Like Circus Clowns and Movie Actors,

Women Should Deduct Their Work-Appearance Costs

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I. Introduction

The tax law on the deductibility of working expenses seems, on its face, gender neutral. A closer look shows that the doctrine fails to account for women’s working experiences, with the result that working women pay higher income taxes than working men.

Women have historically been confined to the private sphere of the home and prohibited from engaging in the public sphere, both explicitly and constructively. Though much has changed in the world, scars of the previous division remain. The law of federal income taxation in the U.S. draws a seemingly unrelated distinction between the ‘personal’ and ‘business’ expenses of working in the public sphere. Expenses which are ordinary and necessary for the production of income are deductible, while those whose value is thought to be enjoyed more personally are not. This doctrinal distinction grows out of a body of law that, in addition to being drafted almost exclusively by men, contemplated a world in which the ‘production of income’ was taken on (and deducted) almost exclusively by men. Now that women make up about half of the U.S. workforce, the line between business and personal costs of working may require a shift, in consideration of women’s working experiences.

The cost of coming to work presentable in appearance has generally fallen within the personal, non-deductible category of expenses. But, while excluded from civic life and full legal personhood, women became reliant on their appearances for social capital (the only currency to which they had direct access). Though today’s culture seems to have adapted to the idea of a woman earning income in the public sphere, the heightened beauty standards of her former condition have followed into her new role. She, therefore, must purchase significantly more products and services to show up ‘presentably’ to work; Products and services which have consistently been shown to cost more than equivalent men’s products. The problematic
combination of private sphere appearance expectations with old public sphere rules creates a unique situation for working women, one with which the Internal Revenue Code has yet to grapple.

This paper argues that expenses of a woman’s business work-appearance are not personal, but are costly inputs to her production of income. Women are not only expected to invest in more specialized inputs than men (think make-up, variety of attire, manicures, etc.), but also to pay more for gender-neutral inputs (think haircuts, razors, dry-cleaning, etc.) because of the ‘pink tax’. Much like movie actors and circus clowns whose appearances can be considered an ordinary and necessary expense of their business, women should be permitted to deduct those inputs.

II. Background

As a preliminary note, the term “woman” is used throughout this paper to refer to anyone who perceives themselves to be subject to feminine social standards. This paper recognizes that there is diversity within gender, which is the subject of ongoing academic exploration. It also recognizes that there are people who will comply with gender expectations, people who will defy them, and people who will do some combination of both. Each of those choices comes with its own related costs. Finally, it recognizes that not all pressures of appearance are externally imposed; There will be people who gain internal satisfaction from presenting in ways that may align with external gender expectations. Nevertheless, this paper identifies a large contingent of people who feel constrained to comply with feminine appearance standards, particularly in the workplace, and argues that those people are effectively paying higher federal income taxes.

The paper approaches the issue of non-deductibility of work-appearance costs from a Cultural Feminist Legal Theory lense with a Pragmatic Feminist slant toward problem solving.
Cultural Feminism, sometimes referred to as Difference Theory, grows out of the shortcomings of Equal Treatment Theory, which emphasized the sameness of women and men in arguments for equality. Recognizing the ways in which that framing forced women to “become subsumed within a male category,” and “abandon their difference,” in order to earn equality, Cultural Feminism seeks instead to center the unique experiences of women and emphasize their different needs.¹ The Cultural Feminist recognition that “[g]ender-neutral laws can keep women down if they do not acknowledge women’s different experiences and perspectives,” is a central foundation of the arguments in this paper.²

The primary criticism of Cultural Feminist Legal Theory is that, by “characterizing women as needing special protection,” it risks perpetuating historical disadvantages by putting women “not on a pedestal, but in a cage.”³ Some have described this risk as “the double-edged sword,” because it permits “unfavorable as well as favorable treatment against an historic background of separate spheres ideology.”⁴ The critique is useful in the context of this paper. It is not difficult to imagine, for example, that acceptance of this paper’s thesis might lead to the conclusion that women are not suited for public sphere work since they can apparently not shed private sphere expectations.

Fortunately, Pragmatic Feminism provides a helpful backstop against tossing out solutions that are helpful in particular contextual realities, even if potentially precarious in more abstract theoretical schemes. Its primary insight, that “an outcome along ideal [theoretical] dimensions may leave individuals without remedy,” helps loosen the double-bind of the difference versus sameness debate.⁵ In acknowledging both the real risks of characterizing women as needing special protection and of providing working women with no remedy to the
overtaxation they face, this paper draws on Pragmatic Feminist in devising contextualized solutions.

III. The Case for Women’s Disproportionate Work-Appearance Costs To Be Deductible as Ordinary and Necessary Business Inputs

Women and men have historically been segregated between the private and public spheres respectively. The U.S. Supreme Court itself approvingly described the divide in its 1872 decision upholding Illinois’s rejection of Myra Bradwell from the state’s bar association as constitutional despite the guarantees of the Fourteenth Amendment:

“The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the creator.”


The doctrinal distinction between ‘personal’ and ‘business’ consumption was developed in the shadows of this separate spheres context. That is to say, it was developed almost exclusively by men and contemplated a world in which the ‘production of income’ was taken on (and deducted) almost exclusively by men. Its goals were relatively innocuous, though.

The personal-business distinction, like most tax policy, grows from the aspiration of taxing people based on their relative ‘Haig-Simons income.’ Economists Robert M. Haig and Henry C. Simons are credited with developing the uses-model of income to which the Federal Income Tax attempts to tether itself. Haig-Simons income is measured as the sum of an
individual’s net accretions to wealth (i.e. savings) for the year and the total of their consumption within that year.\textsuperscript{2}

Because “the concept of income appropriate for tax purposes somehow must be related to the well-being of the person receiving it,” the consumption component is meant to encompass only ‘personal consumption,’ as opposed to consumption for the production of income (‘business consumption’).\textsuperscript{8} This makes sense when applied to a simple example: Imagine a taxpayer, Juliana, who earns $1,000 in a year as a mechanic. She puts away $700 in a savings account, she spends $200 of it on a new set of tools for work, and spends the remaining $100 on swimsuits for her upcoming vacation. Juliana’s Haig-Simons income should be $800 because that is an accurate measure of how much ‘better-off’ she is compared to last year; She has $700 more in savings to draw from and she has gained enjoyment of swimsuits which she valued at $100. The $200 that Juliana spent on work tools does not make her better-off in the same sense. In contrast to the personal consumption of the swimsuits, she undertook the cost of the tools in order to produce more income. The $200 spent on tools then, should be deducted from Juliana’s taxable income (i.e. shielded from federal taxation) as ‘business consumption.’

The calculation becomes more complicated where a consumption item falls somewhere along the border between personal enjoyment and business necessity, posing a valuation problem for the tax law. Imagine if, instead of the swimsuits, Juliana spends her remaining $100 on boots that she wears both at work and in her personal life. Conceptually, it is not so clear now whether the $100 should be taxable or deductible, either in full or in part.

As it stands, the Internal Revenue Code would treat Juliana’s boots like all work clothing. The full $100 would be considered a personal expense taxable under §262, rather than an ordinary and necessary business expense deductible under §162(a). Several IRS rulings carve out
a limited exception from that general rule for uniforms that are specifically required as a condition of employment and are not adaptable to general wear. Where consumption items do not meet the uniform standard, courts will determine the cost of clothing to be deductible as an ordinary and necessary business expense only if “(1) the clothing is required or essential in the taxpayer's employment; (2) the clothing is not suitable for general or personal wear; and (3) the clothing is not so worn.” As the case law demonstrates, this test is rarely met and work-appearance inputs are consistently taxed as personal consumption. Professors Michael Graetz, Deborah Schenk, and Anne Alstott rightly acknowledge that a system which considers “all costs of clothing and grooming inherently personal and thus nondeductible,” would perhaps be unfair to “someone who derived no pleasure from the activity and for whom the expenses played a substantial role in her trade or business.”

It is these borderline items that open the door wide for deviation from the Haig-Simon’s ideal theory of income. Without that economic anchor, legislators and judges are left to fill in the gaps themselves. It should be no great revelation that a small group of elite decision makers, “who have been largely white, male, and wealthy throughout our nation’s history,” have enacted and interpreted a tax code that “reflects their worldviews, values, biases, and experiences.” Tax scholars have, in recent years, recognized the “rather obvious (but unspoken) point,” which underpins all of feminist legal scholarship: “That nearly all public laws in the history of existing civilization were written by men,” and so “if such laws give men a leg up, this news can hardly come as a surprise.”

The Federal Tax Code is no exception. The modern tax code, originally enacted in 1939, “failed to reflect the reality of the lives of women, people of color, and others who experienced ongoing discrimination, whose labor was unrecognized and undervalued, and who faced barriers
to economic security and opportunity.”¹⁶ This is not to say that women’s issues have never been considered, but instead that when they have been considered, they have been easily denied against a framework that never accounted for the roles they now occupy.¹⁷

A. The Shift in the Private-Public Sphere Dichotomy Requires Reconsideration of the Personal-Business Consumption Dichotomy

That framework, the separate spheres ideology, once allowed for straightforward parallels. The personal category of consumption was readily analogized to the private sphere, while the business category was linked to the public sphere. In other words, money spent on things for the home (‘the woman’s domain’) were taxable as personal consumption, and money spent on things for public life (‘the man’s domain’) were deductible as business expenses, roughly speaking. The primary distinction, though, is that the focus of government regulation is reversed. Personal consumption decisions, like behavior in the public sphere, are scrutinized more closely, while business consumption decisions, like private sphere behavior, are protected by a veil of deference.

Criticism of the personal-business consumption dichotomy suggests that personal consumption relies on an illusory ability to choose that “serves the dual goal of emphasizing the taxpayer’s responsibility for the consequences of the choice and minimizing the tax law’s complicity in perpetuating marketplace distortions.”¹⁸ Doubling down on the flawed dichotomy as an “objectively accurate means of measuring ability to pay,” the law works to obscure its own role in “creating and maintaining [a] hierarchy . . . by rationalizing deference on the part of the government toward the business realm while justifying regulation of the personal realm.”¹⁹

Against the separate-spheres backdrop, that hierarchy means greater deference toward ‘men’s domain’ and greater scrutiny toward ‘women’s domain’. Further examination of the analog between the private-public and the personal-business divisions reveals that “those who
have power in the home and in the marketplace enjoy relative liberty in both spheres—they can invoke privacy notions to avoid regulation at home (e.g., allowing domestic violence to go unpunished) and public benefit notions (productivity) to avoid regulation in business and obtain benefits as a matter of right.”

The gains of feminism have blurred the formerly sharp edges of the separate spheres, making public much of what was once considered private and personal. The shift in the private-public sphere dichotomy requires reconsideration of the personal-business consumption dichotomy. Authors like Mary L. Heen have paved the way for such a shift, arguing that child care costs are legitimate income production expenses, and their deductibility should be framed as ordinary and necessary rather than as a subsidy. Similarly, in his 1940 dissenting opinion in Sparkman v. Commissioner, Federal Judge Denman argued that to be characterized as ‘ordinary,’ an expense need not always have been considered ‘ordinary.’ Instead, he suggested, the ‘ordinary’ determination should develop alongside the ever-progressing business world.

The law has certainly permitted business deductions for consumption less ‘ordinary and necessary’ than work-appearance costs, including private jets, high-end hotel accommodations, luxury office furnishings, artwork, golf club memberships, legal costs for defending against criminal activity (including bribery and fraud,) and personal security costs (including personal bodyguards), to name a few.

In the context of a business world that remains dominated by men, the Government’s great deference to business judgment has resulted in preferential treatment (in the form of tax deductions) of borderline personal-business items, primarily where the personal component is masculine. Legal decision makers, who remain predominantly male, struggle to distinguish
traditionally masculine activities from business, yet have little trouble discounting feminine activities as inherently personal.

**B. Expenses of a Woman’s Work Appearance Are Not Personal, But Are Costly Inputs to Her Production of Income**

Much like movie actors and circus clowns whose appearance can be considered an ordinary and necessary expense of their business, women working in a world that deems their bare faces ‘unprofessional’ should be permitted to deduct their work appearance inputs.\(^{26}\) To accurately measure economic income, the tax law must adapt to reflect the realities of a new business world that encompasses women workers and their unique experiences. Judge Denman’s critique is as valid today as it was sixty years ago; Our understanding of which expenses are ordinary and necessary for the production of income should evolve as the practices of income production evolve.

1. **Women’s Work Appearances Differ More From Their Personal Appearances Than Do Men’s Because Business-Appropriate Appearances Were Built on a Male-Model**

   It is first critical to acknowledge that working women’s appearances are subject to a fraught double-standard born of traditional, feminine expectations of the home, on the one hand, and public sphere appearances traditionally reserved for men, on the other. Because business-appropriate appearances have been built on a male-model, a woman’s work appearance is more comparable to a costume than to her own ‘personal’ appearance.

   In this respect, the tax law is guilty of the same flawed stretching of the ‘reasonable man’ standard for which other areas of the law have been criticized. Nominal changes in the law from ‘reasonable man’ to ‘reasonable person’ without a more thorough analysis of the inherent differences between those concepts, means, in effect, that “to be reasonable, a woman must act in
a way that an ordinary man would have acted.”\footnote{22} The effect is comparable in the case of business deductions. To be thought of as ordinary and necessary, an expense must align with what has always been ordinary and necessary to businessmen. The gender-neutral standard masks a gendered workplace that both requires women to put on a modest ‘lady-professional’ costume while still maintaining some feminine appeal.

A multitude of studies have demonstrated the same conclusions one might come to after a single stroll through an office: Women “face greater pressure to be attractive and greater penalties for falling short,” and yet, “even as the culture expects women to conform, it disdains the narcissism in their efforts.”\footnote{28} The double-bind of women’s work appearances means that while within the workplace “there is a widely held expectation that women conform to their gender in order to succeed,” there is a simultaneous bias that feminine dressing is incompatible with credibility and competence.\footnote{29}

One psychological meta-analysis found that “[u]nattrative women are disadvantaged in female-dominated occupations, such as receptionist or secretary,” \ldots but by contrast, “in upper-level management or partnership positions that traditionally have been male-dominated, a beautiful or “sexy” appearance may suggest less competence and intellectual ability.”\footnote{30} Another found that “[w]omen with exceptionally large breasts are judged lower in intelligence and effectiveness.”\footnote{11} Even the courts recognize and reinforce the reality of gender-specific appearance expectations. As recent as in 2006, the Ninth Circuit held that an employer’s requirement that women employees wear makeup did not constitute sex discrimination under Title VII.\footnote{32} Meanwhile, men who pay “too much attention to looks can appear ‘foppish,’” and are accordingly discouraged in many ways from spending on the borderline personal-business work appearance items that are required of women.\footnote{33}
In sum, women face a stifling patchwork of feminine and masculine appearance expectations, enforced by the threat of professional disrepute. If one manages to be successful in achieving that ensemble, she likely views it as a costume necessary for the production of her income, rather than personal consumption she has chosen to enjoy.

2. Women’s Work Appearances Require More Inputs Than Do Men’s

To strike that careful balance between masculine and feminine work presentation, working women are expected to purchase significantly more inputs than working men. They range from societally reinforced expectations like makeup, to physical necessities like maternity wardrobes. Some are expectations carried into the workplace from the private sphere, and others represent attempts to squeeze into the constrained male-model of professionalism. All demonstrate the convoluted double standards of working women’s appearances.

The following inputs are some business expenses unique to working women: bras; hosiery; shapewear; heels; a separate pair of flat shoes for commuting; significant diversity of color and style, maternity wardrobes (especially in what is shaping up to be a future of forced pregnancies\(^{44}\)); makeup; hair-care including styling, coloring, extensions, and wigs (the cost of hair-care inputs, in particular, tends to be even greater for Black women, whose natural hair is the subject of compounding professional criticisms); hair-removal from legs, arms, and face; nail-care; jewelry; cosmetic procedures. Many of these costs are even more acute for women who work in the face of intersecting oppressions like ageism and racism. This is not an exhaustive list by any stretch. Rather, it only begins identifying the particulars that make women’s ‘ordinary’ working expenses different (and greater) than men’s.

3. Women’s Work Appearance Inputs Are More Costly Than Men’s
While keeping pace in the unchoreographed dance between masculine and feminine work presentations, women are also required to pay more than men for the same inputs. That is, not to mention, “in addition to earning less than men in the workplace.” The gendered price disparity between substantially similar products and services is referred to in recent public debate as the ‘pink tax.’ Though not formally a tax, gender-based pricing is the economic equivalent of a tax. It is not payable to a government, derivative of public law, nor intended to raise state revenues. However, it is compulsory and unrequited and so, in effect, can be considered an economic tax.

Further, because the pink tax works as a selective consumption tax on women’s products and services, it imposes regressive effects. By not accounting for income in its application, it ends up taxing lower income people at a higher rate than higher income people. To illustrate the regressive effects of consumption taxes, consider the following example. Mariella earns $100 and her sister, Sofia, earns $50. Both Mariella and Sofia purchase $20 shirts to wear to work. Even though they each paid $20 for the shirt, Mariella only exchanged 20% of her income while Sofia exchanged 40% of hers.

Now recall that on top being a consumption tax, the pink tax is selective, meaning that it only impacts women’s products/services. To round out the previous example, imagine that the women’s brother, Nicholas, buys the same shirt in a ‘men’s cut’ for $15. Given that he is likely to earn more at work by virtue of his gender alone, assume Nicholas has an income of $120. Nicholas then exchanged only 12.5% of his income for the shirt, compared to Mariella’s 20% and Sofia’s 40%. Even if Nicholas earned the same $50 as Sofia, he would still use only 30% of his income compared to her 40% to purchase the shirt.

Once framed as an selective consumption tax, the pink tax is comparable to a ‘sin tax’ that deems the appearance inputs expected of women to be luxury and vain. Quintessential
selective consumption taxes are those levied on alcohol and tobacco. Their goal is to diminish use on ‘undesired products.’ Some have argued that the goals of the pink tax are similar: “an additional charge may either aim to place the product/service out of the reach of women belonging to lower-income levels or be instituted in the first place because the product/service is deemed to be ‘luxurious’, thereby, the demand is expected to be rather inelastic.”

a) Pink Tax on Products

Countless studies have consistently established that products targeted to women are sold at higher prices than substantially similar products targeted to men. In 2015, the New York City Department of Consumer Affairs demonstrated that “on average women’s products cost 7% more than similar products for men,” meaning that “women [were] paying thousands of dollars more over the course of their lives to purchase similar products as men.” In all, the Department found that “[a]cross all industries examined, women and men paid equal prices only 40% of the time.” The study considered prices of approximately 800 products sold by over 90 brands, varying from toys for children to diapers for adults. The products chosen were “strikingly similar, some showing only minor variations from their ‘male counterpart’ (mostly in their colour and packaging) and some showing no visible differences at all.” Among others, the study highlighted the following disparities:

- Children’s scooter ($24.99 in red, $49.99 in pink);
- Children's helmet ($14.99 in blue, $27.99 in pink);
- Identical brand shirt of equal quality ($30 for men’s cut, $40 for women’s);
- Shampoo ($1.29 for 3-in-1 men’s, $1.99 for 2-in-1 women’s);
- Four pack of triple-blade razors for sensitive skin ($4.99 in blue, $6.99 in pink);
- Adult compression socks ($18.99 for men, $21.99 for women);
- Adult diapers ($11.99 for 52-pack for men, $11.99 for 39-pack for women).”

The Federal Government has come to similar conclusions. In 2018, the United States Government Accountability Office (GAO) released a report to Congress finding that among personal care products from 200 national retailers, “women paid more for underarm deodorant,
Another 2018 study examining 110 different facial moisturizers found that “those targeted to women cost approximately $3.09 more per ounce than those targeted to men.” A 2019 study found that “women paid significantly more per milliliter than men for identical [hair loss] medication.” In 2011, a study examining 538 products “including 199 deodorants, 89 shaving gel/creams, 204 razors and 46 body sprays,” determined that on average: “(i) per ounce of deodorant, women paid $1.44, while men paid $1.15; (ii) for a container of body spray women paid $5.81, whereas men paid $4.58; [and] (iii) for one razor, women paid $3.00, while men paid $2.67.”

**b) Pink Tax on Services**

Though the primary focus of ongoing public disapproval has focused on the pink tax on products, the pink tax on substantially similar services is potentially more insidious. The pink tax on services eliminates any possibility of escape that may have remained in the case of products. Though unreasonable for reasons expounded in the following section, a woman may theoretically avoid the products tax by purchasing men’s products. In the case of services though, that scintilla of choice is erased. A woman cannot elect to be charged men’s dry-cleaning or haircut prices, for example. The cost of that lack of choice is non-negligible.

In 1993, the California Assembly Office of Research concluded that the pink tax on services “cost women approximately $1,351 per year in 1993.” That’s $2,712.40 in today’s dollars. The year prior, the New York City DCA concluded that “women were charged more than men at used car dealers, dry-cleaners, launderers (27% more) and hair salons (23% more).” It determined that, “over the course of a year, cleaning 3 suits and 10 shirts per month in 1992 would cost a man approximately $466.20 and a woman $543.72.” In today’s dollars,
that’s a $162.28 yearly upcharge on dry cleaning just for being a woman. A survey examining
department stores found that in several stores “men usually received complimentary tailoring
services, whereas women were charged for the exact same services.”

Multiple studies have shown that these upcharges exist even before additional charges are
incurred for differences in women’s and men’s products. A 2011 study considering prices offered
by 100 randomly selected dry-cleaners found that the average price for cleaning a men’s shirt
was $2.06 and $3.95 for a women’s shirt. That disparity was measured before specific charges
were made for the shirt’s fabric, embellishments, pleats, etc. The Office of the Attorney
General and Human Rights Commission for the State of Vermont discovered a similar
phenomenon. It found that “women were charged up to $5.20 more than men per shirt,” and
more importantly that “[t]he service providers indicated the prices on the phone, without seeing
the specificities of the shirts concerned.” When asked for an explanation for the disparity, not
one provider was able to furnish a viable explanation.

In the case of haircuts, a 2000 study found that “women were charged higher prices for
haircuts even in cases where they specifically asked for hairstyles identical to men.” The
gender disparity existed even when “the hair-cutting technology and the training required for a
hairstylist to work in a hair salon as well as the wages paid to hairstylists were all identical
(substantially similar for wages).” Further, pricing policies were often not based on variables
like hair length and service duration that may reasonably influence cost, but instead were based
on gender alone. The pink tax on haircuts was famously (if unknowingly) highlighted in 2019 by
Congresswoman Alexandria Ocasio-Cortez and former Governor of Wisconsin Scott Walker.
Following a Washington Times article criticizing the Congresswoman’s spending $300 on a
haircut with coloring and gratuity, Walker tweeted a photo of his “$26 (with tip) haircut.” Twitter
users quickly “informed Walker that he had unknowingly pointed out the Pink Tax on women's services.”

c) Critiques of the Pink Tax

The pink tax is the subject of considerable skepticism. It is not a formal tax payable to a government or derivative of public law, but its economic effect remains that of a selective consumption tax: regressive and discriminatory. Because it is levied throughout consumer markets, without apparent coordination at any institutional level, many have searched for other explanations for gender-based pricing. The two most salient are considered in turn.

First, skeptics argue that gendered price disparities are a result of manufacturing costs. It makes for an appealing story. We know that women are encouraged and expected to devote more effort to appearances than men (though not to the point of vanity or discredit). We know that men are generally discouraged and even disparaged for putting such care into their appearances. So, it’s not hard to imagine that a shampoo marketed to women is of higher quality than one marketed to men. Unfortunately, that story is inaccurate. Though product pricing can be affected by labor, materials, “competitor pricing, brand, country of origin, cost of production, availability of supply, cost of packaging, cost of marketing, [and] size and method of manufacture,” those factors, even in combination, cannot explain the pink tax. Controlling for all manufacturing and distribution factors, there still exists “a latent additional amount that is being charged on women’s products for no justifiable reason.” And crucially, that additional cost “is not accompanied with a specific additional benefit that may be derived by the product [or service].”

The second criticism can be summarized by Tim Worstall’s 2014 *Forbes* article titled “The Pink Tax is Nothing to Do with Public Policy, Women Can Solve It for Themselves.” In it he asserts that “[a]bsolutely no legislative relief is necessary here . . . Everyone’s already got the choice and that they make the choices they do shows that they’re entirely happy with the choices
they are making.” In other words, if women are perfectly rational consumers then they should have no complaints about how much they freely choose to spend. If they do have complaints, they must be irrational. Aside from the fact that the author seems to think (in nostalgic nod to the separate-spheres days) that women’s issues are entirely divisible from ‘public policy,’ there are at least four other flaws in his argument.

To begin, women face a complete lack of choice in avoiding the pink tax on services and on products that are not also made for men. As highlighted earlier, the pink tax on services eliminates any remnants of choice that women consumers have in the case of products. Women are charged more for haircuts, for example, simply because they identify as women. Upcharges for duration, difficulty, and number of services are incurred in addition to the initial gender charge. In short, “[w]omen do not get the option to order a ‘men’s service’ and thereby to pay the ‘men’s price’, even when they opt for services that are completely identical to the ones provided to men.” Additionally, women have no option (not even one that would be unreasonable to expect them to exercise) to purchase the ‘men’s version’ of products that are not marketed to men. Bras, hosiery, heels, maternity wardrobes, hair extensions, and the like are only offered for one surcharged price consistent with the rest of products targeted at women.

Similarly, women face an effective lack of choice with respect to women’s products that have men’s equivalents. A woman cannot reasonably be expected to purchase men’s pants, for example. In addition to the fact that they were not made to fit her body, such a choice would almost certainly be met with the “social, economic and psychological repercussions” of transgressing the rigid sanctions of gender, including loss of respect in the workplace. Forcing a man “to wear clothing items that do not fit [his] size,” or “to smell in a way [he] does not like,” such that his workplace reputation and income producing capability is degraded would be a cruel
and unusual price for being a ‘rational consumer.’ It is that same price which effectively eliminates a woman’s choice to avoid the pink tax.

The third flaw implied by the rational consumer critique is that women consumers lack self-control. Several studies have demonstrated that actually the opposite may be true. Most notably, Walter Mischel’s 1960s ‘Marshmallow Test’ revealed that girls as young as preschoolers exercise greater self-control in consumption situations than their male counterparts. Mischel presented children with the opportunity to receive two rewards (for instance, marshmallows) if they could wait alone for up to twenty minutes. If instead, they chose to ring a bell, they could receive one reward immediately. Through extensive trials, Mischel observed that the girls displayed a “greater willingness and ability [] to wait longer,” that is “consistent with the finding that throughout the school years, at least in the US, girls are generally rated higher on self-discipline measures than boys by their teachers, their parents and themselves.” The Marshmallow Test concluded that “on the whole girls seem to have an advantage in the cognitive self-control skills and motivations that enable delay of gratification.” Similar experiments have resulted in the same conclusion. When asked in a separate study whether they prefer to receive $55 today or $75 in 61 days, “girls choose the delayed reward more often than boys.”

Assuming the children were not yet versed in the time-value of money, the study stands for the proposition that women are not inherently irrational consumers. In fact, in the absence of external pressures, they may actually be more conservative consumers.

Finally, but for some recent and limited media coverage, women consumers are likely unaware of the increased prices they are charged for equivalent products and services. There is no feminine surcharge label on product packaging nor a separate line item on purchase receipts. Stores generally display products targeted to women and men in different sections such that if a
consumer did stop to compare prices, she would still be deciding between only women’s products. Even in the exceedingly rare case that a consumer compares prices in disparate sections, deceptive packaging, marketing, and quantities impede equal comparisons.

Despite disagreements over its cause, it is important to note that the pink tax makes both men and women uncomfortable and even outraged once it is put openly on display. A Canadian experiment illustrated just that in 2018. Researchers altered a coffee shop menu to explicitly include higher prices for women. In response, “every customer, including men, protested against [the gender-based price discrimination],” and “most customers left without buying coffee.”

IV. Potential Solutions

If expenses of women’s work-appearances are costly inputs to their production of income, rather than personal expenses, the tax law may need to adjust the personal-business consumption divide. How exactly it should do so remains an open question, as does whether the tax law is the best mechanism for remedying the inequity.

A. Judicial Reform: a Subjective Suitability Test that Accounts for Gender

The more modest reform option would be an evolution of the subjective judicial test used by the Tax Court in Yeomans and Pevsner. Recall that where consumption items do not meet the uniform standard, courts will determine the cost of clothing to be deductible as an ordinary and necessary business expense only if (1) the clothing is required or essential in the taxpayer's employment; (2) the clothing is not suitable for general or personal wear; and (3) the clothing is not so worn. The second of those requirements referring to suitability, is at times taken subjectively, based on the lifestyle of the taxpayer, and taken objectively at others. In Yeomans v. Commissioner, the court permitted the deduction of a female fashion coordinator’s ‘advanced style’ work clothing using a subjective test to determine that the clothing was not suitable for her personal and private wear. Similarly, before being reversed by the Fifth Circuit, the Tax Court
in *Pevsner v. Commissioner* allowed a deduction for designer work clothing required of an Yves Saint Laurent boutique manager because it found that her personal lifestyle and socio-economic level was inconsistent with such attire.  

Consideration of the taxpayer’s lifestyle in determining whether a deduction for work clothing should be permitted opens the door for courts’ consideration of gender. Gender is, after all, a significant informer of one’s lifestyle and the apparel suitable for it. The lady-professional costume that women put on for work is often far removed from anything they would wear in their personal lives. In contrast, the standard suits typical of men’s business attire are also typical of men’s formal wear. Therefore, even if Juliana and Nicholas both attend formal events outside of work only very rarely, Nicholas will find his work attire to be suitable for at least those occasions while Juliana will likely not.

Analogous gender-subjective tests have been adopted on occasion by courts in the context of sexual harassment. In 1991, the Ninth Circuit supported the use of a ‘reasonable woman’ standard capable of encompassing the experiences of women. The court noted that women’s experiences of objectionable sexual conduct tend to diverge sharply from men’s such that a gender-neutral reasonableness standard could be inequitable.

The judicial reform alone, however, has not been successful in shifting the personal-business line. For one, such a test would depend almost entirely on the open-mindedness and unconscious biases of judges (who remain predominantly male and white). Any judicial reform also inches slowly against a backdrop of precedential ties between masculinity and business on the one hand, and femininity and personal consumption on the other. This may explain the still overwhelming prevalence of the objective test.
B. Tax Expenditures

More direct and comprehensive would be Congress’ enactment of a tax credit or deduction. While both effectively shielding a portion of income from taxation, a tax credit has greater equitable features. First, a credit can be refundable such that a taxpayer who does not have income great enough to absorb the amount of a deduction can still receive the full benefit in the form of a tax refund. Second, credits avoid the issue of upside-down subsidies inherent in tax deductions. Think of it this way: Deductions are subtracted from income before the income is multiplied by the taxpayer’s marginal tax rate. So, the higher one’s marginal tax rate, the more they stand to save from the deduction. A person in the highest tax bracket is escaping a (roughly) 37% tax on the amount of the deduction, while a mid-range taxpayer is escaping only a 15% tax on the same amount. Quantitatively, a $1,000 deduction will save $370 for someone in the highest 37% tax bracket while saving only $150 for someone in the 15% tax bracket. By contrast, credits are subtracted from the bottom line of the tax bill such that they have no interaction with the taxpayer’s rate. Thus, the upside-down subsidy effect is eliminated and taxpayers benefit equally.

A credit to remedy women’s inordinate work-appearance costs could be drafted in one of three variations: an individualized credit for all taxpayers, a standard credit for all taxpayers, or a standard credit for working women.

The first and theoretically ideal variation would be a gender-neutral, individualized credit. Unfortunately, it is also the least workable. An individualized credit would most closely mirror a Haig-Simons income measurement by considering exactly what a taxpayer spent on work-appearance inputs. It addresses the valuation concerns of a standard credit by not overtaxing people who spend more than average on work-appearance inputs nor undertaxing the people who spend less than average. Although, some valuation problems would remain at the
individual level. For example, how should the law value makeup that someone wears for work five days per week and for personal purposes two days per week? The larger flaw with the prototype, though, is the infeasibility of administering any individualized tax expenditure that is dependent on taxpayer self-reporting. The cost of monitoring and auditing abuse alone renders the option politically unviable. Additionally, the burden of tracking and itemizing expenses would fall disproportionately on women taxpayers because they have more inputs. Although the theoretical tax ideal, an individualized credit is not the proposal of this paper. Instead, the individualized variation allows for a precise calculation of the tax code’s deviation from Haig-Simons.

The next variation is a standard, gender-neutral credit (“universal credit”). Congress would choose a universal dollar amount by which to reduce each person’s tax bill. Though the most administrable, this option poses the worst valuation issues. It would overtax people who spend more than average on work-appearance inputs and undertax people who spend less. As has been revealed, those people who spend more are overwhelmingly women while those who spend less are men. In effect, a standard credit for all taxpayers regardless of gender would fail to remedy the issue. There is an inherent gender disparity in the aggregate cost of work-appearance inputs that cannot be solved by putting an extra $500 in every person’s pocket.

The final proposal is an imperfect compromise of the previous two. A standard credit available only to working women would address valuation worse than the individualized credit but better than the universal credit. It would address administrability better than the individualized credit but worse than the universal credit. A congressionally determined dollar amount would reduce working women’s tax bills equally. In terms of valuation, men would be overtaxed on any work-appearance inputs that they do not use outside of work, as would women
who spend more than the standard credit amount. Women who spend less than the standard credit
would be undertaxed. The primary administrability concern involves distinguishing taxpayers by
gender.

The final concern constraining this variation is its constitutional questionability. By
offering credits on the basis of gender, such provision might be challenged under the Equal
Protection Clause of the Fourteenth Amendment. However, federal courts have generally not
recognized gender or sex to be inherently suspect classifications worthy of strict scrutiny. 73 In
fact, The Supreme Court has upheld similar legislation from the Social Security Act that allowed
women to eliminate additional low-earning years from calculation of their retirement benefits
because it worked toward “compensat[ing] women for past economic discrimination.” 74 Further,
for whatever it may be worth, women have consistently been found to be more tax compliant on
the whole and so perhaps less likely to abuse a gender-specific tax goodie. 75

Despite the variety of drafting solutions available, the policy issues this paper raises may
not be best resolved through the Internal Revenue Code at all. Policy change by way of the
federal income tax involves certain limitations. Most notably, it is less visible and accessible to
the public than other legislation. Politicians therefore receive less credit and/or backlash from
their constituents for the changes they enact. In today’s climate, Democratic and Republican
politicians alike would probably prefer more attention on such a policy move.

Further, even the best drafted credit could imply approval of heightened beauty standards
and pink taxes. As Joseph Bankman and William A. Klien point out, tax expenditures “may be
intended not as a refinement of the concept of income so much as an express approval of, or
encouragement to, particular kinds of expenditures, in which case the deduction can sensibly be
analogized to a direct subsidy.” 76 Fortunately, Pragmatic Feminism refuses to leave us without
remedy. It suggests moving forward with solutions that are useful within their contexts even if not theoretically ideal.

V. Conclusion

Ultimately, the tax law is limited in its ability to remedy these inequities because they are a product of an ambient social system of gender inequity. The argument is not necessarily that the tax law should reimburse for it (however imperfectly), but that there is a greater business expense women face that should not exist if they are to compete on equal footing with men. What the tax law is uniquely capable of doing is providing an instructive framework for considering the real costs and consequences of the inequity. How to remedy the unchecked gender bias inherent in work-appearance expectations remains an open question.

What is certain is that the skewed line between personal and business expenses is reminiscent of the separate-spheres ideology. It overtaxes women relative to men with respect to their work-appearance inputs. It keeps women from participating fully in the public sphere if they so desire. And, it is not unique in that regard.

The tax law, though facially neutral, has been shown time and again to entrench existing inequities in gender, race, and class. The effective tax law disparities considered through existing scholarship, like the disparity focused on here, are layered on top of non-tax gender inequities of the workplace. If the gender pay gap, pervasive sexual harassment, and unequal burdens of caretaking labor needed any reinforcement in raising the cost of working while female, the tax law is here to help.
Endnotes

6. The separate spheres were and remain more distinct in white America. See Dorothy Brown, *The Whiteness of Wealth, How the Tax System Impoverishes Black Americans—and How We Can Fix It*, 36 (2021) (“Black wives . . . have always worked outside the home more than white wives, even after controlling for income. In fact, even as income rises, the labor gap between white and black wives widens along with it—meaning that among the highest earning couples, more black wives work and more white wives do not. (No matter how high the husband’s income is, black wives are more likely to contribute significant amounts to household income than white wives.’)”) (hereinafter Brown, *The Whiteness of Wealth*).
11. *Pevsner v. C. I. R.*, 628 F.2d 467, 470 (1980) (rejecting the tax court’s subjective test finding that a work clothing deduction should be allowed, and explaining its preferable objective test as making no reference “to the individual taxpayer’s lifestyle or personal taste,” but instead depending on “what is generally accepted for ordinary street wear.”); *Donnelly v. Comm’r*, 262 F.2d 411, 413 (2d Cir. 1959) (affirming the tax court’s objective test finding that a work clothing deduction should be disallowed); *But see Id.* Judge Hand’s dissenting opinion in part (finding the objective line drawn by the opinion to be “entirely arbitrary and capricious”); *Stiner v. United States*, 524 F.2d 640 (10th Cir. 1975) (affirming the denial of a work clothing deduction taken by an airline stewardess for her work shoes, boots, gloves, handbag and cosmetics based on the objective *Donnelly* test); *Hamper v. Comm’r*, 2011 WL 665726 (T.C. Feb. 24, 2011) (denying a deduction for work clothing purchased by a female television news anchor despite taxpayer’s testimony that “[s]he wears her business clothing only at work,” “maintains her business clothing separately from her personal clothing,” and “that the requirement to wear conservative clothing makes her business clothing unsuitable for everyday wear.”); reasoning that “[a]lthough she is required to purchase conservative business attire, it is not of a fashion that is outrageous or otherwise unsuitable for everyday personal wear.”); *Id.* at 5 (denying a deduction for the news anchor’s purchase of makeup, haircuts, manicures, teeth whitening, and skincare because “[a]lthough these expenses may be related to her job, expenses that are inherently personal are nondeductible personal expenses,” and because “[t]he Court is unable to determine whether the
makeup she purchased was primarily for business use.”); Wilson v. Commissioner, 32 T.C.M. 407 (1973) (denying a deduction for a model’s hairstyling expenses).


13. Taxing America, 6-7 (“Without the possibility of an objective basis to make the distinction between personal and business expenses, reliance on the ideal income tax base serves only to obscure biases in the tax law.”).

14. Ariel Jurow Kleiman, Amy K. Matsui, and Estelle Michell, National Women’s Law Center, The Faulty Foundations of the Tax Code: Gender and Racial Bias in Our Tax Laws, 5 (November 2019) (“For example, the tax code and Treasury regulations use male gender pronouns by default, and more often only use female pronouns when using both pronouns, as in, “he or she” and then typically in the context of joint (married) filing issues.”) (hereinafter Kleiman, Faulty Foundations).

15. Levit, Feminist Legal Theory, 16; Brown, The Whiteness of Wealth, 12 (Recognizing an analogous reality with respect to racial bias in the Code; “Like most tax policies, [the relative marriage penalty] was the result of decisions made by many different actors, over many years. But when those actors—members of Congress, judges and clerks, lobbyists, and more—sit down to craft or modify tax law, they bring their conscious and unconscious biases to the table. And our most foundational tax laws were created at a time when racial bias wasn’t just common—it was the norm and quite legal.”).


17. See Pevsner v. C. I. R., 628 F.2d 467, 470 (1980) (denying a work clothing deduction for a woman who was required to wear YSL clothing at work and did not wear it outside of work); Smith v. Commissioner, 40 B.T.A. 1038 (1939), aff’d per curiam 113 F.2d 114 (2d Cir. 1940) (holding, prior to the adoption of §21, that the cost of child care during work hours paid by a two-earner married couple was inherently personal and therefore not deductible).

18. Taxing America, 8-9, 187-189.

19. Id.

20. Id.

21. Levit, Feminist Legal Theory, 13 (“Nearly all [feminist legal theories] challenge the public-private distinction, seeing much greater room for state responsibility in matters (such as intimate violence) that formerly had been thought of as purely private.”).


23. Denman, Circuit Judge (dissenting in part) Sparkman v. Comm’r, 112 F.2d 774, 778–79 (9th Cir. 1940) (“There is no merit in the suggestion that, because there is no evidence that an actor's expenditure for a hiss preventing device for his mouth has not been allowed before, it is not an ‘ordinary’ expenditure. It is ordinary practice to propel a boat or run a factory by mechanical power. Was the expense of running the first gas engine and later the first diesel not deductible because a new technique of power was used? If such a principle be accepted, both the Commissioner and the taxpayer will never know the exact date when the expenditure became ordinary.”).

24. Kleiman, Faulty Foundations, 16; Id. (noting, however, that the Tax Cuts and Jobs Act of 2017 “made golf club dues and certain other entertainment expenses nondeductible. IRC §274(a)(3).”).
25. Kleiman, *Faulty Foundations*, 15-16 (“Worse, when women do start their own businesses, they are likely to be excluded from business tax benefits that target male-dominated industries. Moreover, because women working full-time full-year, on average, make less than their male counterparts, these higher expenses impose an even greater proportionate burden on women than men . . . Notably, men are significantly more likely to own their own businesses. To the extent that men have greater control over such hybrid expenses via their role as business owners, they are better able to enjoy such tax-free personal consumption.”).

26. Bittker and Lokken, *Federal Taxation of Income, Estates and Gifts, Chapter 20.2 Business-Personal Borderline* (2021) (“Although TV entertainers, circus clowns, and similar performers can no doubt deduct the cost of cosmetics and hairstyling, grooming expenses are normally nondeductible costs of living, even if mandated by employers accustomed to obedience.”); *Nelson v. Comm'r*, 25 T.C.M. (CCH) 1142 (T.C. 1966), acq. recommended by IN RE: OSWALD "OZZIE' G. AND HARRIET HILLIARD NELSON, 1972 WL 33220 (IRS AOD Nov. 8, 1972) (allowing movie actor couple to deduct the cost of clothing bought in connection with, and used only on, their TV show portraying an average American family even though most of the clothing was suitable for general use); *Fisher v. Comm'r*, 23 T.C. 218, 225 (1954), acq., IRS Announcement Relating to: Fisher (IRS ACQ Dec. 31, 1955), and aff'd, 230 F.2d 79 (7th Cir. 1956) (allowing a male musician to deduct the cost of tuxedos, sport jackets, and ordinary suits bought and used solely for his performances, as well as the attendant costs of their laundering and dry cleaning); *Denny v. Comm'r*, 33 B.T.A. 738, 738 (1935) (allowing a male movie actor to deduct the cost of wigs and make-up used in his occupation).

27. Wendy Parker, *The Reasonable Person: A Gendered Concept*, 23 Victoria U. Wellington L. Rev. 108, 110 (1993) (arguing, in the context of negligence law, that the nominal change from a ‘reasonable man’ to ‘reasonable person’ standard does not remedy the fact that “the standard was never considered to be anything other than universal and women have subsequently been required to meet the same standard without any attempt being made to include a woman's perspective based on her differing experiences.”); See also Rothgerber, Hank, Katie Kaufling, Ciara Incorvati, C. Blake Andrew, Allison Farmer. *Is a Reasonable Woman Different from a Reasonable Person? Gender Differences in Perceived Sexual Harassment*. Sex Roles (2021) 210, 218 (conducting meta-analyses to conclude that “women were more likely than men to define a broader range of behaviors as more harassing,” which supports “the implementation of a standard that relies on the viewpoint of a reasonable woman as opposed to a reasonable person.”).


32. Jespersen v. Harrah’s Operating Co., 444 F.3d 1104, 1109 (9th Cir. 2006).
34. https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473
https://data.census.gov/cedsci/ (According to 2017 U.S. Census Bureau data, the average woman earns 80.7% of what the average man earns in the United States.).
37. Id. at 54.
38. Id. at 11, citing Julie Menin, From Cradle to Cane: The Cost of Being a Female Consumer, NYC Consumer Affairs (2015) (hereinafter Menin, From Cradle to Cane).
39. Berliner, Tackling the Pink Tax, 72, citing Menin, From Cradle to Cane.
40. Yazicioglu, Pink Tax, 26, citing Menin, From Cradle to Crane.
41. Menin, From Cradle to Crane.
44. Berliner, Tackling the Pink Tax, 73, citing Mackenzie R. Wehner et al., Association Between Gender and Drug Cost for Over-the-Counter Minoxidil, 153 Jama Dermatology 825, 825-26 (2017).
48. Menin, From Cradle to Cane, 15.
49. Id.
53. Id.
55. Id.
56. Berliner, Tackling the Pink Tax, 71.
57. Yazicioglu, Pink Tax, 51.
58. Id.
59. Id.
60. Id. at 35.
61. Id.; See also Rhode, The Injustice of Appearance, 1054 (discussing cultural expectations of women’s appearance).
62. Yazicioglu, Pink Tax, 35.
63. Id. at 22-23, citing Walter Mischel, The Marshmallow Test, Bantam Press (2014).
64. Id.
65. Id.
66. See the adult diapers listed in Section III.B.3.a. of this paper for an example of deceptive quantities.
67. Yazicioglu, Pink Tax, 55.
69. Pevsner v. C. I. R., 628 F.2d 467, 470-471 (5th Cir. 1980).
70. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).
72. See Footnote 11 of this paper.
77. See Lora Cicconi, Competing Goals Amidst the “Opt-Out” Revolution: An Examination of Gender-Based Tax Reform in Light of New Data on Female Labor Supply, 42 Gonz. L. Rev. 257 (2007) (detailing gender bias in the tax code including joint filing, nontaxation of imputed income, limited childcare deductions, and social security); Patricia Cain, The Unfairness of the Marriage Tax Penalty, Reproduced by Bloomberg Tax with permission from Published The Bureau of National Affairs, Inc. (March 31, 2021) (examining the origins, impacts and remedies of the marriage penalty); Lily Kahng, The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages, 101 Cornell L. Rev. 325. (extending analysis of the marriage penalty for women in same-sex marriages); Kleiman, Faulty Foundations (finding that although tax policies including the joint filing of spousal income, treatment of informal caregiving, incentives for business formation and wealth accumulation, and IRS enforcement patterns appear
facially neutral, they “likely provide disproportionate benefit to men, may heighten pressure for
gender, race, and family structure.”).