penalties nor bonuses. Wives would no longer be discouraged from working in the paid labor force.¹⁰⁰ Although acknowledging the difficulty in implementing such a

J. 565, 571 (1995); David L. Sjoquist & Mary B. Walker, *The Marriage Tax and the Rate and Timing of Marriage*, 48 NAT'L TAX J. 547, 556 (1995)). Yet the empirical evidence does not address whether the analysis changes based upon the class or race of those seeking to marry.

98. DODGE ET AL., *supra* note 71, at 22 ("No tax system can be completely neutral, however, because some activities will always be affected by taxation. . . . [T]he income tax unavoidably interferes with people's decisions about how much to work."); SANFORD M. GUERIN & PHILIP F. POSTLEWAITE, *PROBLEMS AND MATERIALS IN FEDERAL INCOME TAXATION* 15 (4th ed. 1994); WILLIAM A. KLEIN & JOSEPH BANKMAN, *FEDERAL INCOME TAXATION* 3-4 (10th ed. 1994). Professors Guerin and Postlewaite explain:

The increased use of tax provisions to effectuate economic goals reflects the theory that individual taxpayers' economic decisions are often based on the tax effects flowing from those decisions. With this in mind, Congress has promulgated incentive and disincentive provisions in an attempt to manipulate individual economic decisions. . . . The child care credit is a current example of such efforts. In part to encourage those with small children to enter the job market, Congress provided a tax credit for child care expenses incurred while the taxpayer is at work. In addition, the provision serves to encourage employment opportunities for those rendering the child care services.

GUERIN & POSTLEWAITE, *supra*, at 15. Also, Professors Klein and Bankman state:

The income tax has also had a substantial effect on the allocation of resources in our economy, on the ways in which people invest their time and their money; indeed, it has affected our lives in the broadest sense. . . . Economists differ in their views of many of the economic effects of such provisions, but one effect is clear: Incentive provisions contribute substantially to the complexity of the law and to the need for tax advice in planning business and other activities.

KLEIN & BANKMAN, *supra*, at 3-4.

99. See Blumberg, *supra* note 2, at 95 (arguing for mandatory separate returns); Gann, *supra* note 2, at 3 (same); Kornhauser, *supra* note 2, at 108 (arguing that joint return ought to be abolished and replaced by system that treats each person as separate taxable unit); Maule, *supra* note 40, at 548 (arguing for mandatory separate returns); McCaffery, *supra* note 2, at 1035 (arguing for separate tax rates); Robinson & Wenig, *supra* note 2, at 850 ("Abandoning marital status as a determinant of tax liability would simultaneously eliminate much of the complexity that currently plagues the average taxpayer."); Jeanette Anderson Winn & Marshall Winn, *Till Death Do We Split: Married Couples and Single Persons Under the Individual Income Tax*, 34 S.C.L. REV. 829, 869 (1983) (arguing for mandatory separate returns); Zelenak, *supra* note 2, at 381 (same).

100. See Kornhauser, *supra* note 2, at 109 (noting that "[s]tudies show that the wages of the second earner, usually the wife, are sensitive to the tax rate, whereas the wages of married men and singles are relatively insensitive").

system,¹⁰¹ most commentators have not attempted to work through the difficult theoretical issues.¹⁰² Professor Zelenak is one of the few to have addressed in detail the allocation issues of mandatory individual filing.¹⁰³

2. Tax Imputed Income

Some commentators suggest that if imputed income was taxed, the federal tax laws would not discourage women from entering the paid labor force.¹⁰⁴ If wives' contributions to the household were taxed, whether they were made in the home or made from wages in the paid labor force, single wage-earning couples would be treated like dual wage-earning couples.¹⁰⁵

3. Provide Tax Incentives for Wives in the Paid Labor Force

One suggestion is to allow a deduction for all expenses that result from the second wage earner's decision to work.¹⁰⁶ An alternative is either a limited deduction or credit as a percentage of the second wage earner's wages.¹⁰⁷ Professor McCaffery as well as others suggest, as a possible solution, a higher

101. See Gann, *supra* note 2, at 32; Kornhauser, *supra* note 2, at 108 n.146. Professor Kornhauser also notes that "[t]he individual return is a better solution than the joint return." *Id.* at 111.

102. See Zelenak, *supra* note 2, at 344 ("These issues are commonly glossed over by advocates of separate returns.").

103. See *id.* at 343, 381-401 (discussing "problems of allocating property income and itemized deductions between spouses under separate returns"); see also Kornhauser, *supra* note 2, at 108 n.146.

104. See Zelenak, *supra* note 2, at 403 ("O'Kelley solves this problem, however, by requiring that the non-earning spouse include \$10,000 imputed income from homemaking services in her taxable income." (citing Charles R. O'Kelley, Jr., *Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the Purpose and Ideal Structure of a Progressive Income Tax*, 58 S. CAL. L. REV. 727, 744-51, 764 (1985))); cf. Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1618 (1996) (discussing benefits of taxing value of services provided by spouses to members of their household).

105. See Zelenak, *supra* note 2, at 403.

106. See Bittker, *supra* note 2, at 1433-34 (acknowledging following difficulties in administering such deduction provision: (1) determining which job-related expenses would be deductible; (2) potential for taxpayer manipulation of any deduction standard with "self-serving declarations;" and (3) eliminating that portion of additional expenses that generate some "personal" benefits). Professor Bittker acknowledges the difficulty of administering such a system. *Id.*; see also Blumberg, *supra* note 2, at 95 (proposing "earned income allowance for secondary family earners" and suggesting changes to existing limits on child care deductions that would enable more families to receive benefits); McCaffery, *supra* note 2, at 1042, 1059 (suggesting "reinstating a two-earner deduction, or otherwise encouraging secondary-worker participation" and proposing refundable child care credit).

107. See Bittker, *supra* note 2, at 1434-35. This became law in 1981 and was repealed in 1986. I.R.C. § 221 (repealed 1986); see Zelenak, *supra* note 2, at 360.

tax on primary earners to finance a subsidy for secondary earners.¹⁰⁸ Under that proposal, if a wife stayed home she would be taxed on the foregone subsidy that would have been available to her under the proposal had she worked in the paid labor force.¹⁰⁹ Alternatively, if a husband responded to the increased tax rates by reducing his participation in the paid labor force, and instead worked inside the home, he would receive a full imputed income bonus.¹¹⁰

4. *Subsidize Employers that Hire Wives*

Only Professor McCaffery suggests that the tax laws should subsidize employers who hire wives.¹¹¹ As McCaffery acknowledges, the difficulties with implementation may be insurmountable.¹¹² Accordingly, this proposal is not considered in extensive detail here.

5. *Replace Progressive Rate Structure with Flat Tax*

A few commentators support a flat tax as a way to solve the problem.¹¹³ By eliminating the progressive tax rates, the second earner's wages would not be taxed at her spouse's higher marginal tax rate. The proposals have many similarities. They include a rather large deduction for personal exemptions and a flat tax rate for the balance of taxable income, with mandatory separate returns.¹¹⁴ The commentators disagree about including imputed income in the tax base.¹¹⁵ A flat tax would significantly decrease the marriage penalties and bonuses, but would not eliminate them.¹¹⁶ An increased personal exemption

108. See McCaffery, *supra* note 2, at 1052; cf. Gann, *supra* note 2, at 44 ("Congress could more efficiently tax married couples if it applied the higher tax rate to the husband's income rather than to the wife's income.")

109. See McCaffery, *supra* note 2, at 1005.

110. See *id.* Yet given Professor McCaffery's observation that the labor elasticity for married men is lower than that of married women, it may not be realistic to expect that married men will work inside the home. See *supra* note 26 and accompanying text.

111. See McCaffery, *supra* note 2, at 1052 ("One approach might be to subsidize firms that hire married women.")

112. See *id.* (discussing uncertainty surrounding "firm-side remedy").

113. See Michael C. Lovell, *On Taxing Marriages*, 35 NAT'L TAX J. 507, 507-09 (1982); Maule, *supra* note 40, at 548; O'Kelley, *supra* note 104, at 766-69; see also Zelenak, *supra* note 2, at 402-04 (acknowledging flat tax as solution, but then determining that it causes more inequities than it solves).

114. See Maule, *supra* note 40, at 548; O'Kelley, *supra* note 104, at 766-69.

115. Professor Maule would not include imputed income. Maule, *supra* note 40, at 548. Professor O'Kelley would include imputed income. O'Kelley, *supra* note 104, at 744-51, 764. Professor Zelenak observes that O'Kelley's proposal would offset the imputed income by the wife's personal exemption, resulting in no net benefit. Zelenak, *supra* note 2, at 403.

116. See Forman, *supra* note 66, at 5-7. Professor Forman states that "[c]onsequently,

would minimize, if not eliminate, many nondeductibility problems of married women.

III. *Unmasking the Race, Class, and Gender Bias in the Federal Tax Laws*

A. *Introduction*

This Part provides a more inclusive gender analysis by describing the labor force experiences of African-American and white wives and the differing impact of the federal tax laws based upon those experiences. It begins by describing those labor force experiences which seek to privilege white males at the expense of white women and African-Americans.¹¹⁷ It then provides an analysis of spousal contributions to total household income in African-American and white households.¹¹⁸ In describing the contributions to household income based upon race, this Article provides information never before published. It then applies the three federal tax policies described in Part II to the analysis of spousal contributions described in this Part to demonstrate that the literature's focus on married women as marginal wage earners and married men as primary wage earners hides the race, class, and gender bias of the federal tax laws.¹¹⁹

B. *The Race, Class, and Gender Bias in the Waged Labor Force*

This subpart approaches the issue in a unique way by describing the labor force experiences of husbands and wives in African-American and white households.¹²⁰ Husbands and wives are treated differently in the labor force based upon their race, class, and gender – not merely their marital status, as the literature suggests.¹²¹

even a 'flat' tax system would end up violating the couples neutrality principle, or the marriage neutrality principle, or both." *Id.* at 7.

117. See *infra* Part III.B.

118. See *infra* Part III.C.

119. See *infra* Part III.D.

120. See Ingrassia & Wingert, *supra* note 6, at 36 (discussing new study which shows that in nearly half of U.S. families women earn about as much as men).

121. See TERESA AMOTT & JULIE MATTHAEI, *RACE, GENDER, & WORK* 27 (1991) ("Women throughout the United States have not experienced a common oppression as women."); NATALIE J. SOKOLOFF, *BLACK WOMEN AND WHITE WOMEN IN THE PROFESSIONS* 3 (1992). Professor Sokoloff states:

Although discrimination on the basis of gender has been (and continues to be) directed against women of all races, racial discrimination is at least as important a factor in the work lives of racial/ethnic minority women. In short, the experiences of minority women and white women are not the same.

Id.

Married white men earn the highest salaries, with a mean annual wage of \$39,389 for 1990.¹²² The next highest paid group is married African-American men, with a mean annual wage of \$27,026.¹²³ Married African-American men earn 68.61% of what married white men earn.¹²⁴ They are followed by married white women who have a mean annual wage of \$23,493.¹²⁵ They earn 59.64% of what married white men earn, and 86.92% of what married African-American men earn.¹²⁶ The lowest paid are married African-American women who have a mean annual wage of \$20,693.¹²⁷ They earn 76.57% of what married African-American men earn, 52.53% of what married white men earn, and 88.08% of what married white women earn.¹²⁸

When considering full-time workers, African-American women earn about 6% less than white women.¹²⁹ Their earnings are lower at all educational levels.¹³⁰ African-American wives have higher labor force participation rates than white wives.¹³¹ Married African-American women are much more likely to work full time than their white counterparts.¹³² Unlike women of other racial groups, married African-American women with young children are more likely to participate in the labor force than married African-American women as a group.¹³³ Notwithstanding that data, Professor McCaffery says "studies confirm that many married mothers do stay home – the labor force participation rate of married mothers with young children is only slightly more than 50 percent."¹³⁴ This Article seeks to point out the dangers of view-

122. BUREAU OF THE CENSUS, U.S. DEP'T OF COM., SERIES P60, NO. 174, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE U.S., 1990, CURRENT POPULATION REPORTS, tbl. 28 (1991) (Table of Marital Status – Persons 18 Years Old and Over, by Total Money Income in 1990, Race, Hispanic Origin, Sex, and Work Experience in 1990) [hereinafter BUREAU OF THE CENSUS].

123. *Id.*

124. *See id.*; *see also* U.S. COMM'N ON CIVIL RIGHTS, THE ECONOMIC STATUS OF BLACK WOMEN: AN EXPLORATORY INVESTIGATION 15 (1990) (noting that on average, married black men earn two-thirds as much as married white men) [hereinafter U.S. COMM'N ON CIVIL RIGHTS].

125. BUREAU OF THE CENSUS, *supra* note 122, at 124-27.

126. *See id.*

127. *Id.*

128. *See id.*

129. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 124, at 13.

130. *Id.*

131. *See id.* (finding that African-American and Asian women are more likely to participate in labor force than white women and women from other minority groups).

132. *Id.* at 105.

133. *Id.* at 13. The percentage of married African-American women who participated in the paid labor force in 1980 is 60.5%, and for married African-American women with children the percentage is 65.2%. *Id.*

134. McCaffery, *supra* note 2, at 1024 (citing Nancy E. Dowd, *Work and Family: Restruc-*

ing women as an homogenous group. As previously stated, African-American wives are much more likely to hold full-time jobs than their white counterparts.¹³⁵ Viewing women as an homogenous group may lead to results that do not account for the experiences of African-American women.

As a result of different labor force experiences, husbands and wives make different household contributions based upon their race and class.¹³⁶ All married women are not marginal wage earners and all married men are not primary wage earners.¹³⁷ Those household contributions that differ as a result of race and class determine the extent of the marriage penalty paid, or marriage bonus received, by taxpayers.

C. Analysis of Spousal Contributions to Household Income by Race, Class, and Gender

1. Household Contributions by African-American Husbands and Wives¹³⁸

"Married African-American women contribute a substantially higher percentage of their family income than married white women."¹³⁹ This difference has been partially attributed to the fact that other family members contribute relatively less to family income in African-American households

turing the Workplace, 32 ARIZ. L. REV. 431, 443-44 (1990)). "Marriage decreases the likelihood that women are in the workforce and weakens their labor market position." Dowd, *supra*, at 444 (stating that bare majority of mothers with children under age six are employed).

135. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 124, at 105.

136. See Alstott, *supra* note 10, at 2025-26 (noting that discrepancy leads to disparate treatment under different tax plans); Brown, *supra* note 2, at 49-50 (highlighting differences in household contributions made by African-American and white women); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 794-96. Perhaps not coincidentally, African-American women have significantly lower marriage rates than white women. As of 1990, approximately 30% of African-American women were married whereas 55% of white women were married. BUREAU OF THE CENSUS, U.S. DEP'T OF COM., PUB. NO. 1990-CP-1-1, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS, tbl. 40 (1992).

137. See *infra* Table 3.1, at p. 1492; *infra* Table 3.2, at p. 1496.

138. This section only includes data on same-race couples, given the small percentages of interracial married couples. See Brown, *supra* note 2, at 49 ("[I]n 1985, 98.9 percent of black married women and 96.6 percent of black married men had a black spouse."); Linda Mathews, *More Than Identity Rides On a New Racial Category*, N.Y. TIMES, July 6, 1996, at A1. Mathews states:

Only 6 percent of black men and 2 percent of black women marry outside their race, compared to 12 percent of Asian men, 25 percent of Asian women, and 59 percent of American Indian men and 60 percent of American Indian women. For whites, 1.6 percent of the men and 1.4 percent of the women marry non-whites.

Id.

139. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 124, at 99.

than in white households.¹⁴⁰ A 1990 study showed that although married African-American women contributed on average approximately 40% to total household income, married white women contributed on average approximately 29%.¹⁴¹ Those averages, which suggest racial differences, hide class differences. This section explores those different contribution percentages at every income level among African-American and white households.

This section examines the contributions to household income by African-American husbands and wives at all income levels. Table 3.1 describes the percentage of household income contributed by African-American wives based upon 1990 Census Bureau data.¹⁴² Table 3.1 also describes the household contributions for African-American husbands. Whatever percent of household income not contributed by the wife is contributed by the husband. For example, if an African-American wife contributes between 90-100% of household income, then her husband contributes the other 10-0%. At most, the data described in the literature in Part II used the mean contributions to household income of wives without class or racial breakdowns.¹⁴³ This Part will show that mean figures mask race, class, and gender distinctions and make meaningful analysis impossible.

At each income level, African-American wives contribute a different percentage of household income – a difference that mean figures do not reveal. Those differing contributions determine the extent of the marriage penalty paid by or marriage bonus received by each African-American household. Recall that marriage penalties are the highest when each spouse contributes equally to household income and marriage bonuses are the greatest when one spouse contributes all the income.¹⁴⁴

For African-American families earning up to \$10,000, 42.27% of wives contribute between 90 and 100% of household income, whereas 41.81% of husbands contribute between 90 and 100% of household income.¹⁴⁵ Thus, in approximately 84% of African-American households earning \$10,000 or less, there are sole wage earners.¹⁴⁶ In low-income African-American households,

140. *Id.* at 116.

141. *Id.* at 100; Brown, *supra* note 2, at 49-50.

142. *See infra* note 146.

143. *See, e.g.,* McCaffery, *supra* note 2, at 994 ("[M]arried working women earn, on average, forty-six percent of what their husbands do."). Such averages hide low-income wives who are primary wage earners, obscure African-American wives who are equal wage earners, and overstate the minimal household contribution of upper-income white women. *See infra* notes 156-79 and accompanying text.

144. *See supra* Table 2.1, at p. 1480.

145. *See infra* Table 3.1, at p. 1492. For ease of discussion, households in which income is split 90/10 will be referred to as single wage earner households.

146. *See infra* Table 3.1, at p. 1492.

Table 3.1
HOUSEHOLD CONTRIBUTION BY AFRICAN-AMERICAN WIVES¹⁴⁷

Household Income	90% to 100%	80% to 90%	70% to 80%	60% to 70%	50% to 60%	40% to 50%	30% to 40%	20% to 30%	10% to 20%	0% to 10%
\$0 to 10,000	42.27	1.40	1.60	1.57	1.83	2.89	2.23	2.05	2.36	41.81
\$10,001 to 20,000	22.31	2.19	2.53	2.88	4.45	7.63	6.22	5.41	5.30	41.09
\$20,001 to 30,000	10.37	1.68	2.70	4.15	8.32	15.70	12.94	9.17	6.48	28.51
\$30,001 to 40,000	5.28	1.39	2.41	4.73	11.37	21.35	15.57	10.40	6.65	20.84
\$40,001 to 50,000	2.43	1.01	2.00	5.71	13.28	23.46	20.93	11.86	6.23	13.07
\$50,001 to 60,000	1.06	.61	1.98	5.54	13.49	29.39	22.04	12.08	5.67	8.16
\$60,001 to 70,000	.75	.34	1.87	5.96	15.28	31.21	22.42	12.12	4.41	5.64
\$70,001 to 80,000	.82	.57	1.17	5.27	16.17	31.76	24.19	10.43	3.80	5.82
\$80,001 to 90,000	.47	.19	1.72	4.48	16.20	33.26	21.76	12.75	3.77	5.40
\$90,001 to 100,000	.65	.54	2.11	4.63	11.42	31.01	22.71	13.87	7.15	5.90
\$100,001 to 120,000	1.20	1.62	2.12	5.37	8.59	27.56	23.20	16.32	5.98	8.04
\$120,001 & over	5.46	2.56	2.55	3.07	4.63	17.14	9.09	11.43	12.13	31.94

147. The information in Tables 3.1-3.6 is from 1990 Public Use Micro-Data Sample and is based upon a 5% sample of the population of same race couples (on file with author). The information is collected by the Census Bureau; however, it is not published. Census Bureau data is used herein because the Internal Revenue Service does not keep data based upon race.

wives are slightly more likely than their husbands to be the sole wage earner.¹⁴⁸ Accordingly, the "traditional" model of a sole wage earner is present in African-American families earning \$10,000 or less, yet the sole wage earner is slightly more likely to be the wife.¹⁴⁹ Recall the severe marriage penalties associated with the EITC for dual wage earner households.¹⁵⁰

For African-American families earning between \$10,001 and \$30,000, the traditional sole wage earner model in which the sole wage earner is the husband is the most prevalent.¹⁵¹ In African-American families earning between \$10,001 and \$20,000, husbands are almost twice as likely as their wives to be the sole wage earner.¹⁵² African-American wives are the sole wage earner in 22.31% of the households at that level while husbands are the sole wage earner in 41.09% of such households.¹⁵³ Again, this income group is subject to severe EITC penalties for dual wage earner households.¹⁵⁴ At that income level, approximately 63% of African-American couples reside in "traditional" sole wage earner households, even though they might benefit from the income of a second wage earner.

For African-American families earning between \$20,001 and \$30,000, husbands are almost three times as likely as wives to be the sole wage earner.¹⁵⁵ Wives are the sole wage earner in 10.37% of those households, while husbands are the sole wage earner in 28.51%.¹⁵⁶ At that income level, 15.70% of wives contribute between 40 and 50% to household income, with their families paying a marriage tax penalty.¹⁵⁷ At this income level, one begins to observe a more significant percentage of households in which the marriage penalty falls the heaviest – in those families that are the least "traditional" because household income is split roughly equally.¹⁵⁸

See Brown, *supra* note 2, at 49; Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89, 91 (1997).

148. See *supra* Table 3.1, at p. 1492.

149. See *supra* Table 3.1, at p. 1492.

150. See *supra* notes 59-69 and accompanying text (describing severe marriage penalties associated with earned income tax credit as it applies to two-wage earner low-income couples).

151. See *supra* Table 3.1, at p. 1492.

152. See *supra* Table 3.1, at p. 1492.

153. See *supra* Table 3.1, at p. 1492.

154. See *supra* notes 59-69 and accompanying text.

155. See *supra* Table 3.1, at p. 1492 (showing that in households earning between \$20,001 and \$30,000, 28.51% of husbands were sole wage earners, while 10.37% of wives were sole wage earners).

156. See *supra* Table 3.1, at p. 1492.

157. See *supra* Table 3.1, at p. 1492; see also *supra* notes 54-58 and accompanying text.

158. See *supra* Table 3.1, at p. 1492. For ease of discussion, households in which income contributions fall in the 40-50 and 50-60 categories will be referred to as equal earning couples.

For African-American families earning between \$30,001 and \$40,000, wives contribute 40 to 50% of household income in 21.35% of the households.¹⁵⁹ In 20.84% of the households at that income level, husbands contribute between 90 and 100% of the household income, and in 5.28%, wives contribute between 90 and 100%.¹⁶⁰ Given that marriage penalties are highest in households in which husbands' and wives' contributions are roughly equal, 21.35% of the African-American families at this income level are paying the highest marriage penalty.¹⁶¹ Given that marriage bonuses are the highest when household income is earned by one spouse, approximately 26% of the African-American families at that income level are receiving marriage bonuses.¹⁶²

For African-American families with household income between \$30,001 and \$120,000, a greater percentage of wives contribute between 40 and 50% to household income than any other contribution percentage.¹⁶³ Correspondingly, their husbands contribute between 50 and 60% of household income.¹⁶⁴ Accordingly, when total household income is between \$30,001 and \$120,000, more African-American couples pay marriage penalties than receive marriage bonuses. Also, there are very few sole wage earning households at these income levels. At the \$30,001 to \$40,000 income level, over 26% of African-American households have sole wage earners, 21% of households have African-American wives contributing 40 to 50% of household income, and 11% of households have African-American wives contributing 50 to 60% of household income.¹⁶⁵ Between \$50,001 and \$120,000, less than 10% of African-American families live in sole wage earner households.¹⁶⁶

In African-American households in which income is greater than \$120,000, 31.94% of these households have husbands who contribute between 90 and 100% of total household income and 5.46% of these households have wives who contribute between 90 and 100% of total household income.¹⁶⁷ Accordingly, approximately 37% of African-American households earning more than \$120,000 receive a marriage bonus. At that same income level, 17.14% of African-American households, the next largest category, have household income split roughly equally and thereby incur the highest marriage penalties.¹⁶⁸

159. See *supra* Table 3.1, at p. 1492.

160. See *supra* Table 3.1, at p. 1492.

161. See *supra* Table 3.1, at p. 1492; see also *supra* notes 54-58 and accompanying text.

162. See *supra* Table 3.1, at p. 1492; *supra* note 51 and accompanying text.

163. See *supra* Table 3.1, at p. 1492.

164. See *supra* Table 3.1, at p. 1492.

165. See *supra* Table 3.1, at p. 1492.

166. See *supra* Table 3.1, at p. 1492.

167. See *supra* Table 3.1, at p. 1492.

168. See *supra* Table 3.1, at p. 1492.

Four observations can be drawn from the information presented in Table 3.1. First, African-American wives are slightly more likely to be the primary wage earner in households in which income is \$10,000 and less. Second, African-American wives are most likely to be the marginal wage earner in households earning between \$10,001 and \$30,000. Third, African-American wives are most likely to be equal contributors when household income is between \$30,001 and \$120,000. Fourth, African-American wives are more likely to be marginal wage earners in households earning over \$120,000. Therefore, at low income levels, African-American women are more likely to be the primary wage earner; at middle income levels, African-American women are most likely to be equal contributors and pay a high marriage penalty; at upper income levels, African-American wives are more likely to be marginal wage earners and receive marriage bonuses.

In very high income households, African-American men are significantly more likely than their wives to be primary wage earners. At very low income levels, African-American wives are equally likely to be primary wage earners as their husbands. At the \$10,001 to \$30,000 income levels, African-American men are more likely to be the primary wage earners. Yet, the literature tells us that men are more than five times more likely to be the single earner in single-earner households.¹⁶⁹ That statement is overinclusive with respect to lower-income African-American households.

Further, at the middle income levels, African-American men are more likely to contribute household income roughly equal to their wives. Neither men as primary wage earners nor women as marginal wage earners is an accurate description of African-American families at the middle income levels.

2. Household Contributions by White Husbands and Wives

This section examines the contributions to household income by white husbands and wives.

Table 3.2 describes the different contributions to household income by white wives. For white households with income \$10,000 or less, 43.08% of wives contribute between 90 and 100% of household income, and their husbands contribute between 0 and 10%.¹⁷⁰ Wives, not husbands, are primary wage earners in approximately 43% of households earning \$10,000 or less.¹⁷¹ At that same income level, in 44.45% of households white husbands contribute between 90 and 100% of household income, and their wives between 0 and 10%.¹⁷² Almost 90% of white households earning \$10,000 or less have

169. *Supra* note 50 and accompanying text.

170. *See infra* Table 3.2, at p. 1496.

171. *See infra* Table 3.2, at p. 1496.

172. *See infra* Table 3.2, at p. 1496.

Table 3.2
HOUSEHOLD CONTRIBUTION BY WHITE WIVES¹⁷³

Household Income	90% to 100%	80% to 90%	70% to 80%	60% to 70%	50% to 60%	40% to 50%	30% to 40%	20% to 30%	10% to 20%	0% to 10%
\$0 to 10,000	43.08	1.03	1.17	1.16	1.35	2.44	1.75	1.66	1.92	44.45
\$10,001 to 20,000	24.67	1.71	2.06	2.45	3.23	5.95	5.06	4.93	5.35	44.59
\$20,001 to 30,000	10.31	1.30	1.96	2.75	4.90	9.47	9.40	8.46	8.44	43.00
\$30,001 to 40,000	4.11	.89	1.47	2.69	5.99	13.08	12.80	11.21	10.16	37.60
\$40,001 to 50,000	1.82	.57	1.17	2.69	7.11	15.13	16.48	13.05	10.76	31.23
\$50,001 to 60,000	.95	.42	.90	2.64	7.85	18.50	18.42	13.82	10.41	26.09
\$60,001 to 70,000	.70	.32	.83	2.57	8.35	19.54	19.09	15.53	9.60	23.47
\$70,001 to 80,000	.71	.28	.61	2.43	7.97	18.93	20.63	13.43	9.60	25.39
\$80,001 to 90,000	.64	.27	.64	2.17	7.85	19.19	17.95	15.21	10.17	25.91
\$90,001 to 100,000	.84	.30	.80	2.05	6.35	15.61	14.95	13.89	9.77	35.45
\$100,001 to 120,000	.73	.41	1.00	2.39	5.54	13.82	13.86	14.12	12.21	35.91
\$120,001 & over	1.20	.76	1.35	1.51	2.47	6.76	6.35	9.11	12.79	57.70

primarily one wage earner.¹⁷⁴ Notice, however, that a slightly higher percentage of white husbands are primary wage earners than white wives (as com-

173. See *supra* note 147.

174. See *supra* Table 3.2, at p. 1496.

pared with African-American families in which wives are slightly more likely to be the primary wage earner).¹⁷⁵

For every income level, a higher percentage of white wives contribute between 0 and 10% to household income than any other contribution percentage.¹⁷⁶ Once beyond the EITC level, those households receive a marriage bonus. The percentage of white wives who contribute between 0 and 10% to total household income ranges from 44.45% at the \$0 to \$10,000 level to a low of 23.47% for the \$60,001 to \$70,000 household income level and then increases once again to a high of 57.70% in the over \$120,000 household income level.¹⁷⁷ These statistics suggest that the literature which describes women as marginal wage earners is correct as applied to married white women. Yet, upon closer examination, it masks another issue, namely that at certain income levels a significant amount of white wives are not marginal wage earners, but contribute roughly equal amounts to household income.

White wives' contributions to household income in instances in which the marriage penalties are the greatest fall in the 40 to 50% – 50 to 60% categories. When these categories are combined one sees that a greater percentage of white families pay the marriage penalty than receive the marriage bonus in households in which the total income is between \$60,001 and \$90,000.¹⁷⁸ Once household income exceeds \$90,000, the percentage of white households receiving a marriage bonus again exceeds the percentage of those paying the marriage penalty.¹⁷⁹

Several observations can be made from Table 3.2. First, not all white wives are marginal wage earners. Upper-income white wives are the most likely to be marginal wage earners.¹⁸⁰ The literature's description of all wives as marginal wage earners is overinclusive as it ignores the significant percentage of white wives who are primary wage earners at the lower income levels. Second, the literature ignores the percentage of white wives who contribute between 40 and 60% of household income – namely the income split in which the marriage penalty paid is the highest.¹⁸¹ Simply because the 0 to 10% contribution category has the single highest concentration of white wives does not eliminate the reality that many white wives contribute significant amounts to household income at many different income levels and, as a result, their households incur a marriage penalty. One commentator has estimated that the average marriage penalty paid by married couples in 1994

175. See *supra* Table 3.2, at p. 1496; *supra* note 149 and accompanying text.

176. See *supra* Table 3.2, at p. 1496.

177. See *supra* Table 3.2, at p. 1496.

178. See *supra* Table 3.2, at p. 1496.

179. See *supra* Table 3.2, at p. 1496.

180. See *supra* Table 3.2, at p. 1496.

181. See *supra* notes 54-58 and accompanying text (describing marriage penalty).

was \$1,244, and the average marriage bonus received by married couples was \$1,399.¹⁸² Although that commentator did not provide a class- or race-based analysis, given the data described in this Part, those averages significantly mask race, class, and gender bias. One would expect that a significant number of upper-income taxpayers would receive a marriage bonus to offset the significant numbers of middle-income taxpayers who pay marriage penalties.

The literature's construction of men as primary wage earners and women as marginal wage earners does not accurately describe all white families.¹⁸³ First, white wives are almost as likely as their husbands to be primary wage earners in households with income under \$10,000. Second, white husbands are primary wage earners in the majority of white households only in households in which income is over \$120,000. At every other income level white husbands are primary wage earners in less than one-half (and in one instance less than one-quarter) of the white households at each income level. Thus, by focusing on white households in which men are primary wage earners, the literature ignores more than one-half, and in certain instances more than three-fourths, of existing white households in which white wives make significant contributions to household income.

Although Table 2.1 suggests that high-income couples pay a significant marriage penalty if their contributions to household income are roughly equal,¹⁸⁴ less than 10% of white couples in households in which family income exceeds \$120,000 have a 60/40-50/50 contribution ratio.¹⁸⁵ Instead, almost 60% of upper-income white households fall within the marriage bonus of Table 2.1.¹⁸⁶

D. The Tax Consequences of Spousal Contributions to Household Income by Race, Class, and Gender

This subpart describes the race, class, and gender bias of the three federal tax policies outlined in Part II that the literature ignores. This subpart demonstrates that the paradigm of primary/secondary wage earner does not apply to many married couples. Specifically, this subpart makes three points. First, the literature most accurately describes upper-income white households, yet does not so limit its analysis.¹⁸⁷ Second, the federal tax laws penalize equal wage-earning couples and a disproportionate number of such penalized

182. See Brown, *supra* note 2, at 49 (citing DANIEL R. FEENBERG & HARVEY S. ROSEN, RECENT DEVELOPMENTS IN THE MARRIAGE TAX 11 (National Bureau of Econ. Research Working Paper No. 4075, 1995)).

183. See *supra* Part II.

184. See *supra* Table 2.1, at p. 1480.

185. See *supra* Table 3.2, at p. 1496.

186. See *supra* Table 3.2, at p. 1496; *supra* Table 2.1, at p. 1480.

187. See *infra* notes 191-202 and accompanying text.

couples are African-American.¹⁸⁸ The literature could not make this point because it ignores racial differences among households. Third, low-income households are just as likely to have wives, instead of husbands, as the primary wage earners, regardless of race, because the federal tax laws penalize low-income households that have two wage earners.¹⁸⁹ The literature ignores this possibility insofar as it only views husbands as primary wage earners.¹⁹⁰

1. *The Literature Most Accurately Describes Upper-Income White Households*

The literature proposes that: (1) as the husband's income increases, the participation rate of the wife's decreases;¹⁹¹ (2) the wage gap between husbands and wives minimizes the wives' contributions to household income;¹⁹² (3) the family's economic survival is not dependent upon wives working outside of the home;¹⁹³ (4) husbands earn considerably more in the work force than their wives;¹⁹⁴ and (5) the tax laws encourage married women to work at home.¹⁹⁵ This section will demonstrate that the literature describes primarily the experiences of upper-income white households, not African-American households or middle- or low-income white households.¹⁹⁶

Almost 60% of white husbands in households earning over \$120,000 are primary wage earners,¹⁹⁷ whereas only approximately 30% of African-American husbands in households earning over \$120,000 are primary wage earners.¹⁹⁸ Households in which one spouse earns all of the income receive the greatest marriage bonus. Thus, upper-income white households receive the greatest marriage bonuses under the federal tax laws. African-American households also receive marriage bonuses but in a significantly smaller percentage than represented by white households. Table 3.3 below shows that a higher percentage of white families receive marriage bonuses than African-American families at every income level.

Married white men earn higher incomes than married African-American men.¹⁹⁹ These higher wages permit more white wives to work inside the home

188. See *infra* notes 203-25 and accompanying text.

189. See *infra* notes 226-37 and accompanying text.

190. See *supra* Part II.

191. See *supra* notes 26-29 and accompanying text.

192. See *supra* notes 30-32 and accompanying text.

193. See *supra* notes 33-38 and accompanying text.

194. See *supra* notes 25, 31 and accompanying text.

195. See *supra* notes 26-27, 32 and accompanying text.

196. Cf. Moran & Whitford, *supra* note 136, at 759-72 (describing how federal tax laws benefit wealthy who are predominantly white).

197. See *supra* Table 3.2, at p. 1496.

198. See *supra* Table 3.1, at p. 1492.

199. See *supra* notes 122-24 and accompanying text.

Household Income	WHITE Income Split	AFRICAN- AMERICAN Income Split
	100/0% — 90/10%	100/0% — 90/10%
\$0-10,000	87.49%	84.06%
\$10,001-20,000	69.11%	63.25%
\$20,001-30,000	53.21%	38.81%
\$30,001-40,000	41.63%	26.07%
\$40,001-50,000	32.87%	15.42%
\$50,001-60,000	27.00%	9.22%
\$60,001-70,000	24.15%	6.37%
\$70,001-80,000	26.06%	6.59%
\$80,001-90,000	26.54%	5.88%
\$90,001-100,000	35.98%	6.55%
\$100,001-120,000	36.61%	9.24%
\$120,001-over	58.88%	37.40%

so that the value of services they provide to their families is excluded from taxable income. The tax law further benefits white couples with joint return provisions that afford the greatest marriage bonus to households with sole wage earners. Thus, the federal tax laws reward upper-income households already benefitted by the labor market with a marriage bonus.

The model of the upper-income white male as primary wage earner with the wife working at home satisfies the literature's description most accurately. Upper-income white households have the lowest percentage contributions to household income by wives.²⁰¹ Wives in those households do not work in the paid labor force, and thus their husbands earn virtually all of the household's income.

200. See *supra* note 147.

201. See *supra* Table 3.3, at p. 1500.

The largest percentage of married white women regardless of income group is the category in which wives contribute between 0 and 10% to household income.²⁰² Accordingly, when the literature refers to married women as marginal wage earners, its statements apply to white women. Although the largest percentage of married white women contribute between 0 and 10% to household income, there are various income groups in which married white women contribute significantly more to household income. The less household income wives contribute, the less the marriage penalty and the greater the possibility of a marriage bonus.

2. Federal Tax Laws Penalize Equal Wage-Earning Couples

a. African-American Households Pay the Greatest Marriage Penalty

African-American husbands earn significantly less than white husbands.²⁰³ African-American wives cannot economically afford to stay home and provide services to their families that escape taxation. African-American wives most likely contribute between 40 and 50% to total household income.²⁰⁴ African-American husbands contribute between 50 and 60% to total household income.²⁰⁵

The federal tax laws penalize households in which husbands and wives make roughly equal contributions to total household income and limit the deductibility of work-related expenses that such taxpayers incur.²⁰⁶ Because African-American wives make more significant contributions to household income than white wives, a greater percentage of African-American families pay a marriage penalty than white families at all income levels.²⁰⁷ As a result, the federal tax laws exacerbate the penalty that African-American families suffer in the labor force.

The marriage tax penalty does not discourage African-American wives from working in the waged labor market because of these women's economic circumstances. African-American husbands receive lower wages than white husbands and their wives receive lower wages than white wives.²⁰⁸ This, in turn, provides an economic incentive for African-American wives to work longer and harder and to incur a significant marriage tax penalty.

Table 3.4 below shows the percentage of families in which spouses contribute roughly equal amounts and thereby incur the greatest marriage

202. See *supra* Table 3.2, at p. 1496.

203. See *supra* notes 122-24 and accompanying text.

204. See *supra* Table 3.1, at p. 1492.

205. See *supra* Table 3.1, at p. 1492.

206. See *supra* notes 54-58, 78 and accompanying text.

207. See *infra* Table 3.4, at p. 1502.

208. See *supra* notes 122-28 and accompanying text.

penalties. As Table 3.4 shows, a greater percentage of African-American families are in the marriage penalty category than white families.

Table 3.4
GREATEST MARRIAGE PENALTY BY INCOME LEVEL²⁰⁹

Household Income	WHITE Income Split	AFRICAN- AMERICAN Income Split
	60/40% — 50/50%	60/40% — 50/50%
\$0-10,000	3.97%	5.06%
\$10,001-20,000	9.58%	12.65%
\$20,001-30,000	15.18%	25.11%
\$30,001-40,000	19.38%	33.16%
\$40,001-50,000	23.33%	38.33%
\$50,001-60,000	26.72%	43.21%
\$60,001-70,000	28.17%	46.76%
\$70,001-80,000	27.79%	49.23%
\$80,001-90,000	27.17%	49.53%
\$90,001-100,000	22.97%	44.15%
\$100,001-120,000	19.48%	36.15%
\$120,001-over	9.42%	21.96%

To speak of all husbands as primary wage earners ignores the very wage discrimination that results in African-American married men earning significantly less than white married men. As a result of African-American men earning less income than white men, African-American wives are required to contribute more towards household income. Thus, the literature that speaks in terms of all men being primary wage earners ignores the experiences of African-American households.

An examination of African-American households points out the flaws found in the tax literature. First, the literature suggests that as the husband's income increases, the participation rate of the wife decreases.²¹⁰ Yet, the

209. See *supra* note 147.

210. *Supra* notes 26-29 and accompanying text.

greatest concentration of African-American wives is found at the 40 to 50% contribution rate for all households in which income is between \$30,001 and \$120,000.²¹¹ African-American wives make significant contributions even when total household income increases.

Second, the literature informs us that the wage gap between wives and their husbands minimizes the wives' contribution to total household income.²¹² The wage gap between African-American husbands and their wives is significantly less than that between white husbands and their wives. African-American wives earn 76.57% of what African-American husbands earn, whereas white wives earn 59.64% of what white husbands earn.²¹³ Therefore, the wage gap discussed in the literature is significantly diminished for African-American households. The lower wages of African-American men provide an economic incentive for their wives to work more and seek to contribute more.²¹⁴ The income data for African-American households does not support the fundamental premise of the literature that there is a significant wage gap between husband and wife.

Third, the literature tells us that the family's survival is not dependent upon wives working outside of the home.²¹⁵ Although this may be accurate for upper-income white households, it is decidedly untrue for African-American households in which each spouse contributes roughly equal amounts to household income. When income is split equally, the family could not survive without the wife participating in the paid labor force. Many African-American men simply do not earn amounts sufficient to provide the sole support so their wives can have the option of remaining at home.

Fourth, the tax literature argues that the tax laws encourage married women to remain at home.²¹⁶ That is simply not true when applied to African-American households. Although the tax laws may penalize their entry into the workforce, the vast majority of African-American wives have no economic choice but to work. Table 3.5 below shows that the greatest percentage of African-American households with total income between \$30,001 – \$120,000 are found in the category with the highest marriage penalties, namely the co-equal earner model.

211. See *supra* Table 3.1, at p. 1492.

212. See *supra* notes 30-32 and accompanying text.

213. See *supra* notes 125-28 and accompanying text.

214. See *supra* notes 122-28 and accompanying text.

215. See *supra* notes 33-38 and accompanying text.

216. See *supra* notes 73-77 and accompanying text.

Income Levels	100/0% – 90/10%	90/10% – 80/20%	80/20% – 70/30%	70/30% – 60/40%	60/40% – 50/50%
\$0 - 10,000	84.06%	3.60%	3.70%	3.57%	5.06%
\$10,001 - 20,000	63.25%	7.32%	8.02%	8.76%	12.65%
\$20,001 - 30,000	38.81%	7.75%	12.20%	16.13%	25.11%
\$30,001 - 40,000	26.07%	7.76%	12.94%	20.08%	33.16%
\$40,001 - 50,000	15.42%	6.87%	13.70%	25.68%	38.33%
\$50,001 - 60,000	9.22%	6.13%	14.00%	27.45%	43.21%
\$60,001 - 70,000	6.37%	4.57%	14.13%	28.17%	46.76%
\$70,001 - 80,000	6.59%	4.21%	11.73%	28.23%	49.23%
\$80,001 - 90,000	5.88%	3.81%	14.62%	26.17%	49.53%
\$90,001 - 100,000	6.55%	7.52%	14.90%	26.88%	44.15%
\$100,001 - 120,000	9.24%	7.60%	18.35%	28.66%	36.15%
\$120,001 & over	37.40%	14.54%	14.12%	11.98%	21.96%

*b. In White Households, Middle-Income Families Pay the
Greatest Marriage Penalty*

Although white middle-income taxpayers do not have as great a percentage of households in the marriage penalty category, their numbers are significant. In middle-income white households, wives contribute significant amounts to household income.²¹⁸ Accordingly, the marriage penalties start to appear here. Although the literature suggests that as the husband's income increases, the participation rate of the wife decreases, there is no such evi-

217. See *supra* note 147.

218. See *supra* Table 3.2, at p. 1496.

dence here.²¹⁹ Middle-income white wives contribute roughly the same proportions to total household income as total household income increases.²²⁰ The percentage of such couples splitting household income roughly equally is significant. Table 3.6 below sets forth the percentage of white families based on spousal contribution levels to household income.

Table 3.6					
WHITE HOUSEHOLD INCOME ALLOCATION					
BETWEEN HUSBAND AND WIFE²²¹					
Income Levels	Contribution Percentages				
	100/0% – 90/10%	90/10% – 80/20%	80/20% – 70/30%	70/30% – 60/40%	60/40% – 50/50%
\$0-10,000	87.49%	2.85%	2.89%	2.80%	3.97%
\$10,001-20,000	69.11%	6.88%	7.18%	7.26%	9.58%
\$20,001-30,000	53.21%	9.27%	10.87%	11.47%	15.18%
\$30,001-40,000	41.63%	10.77%	12.79%	15.43%	19.38%
\$40,001-50,000	32.87%	10.86%	14.39%	18.55%	23.33%
\$50,001-60,000	27.00%	10.63%	14.77%	20.88%	26.72%
\$60,001-70,000	24.15%	9.80%	16.44%	21.44%	28.17%
\$70,001-80,000	26.06%	9.27%	14.63%	22.25%	27.79%
\$80,001-90,000	26.54%	10.27%	15.98%	20.04%	27.17%
\$90,001-100,000	35.98%	9.78%	14.52%	16.74%	22.97%
\$100,001-120,000	36.61%	12.57%	15.17%	16.17%	19.48%
\$120,001-over	58.88%	13.07%	10.47%	7.70%	9.42%

219. Cf. *supra* notes 30-32 and accompanying text.

220. See *infra* Table 3.6, at p. 1505.

221. See *supra* note 147.

Further, the literature informs us that the wage gap between husbands and their wives causes wives to contribute less to household income.²²² In middle-income white households, wives' and husbands' contributions remain similar at various income levels.²²³

To the extent that the literature suggests that family economic survival is not dependent upon the wife's economic contribution, it is most correct with respect to upper-income white households.²²⁴ Middle-income white families increasingly have come to rely on the wife's income – although to a lesser degree than African-American families. The literature similarly does not apply to middle-income white households in that it asserts that husbands earn considerably more in the work force than their wives.²²⁵

3. *Low-Income Wives Are Equally Likely to Be the Sole Wage Earner*

In households earning \$10,000 or less, white wives are almost as likely as their husbands to be primary wage earners.²²⁶ Accordingly, low-income white husbands are not always the primary wage earner. These results are not surprising given the severe tax penalties associated with the EITC if two spouses contribute income.²²⁷

In households earning \$10,000 or less, African-American wives are slightly more likely to be the primary wage earner than their husbands.²²⁸ Although Professor McCaffery acknowledges that the Code pushes lower-income households towards the single-earner model, he never discusses the possibility that the primary wage earner could be the wife.²²⁹ Neither did any other author.²³⁰

Further, the literature suggests that families' economic survival is not dependent upon wives working outside of the home.²³¹ This assertion simply is not true when applied to low-income women, regardless of race, who are primary wage earners. Lower-income white wives are almost as likely to be the primary wage earner as white husbands.²³² If the primary wage earner is

222. See *supra* notes 30-32 and accompanying text.

223. See *supra* Table 3.6, at p. 1505.

224. See *supra* Table 3.6, at p. 1505.

225. See *supra* Table 3.6, at p. 1505.

226. See *supra* Table 3.2, at p. 1496.

227. See *supra* notes 59-69 and accompanying text.

228. See *supra* Table 3.1, at p. 1492.

229. See McCaffery, *supra* note 2, at 996, 1017.

230. See *supra* note 4 (quoting commentators who treat married women as secondary wage earners).

231. See *supra* Part II.B.

232. See *supra* Table 3.2, at p. 1496.

the wife, it simply cannot be correct to state that the family's economic survival is not dependent upon the wife working outside of the home. This assertion is less true with respect to African-American women who are more likely to be the primary wage earner in African-American households than their husbands.²³³

Similarly, the literature asserts that husbands earn considerably more in the work force, which is inapplicable to low-income households in which wives are the primary wage earners.²³⁴ The statistic that men are five times more likely to be the single earner in single earner households masks any race, class, or gender implications.²³⁵ Men are slightly more likely to be the primary wage earner in low-income white households and women are slightly more likely to be the primary wage earner in low-income African-American households.²³⁶ Contrary to what the literature suggests, the tax laws do not encourage low-income married women to work at home when they are the primary support for their families.²³⁷ Low-income married women not only work, but they are the primary wage earners in almost half of the households—regardless of race.

4. Summary

The primary/secondary paradigm does not fit most households. A significant percentage of white husbands provide between 90 and 100% of household income only in households with income greater than \$120,000.²³⁸ The highest concentration of primary wage-earner African-American husbands is found in households earning up to \$10,000.²³⁹ The literature's characterization of households with primary and secondary wage earners is accurate mainly with respect to upper-income white households. All other households do not fit neatly into the literature's primary/secondary analysis. More white households pay marriage penalties than the literature might suggest.²⁴⁰

Although most married men are not primary wage earners, white husbands are still more likely to be primary wage earners than African-American husbands at all income levels.²⁴¹ As a result, white households are more likely to enjoy a marriage bonus.

233. See *supra* Table 3.1, at p. 1492.

234. See *supra* Part II.B.

235. See *supra* Part II.B.

236. See *supra* Table 3.2, at p. 1496; *supra* Table 3.1, at p. 1492.

237. See *supra* Part II.B.

238. See *supra* Table 3.2, at p. 1496.

239. See *supra* Table 3.1, at p. 1492.

240. See *supra* Table 3.4, at p. 1502; *supra* notes 178-79 and accompanying text.

241. See *supra* Table 3.1, at p. 1492; *supra* Table 3.2, at p. 1496.

IV. Tax Literature Solutions Perpetuate Class, Race, and Gender Biases

A. Introduction

This Part shows how, given the race, class, and gender implications of the federal tax laws described in Part III, the literature's proposed solutions do not improve the economic circumstances of many women. The literature's proposed solutions are designed to encourage increased labor force participation.²⁴² Those solutions have race, class, and gender implications which have been previously ignored.

First, the proposals will have little impact on low-income wives who are already primary wage earners. Second, the proposals will have little impact on wives who contribute significant amounts to household income due to their full-time labor. Third, the proposals designed to subsidize women as secondary wage earners by penalizing men as primary wage earners will have the opposite effect in all households in which women are primary wage earners. In general, the proposed solutions benefit only upper-income white women.

By focusing on increased labor participation as a solution to "gender" bias, the literature ignores the possibility that work inside the home may be valuable to women as well as the possibility that working more, given the discrimination women experience, may be an inefficient solution. By focusing on increased labor participation as the sole solution, the literature perpetuates the race, class, and gender implications of who benefits in the paid labor force and who loses.

B. The Literature's Solutions Perpetuate Race, Class, and Gender Bias

1. Abolish Joint Return

Mandatory individual filing would only eliminate marriage penalties and marriage bonuses imposed by the federal tax laws. Individual filing would have no impact on the race, class, and gender bias found in the waged labor market.²⁴³ To the extent that married white men earn the most in the paid labor force, they would continue to do so. Their total tax liability would be dependent upon whether other federal tax law provisions would enable them to minimize their tax liability. Studies suggest that certain married women, namely those without children, those with reliable childcare, those with jobs with flexible hours, and those with skilled careers, are more likely to increase their labor market participation.²⁴⁴ Studies also suggest that married women

242. See *supra* Part II.D.

243. See Alstott, *supra* note 10, at 204 ("Although individual filing obviously cannot solve all women's economic problems, it may not even be a good first approach to addressing the most significant barriers to improving women's economic well-being through market work.").

244. See *id.*

in low-wage work are less likely to benefit from increased waged labor.²⁴⁵ In addition to those class distinctions, studies show that married women who work at home tend to be white.²⁴⁶ Individual filing, therefore, has race, class, and gender implications. That is, individual filing will benefit upper-income, highly skilled white women who will then be able to enter the labor force. Low-income, less highly skilled women will be unable to enter the market. Additionally, African-American women already work in the paid labor market to a great extent, and any proposal designed to encourage them to work more misses the mark.

Those studies suggest that encouraging paid labor market participation will increase the participation of nonworkers and will be less likely to increase the participation of married women already in the paid labor market.²⁴⁷ Because nonworking married women are more likely white and working married women are more likely African-American,²⁴⁸ Professor Alstott has noted that "advocates of individual filing ought to consider the possibility that the largest tax incentives would accrue primarily to white, middle- and upper-income housewives."²⁴⁹

Thus, abolishing the joint return would not eliminate wage discrimination and therefore would not help those who are paid less because of their race or gender, namely African-American families and white women.

2. Tax Imputed Income

Taxing imputed income penalizes those families in which the primary wage earner earns enough income in the paid labor force to allow the other spouse to work inside the home. These families are primarily middle- and upper-income white families, as well as a few upper-income African-American families.²⁵⁰ Taxing imputed income could cause more women to enter the paid labor force which could lead to higher taxable income. African-American women already participate in the waged labor market at higher percentages than white women.²⁵¹ To the extent that wage discrimination continues to exist, married white women would continue to earn more than all other women. One might predict that as white women and African-American women seek jobs outside the home in the paid sector, employers would continue to

245. *Id.* at 2024-25.

246. *Id.* at 2025.

247. *Id.*

248. See Brown, *supra* note 2, at 49 ("Black women historically have entered the workforce in larger numbers than white women and have stayed there longer.").

249. Alstott, *supra* note 10, at 2025.

250. See *supra* Table 3.1, at p. 1492; *supra* Table 3.2, at p. 1496.

251. See *supra* notes 139-41 and accompanying text.

favor hiring white women.²⁵² The tax laws would encourage women to enter the paid labor force, but these laws would not favorably affect the supply of jobs for those women. Given the discrimination African-American women currently experience, one would again expect them to be disproportionately left out or placed at the bottom of the paid labor force. If imputed income of African-American wives was taxed but these women were without resources to pay their additional tax liability, the proposed solution would further exacerbate the economic hardship caused by the race and gender discrimination African-American women and their families face.²⁵³

In addition, if a joint return was still permitted, African-American families would pay a disproportionately higher marriage penalty because African-American wives and husbands earn wages proportionately closer to each other than white wives and husbands.²⁵⁴ Married white women, on the other hand, earn a lower percentage of their husband's salary and would pay a lower marriage penalty.²⁵⁵ The proposal to tax imputed income would perpetuate the race, class, and gender bias, and white families would continue to pay the lowest marriage penalty while African-American families would continue to pay the highest marriage penalty.

3. Provide Tax Incentives to Wives in the Paid Labor Force

Subsidizing married women by imposing a tax on the primary earner would severely penalize lower-income wives who are the primary wage earner. It would also penalize African-American families with no clear primary wage earner and African-American wives who are the primary wage earner. Yet the literature assumes that the husband is the primary wage earner. Increasing the tax liability of African-American husbands who are already paid less due to their race in the labor force would perpetuate the racial bias of the federal tax laws. Professor Heen acknowledges that child care credits are helpful in middle-class families, but the benefits are severely limited in low- and upper-income families.²⁵⁶ Professor Heen also notes that lower-income families cannot take full advantage of the credit because it is nonrefundable, whereas upper-income families are limited in the amounts

252. Cf. Brown, *supra* note 2, at 53 ("[D]uring the 1980s [white women] were more successful than black women in breaking the glass ceiling.").

253. Cf. Alstott, *supra* note 10, at 2024 ("[T]he relationship between market work and women's economic well-being is also extremely complex and may vary by class, by race, and by occupation."); Staudt, *supra* note 104, at 1574 ("Focusing solely on market labor as a means to economic independence, for example, fails to acknowledge that many women who currently participate in the market remain economically vulnerable.").

254. See *supra* notes 126, 128 and accompanying text.

255. See *supra* note 126 and accompanying text.

256. Heen, *supra* note 51, at 189.

expended which can be used for the credit calculation.²⁵⁷ Although Professor Heen acknowledges class distinctions among taxpayers, she does not mention racial distinctions among taxpayers.

As a result of the data described in Part III of this Article, one could also posit that greater deductions for child care expenses under Section 21 would disproportionately help the middle- and upper-income white households which could better afford to pay for child care. African-American households would similarly receive child care deductions, but only to the extent that they could afford to pay for the child care, a more difficult task given the wage discrimination African-Americans face in the paid labor market. In addition, Section 129 does not benefit the vast majority of married women with children because only one-third of full-time employees at private firms were eligible for such plans in 1991.²⁵⁸ The Section 129 exclusion provides the greatest benefit for most middle- and upper-income taxpayers.²⁵⁹ Increasing the deduction or credit for child care expenses would perpetuate the class, race, and gender biases of the federal tax laws.

4. *Subsidize Employers that Hire Wives*

A subsidy for employers that hire wives may subsidize employers that continue to prefer hiring white women.²⁶⁰ Accordingly, this proposal would subsidize firms that continue to discriminate against African-American men and women. It could also subsidize employers that prefer highly-skilled labor and would benefit highly-skilled upper-income white women to the detriment of less-skilled workers.²⁶¹ This again would perpetuate the discrimination by employers on the basis of race, class, and gender.

5. *Replace Progressive Rate Structure with Flat Tax*

Taxing only wages, and not wealth, as the flat tax is designed to do, would further perpetuate class, race, and gender biases. Studies show that white families have a disproportionate amount of wealth relative to African-American families.²⁶² One would therefore expect a flat tax that excludes

257. See *id.* at 189-90.

258. See *supra* note 86 and accompanying text.

259. See Heen, *supra* note 51, at 192.

260. See Brown, *supra* note 2, at 53 (describing white women as primary beneficiaries of affirmative action).

261. Cf. Alstott, *supra* note 10, at 2024-26 (positing that individual filing would likely benefit highly-skilled upper-income women more than less-skilled lower-income women).

262. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH* 7 (1995) ("Middle-class blacks, for example, earn seventy cents for every dollar earned by middle-class whites but they possess only fifteen cents for every dollar of wealth held by middle-class

wealth to cause African-American families to incur a higher tax liability. One would also need to examine the gender dimension to wealth as well. This solution would only exacerbate the race, class, and gender bias of the federal tax laws.

V. Conclusion

Tax literature that examines gender bias in the federal tax laws treats all women alike. This gender essentialism leads commentators to propose solutions that do not address the problems faced by many white women and African-American women. This Article shows how federal tax laws either benefit or penalize married women based upon their race, class, and gender. Further, this Article shows how the gender bias literature's focus on wives as secondary wage earners ignores how federal tax laws benefit upper-income white families and penalize African-American families and middle- and low-income white families.²⁶³ Perhaps, if the literature acknowledged the race and class differences among women, one could observe the tax penalties paid by low- and middle-income white wives and all African-American wives when compared to the tax benefits disproportionately received by upper-income white wives.

The race, class, and gender bias in the federal tax laws must be examined and acknowledged. Only then can solutions be designed to assist all women. This Article takes a first step in that process.

whites."); see also Moran & Whitford, *supra* note 136, at 759-72 (discussing tax consequences of racial wealth disparity).

263. Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (stating that "this principle of interest convergence provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites").

CONFERENCE
