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COMMENT

Should Tax Rates Decline with Age?

For nearly a century, economists have recognized that it is "advantageous to . . . tax most the source of supply which is least elastic."[1] But although the "inverse elasticity rule" is now a basic tenet of public economics,[2] it rarely yields practicable prescriptions for tax policy.[3] For example, the inverse elasticity rule would suggest that marginal tax rates should decrease as income increases,[4] as taxes are more likely to disincentivize labor for high-income individuals than for low- and moderate-income individuals.[5] However, such a

1. F.P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47, 58 (1927). A source of supply is "elastic" if "the quantity supplied responds substantially to changes in the price," whereas a source of supply is "inelastic" if "the quantity supplied responds only slightly to changes in the price." N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 104-05 (2d ed. 2001).
2. *See* William J. Baumol, *What Marshall Didn't Know: On the Twentieth Century's Contributions to Economics*, 115 Q. J. ECON. 1, 34-35 (2000).
3. *See* Peter A. Diamond, *Optimal Income Taxation: An Example with a U-Shaped Pattern of Optimal Marginal Tax Rates*, 88 AM. ECON. REV. 83, 83 (1998) ("The public finance community has recognized that the results deriving zero marginal tax rates at the top and the bottom of the income distribution are of little or no relevance for policy.").
4. *See* Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391, 1401 (2002) (reviewing DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH (Joel B. Slemrod ed., 2000)) (explaining why "optimal tax theory generally rejects progressive marginal rates").
5. *See* Jon Gruber & Emmanuel Saez, *The Elasticity of Taxable Income: Evidence and Implications*, 84 J. PUB. ECON. 1, 24 (2002) (reporting that individuals who earn more than $100,000 per year are approximately three times as price-elastic as individuals who earn less than $100,000 per year).

policy may not be politically feasible[6]—or normatively desirable[7]—on account of its regressive implications.

Still, there is one segment of the workforce whose labor supply is highly price-elastic and whose relative tax rates[8] might be lowered without triggering the political concerns and distributive qualms mentioned above: older workers.[9] By one estimate, the price elasticity of labor supply—the percentage increase in hours worked for every one percent increase in after-tax income—is approximately three times as high for sixty-year-olds as it is for forty-year-olds.[10] Other estimates indicate an even more dramatic increase in labor supply elasticity over age.[11] Thus, the deadweight loss per dollar raised from income taxation is much larger for taxes imposed on older Americans than for taxes imposed on prime-age workers.[12] Congress could raise the same amount of revenue while generating less deadweight loss if it increased rates on prime-age workers and lowered rates on older ones.[13]

This Comment evaluates age-adjusted tax rates from the perspectives of economic efficiency, distributive equity, and political feasibility.[14] It presents

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6. *See* Kim Dixon, *Most Americans: "Tax the Rich but Not Me,"* REUTERS, Mar. 29, 2010, *available at* http://www.reuters.com/article/idUSTRE62S44B20100329 (reporting that most Americans—including a majority of Republicans—support progressive taxation).

7. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 511-12 (7th ed. 2007) ("Unfortunately, attempts to minimize allocative inefficiency may clash with the distributive goals of tax policy.").

8. This Comment takes no position on whether absolute income tax rates are too high or too low. Its argument is limited to the claim that Congress should impose relatively lower rates on older workers than on younger workers.

9. *See infra* Part III (discussing political and constitutional dimensions of age-adjusted tax rates).

10. Eric French, *The Effects of Health, Wealth, and Wages on Labour Supply and Retirement Behaviour*, 72 REV. ECON. STUD. 395, 411 (2005).

11. *See infra* text accompanying note 20.

12. *Cf.* MANKIW, *supra* note 1, at 811 (defining "deadweight loss" as "the fall in total surplus that results from a market distortion, such as a tax").

13. The rate hike for prime-age workers would not need to be as large as the rate reduction for older workers in order for such a reform to be revenue-neutral. In the year 2012, only about four percent of the U.S. civilian labor force will be sixty-five or older. *See* Mitra Toossi, *Labor Force Projections to 2012: The Graying of the U.S. Workforce*, MONTHLY LAB. REV., Feb. 2004, at 37, 49 tbl.5. Thus, a one-percentage-point rate hike for prime-age workers would increase tax receipts by many times more than a one-percentage-point cut for older workers would reduce receipts.

14. Other commentators have considered the possibility of age-adjusted tax rates. *See* Lee Anne Fennell & Kirk J. Stark, *Taxation over Time*, 59 TAX L. REV. 1 (2005); Michael Kremer, Should Taxes Be Independent of Age? (Sept. 2001) (unpublished manuscript), *available at*

the first sustained case from a law-and-economics perspective for reducing income tax rates on individuals as they enter old age. It also explains how age-sensitive tax rates can be consistent with distributive equity objectives. Finally, it shows the importance of reconciling optimal taxation theory with political reality and constitutional law. Until now, tax theorists have derived optimal tax rules without reference to political and constitutional constraints. By incorporating political considerations into the optimal tax calculus, economists and tax law scholars can generate policy prescriptions that not only are efficient in theory but also stand a chance at implementation.

I. THE ECONOMIC EFFICIENCY OF AGE-ADJUSTED TAX RATES

Economists of all political persuasions agree that income taxes disincentivize labor to some degree,[15] although they differ dramatically in their

http://www.economics.harvard.edu/faculty/kremer/papers_kremer; Matthew Weinzierl, The Surprising Power of Age-Dependent Taxes (Sept. 8, 2008) (unpublished manuscript), *available at* http://www.people.hbs.edu/mweinzierl/paper/AgeDependentTaxes.pdf. But those commentators primarily consider age-based income tax reductions for the youth. They either make only passing mention of relative rate reductions for older workers, *see* Fennell & Stark, *supra*, at 41; Kremer, *supra*, at 25-26, or do not take older workers into consideration at all, *see* Weinzierl, *supra*, at 14 ("I limit the sample to the ages 30 through 59 . . . .").

While this Comment was in the process of publication, a panel in the United Kingdom led by Nobel laureate economist James Mirrlees unveiled drafts of a sweeping plan for reform of the British tax system, including two proposals that would effectively raise rates for taxpayers under age fifty-five and lower rates for taxpayers between ages fifty-five and sixty-five. *See* JAMES MIRRLEES ET AL., TAX BY DESIGN (forthcoming 2011) (manuscript at ch. 4, at 43-44), *available at* http://www.ifs.org.uk/mirrleesreview/design/ch4.pdf. The Mirrlees proposals come on top of existing age-related elements of the U.K. tax system, such as the phase-out of National Insurance contributions (NICs) for taxpayers between ages sixty and sixty-five and a more generous personal allowance (the British analogue to the U.S. Tax Code's personal exemption) for taxpayers over sixty-five. *See id.* at 5, 43-44; *cf.* 26 U.S.C. § 151 (2006) (providing personal exemptions). Although the Mirrlees panel's proposals are U.K.-specific, the general thrust of the panel's age-related reforms is consistent with the core argument of this Comment. *See* Mirrlees et al., *supra*, at 47 ("As a broad direction for reform, we . . . think that . . . tax and benefit rates . . . could take better account of what we know about people's responsiveness around retirement age.").

15. For instance, Paul Krugman, the outspokenly liberal Nobel laureate, and N. Gregory Mankiw, chairman of the Council of Economic Advisors under George W. Bush, both present this basic principle in their introductory economics textbooks. *See* PAUL KRUGMAN & ROBIN WELLS, ECONOMICS 190 (2d ed. 2009) ("[H]igh marginal tax rates . . . create major incentive problems."); MANKIW, *supra* note 1, at 165 ("[B]ecause taxes distort incentives, they cause markets to allocate resources inefficiently.").

estimates of the magnitude of this effect.[16] There are at least three reasons why we might expect labor supply to be relatively insensitive to taxes. First, workers may not respond to changes in their tax burden because they cannot comprehend the intricacies of the Tax Code. Second, nonpecuniary factors such as social pressure may lead individuals to remain in the workforce even when marginal tax rates are extraordinarily high.[17] Third, wage earners do not necessarily have full control over their labor supply. It may be difficult for them to slide along the "intensive margin" (that is, to adjust the number of hours that they work per day or the number of weeks that they work per year) because employers often demand a minimum number of hours from their employees. By contrast, workers generally have much more freedom to make choices at the "extensive margin," such as to exit the labor force entirely.[18]

If individual workers cannot make marginal adjustments to their hours, then we would expect the price elasticity of labor supply to be greater for individuals who are considering exit from the workforce than for individuals who might desire an incremental reduction in hours.[19] In other words, we would expect the disincentive effects of taxation to be greater around the retirement decision than at midcareer. Empirical evidence largely supports this intuition. According to one estimate using U.S. data, labor supply elasticity is approximately 0.03 for thirty-year-olds, 0.24 for forty-year-olds, and 0.54 for fifty-year-olds, but it rises rapidly to 1.42 for sixty-year-olds and 2.69 for sixty-five-year-olds.[20] These findings are consistent with elasticity estimates from other advanced economies.[21]

16. *See* Michiel Evers, Ruud de Mooij & Daniel van Vuuren, *The Wage Elasticity of Labour Supply: A Synthesis of Empirical Estimates*, 156 DE ECONOMIST 25, 32 tbl.1 (2008) (Neth.) (showing minimum price elasticity estimates for the labor supply of U.S. males as low as 0.22 and maximum price elasticity estimates for the labor supply of U.S. males as high as 0.25); *id.* at 33 tbl.2 (showing minimum price elasticity estimates for the labor supply of U.S. females as low as -0.08 and maximum price elasticity estimates for the labor supply of U.S. females as high as 2.73).

17. *Cf.* A. Georges L. Romme, *Projecting Female Labor Supply: The Relevance of Social Norm Change*, 11 J. ECON. PSYCHOL. 85, 90 (1990) ("The social pressure to enter the labor force differs according to age, upbringing, education, profession, peer group, region, etc.").

18. *See* Raj Chetty, et al., *Adjustment Costs, Firm Responses, and Labor Supply Elasticities: Evidence from Danish Tax Records*, 125 Q.J. ECON. (forthcoming 2011) (manuscript at 1) (on file with author) (presenting a model of intensive-margin labor supply in which "each firm requires its employees to work a fixed number of hours because of an ex ante commitment to a production technology" even when the employee would prefer to work less–or more).

19. *See* French, *supra* note 10, at 397 n.2.

20. Gopi Shah Goda, John B. Shoven & Sita Nataraj Slavov, *A Tax on Work for the Elderly: Medicare as a Secondary Payer* 13 tbl.1 (Nat'l Bureau of Econ. Research, Working Paper No.

One possible implication of this data is that high marginal tax rates on older workers generate greater deadweight loss than similarly high rates on prime-age individuals.[22] However, if workers respond to tax incentives through extensive-margin shifts rather than intensive-margin adjustments, then the relevant statistic for older workers is not the marginal tax rate but the average tax rate. In other words, if older workers are choosing between working forty hours per week and not working at all, then their decisions will be influenced by their expected aggregate tax liabilities, not the marginal tax rate on the last hour worked.

Section 63 of the Internal Revenue Code already accords a small benefit to senior citizens: the standard deduction increases by $1100 for individuals over age sixty-five.[23] However, this provision does nothing to reduce tax liabilities for taxpayers over age sixty-five who itemize their deductions.[24] To implement age-adjusted taxation for all taxpayers, Congress could amend § 151 of the Internal Revenue Code such that individuals would be able to claim a larger

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13383, 2007), *available at* http://www.nber.org/papers/w13383.pdf; *see also* French, *supra* note 10.

21. *See, e.g.*, Paul de Hek & Frank van Erp, *Analyzing Labour Supply of Elderly People* 45 (2009), *available at* http://www.cpb.nl/sites/default/files/publicaties/download/analyzing-labour-supply-elderly-people-life-cycle-approach.pdf (reporting "sharp increases" in the labor supply elasticity of Dutch workers at "ages close to . . . retirement").

22. Regarding the deadweight loss generated by high marginal tax rates for older workers, see Leora Friedberg, *The Labor Supply Effects of the Social Security Earnings Test*, 82 REV. ECON. & STAT. 48 (2000). Friedberg shows that in 1998, when the Social Security earnings test reduced benefits for sixty-two- to sixty-four-year-olds by fifty cents for every dollar earned above $9120–and reduced benefits for sixty-five- to sixty-nine-year-olds by thirty-three cents for every dollar earned above $14,500–"the working elderly bunch[ed] in substantial numbers at and just below the earnings exempt amount." *Id.* at 48; *see also id.* at 48-49 (noting that the price elasticity of labor supply for older workers "impl[ies] substantial deadweight loss from the earnings test"). The Senior Citizens' Freedom To Work Act of 2000, Pub. L. No. 106-182, 114 Stat. 198 (codified at 42 U.S.C. §§ 402-403 (2006)), eliminated the earnings test.

23. The additional standard deduction of $1100 applies to married taxpayers over the age of sixty-five; unmarried taxpayers over the age of sixty-five may increase their standard deduction by $1400. *See* 26 U.S.C. § 63(f) (2006); Rev. Proc. 2009-50, 2009-45 I.R.B. 622-23. As of 2010, all taxpayers who did not itemize deductions on their returns were entitled to a standard deduction of $5700 ($8400 for heads of household). *See* 26 U.S.C. § 63(a)-(c); Rev. Proc. 2009-50, 2009-45 I.R.B. 622.

24. Taxpayers who itemize deductions on their tax return cannot claim the standard deduction. *See* 26 U.S.C. § 63(b). Approximately thirty-four percent of all taxpayers choose to itemize. *See* STATISTICS OF INCOME DIV., INTERNAL REVENUE SERV., ALL RETURNS: ADJUSTED GROSS INCOME, EXEMPTIONS, DEDUCTIONS, AND TAX ITEMS, BY SIZE OF ADJUSTED GROSS INCOME AND BY MARITAL STATUS, TAX YEAR 2008 (2010), *available at* http://www.irs.gov/pub/irs-soi/08in12ms.xls.

personal exemption as they age.[25] This would provide a benefit for itemizers and nonitemizers alike, although it would not necessarily reduce marginal rates for older taxpayers.[26] Alternatively, Congress could choose to reduce marginal rates for older workers in all tax brackets (which would, in turn, lower average rates as well). The tax break could kick in gradually after workers pass a particular age. For example, fifty-five-year-olds might be taxed at the same marginal rate as younger workers with the same income; fifty-six-year-olds might be eligible for a one-percentage-point reduction; fifty-seven-year-olds might be eligible for a two-percentage-point reduction; and so on. This might mitigate the tax deferral incentives that would arise if the reduction kicked in all at once.[27]

Questions about the details of an age-adjusted tax system lie beyond the scope of this Comment. One might argue that age-adjusted tax rates should take effect through deductions available to all older taxpayers (nonitemizers and itemizers alike) without any change to the marginal rate schedule. Alternately, one might argue that age adjustments should be integrated into the marginal rate schedule set forth in 26 U.S.C. § 1. Regardless of the implementation details, the core claim of this Comment remains the same: because the price elasticity of labor supply increases over worker age, tax rates should be lower for older workers than for younger ones. Such a system would reduce the deadweight loss generated by the government's revenue-raising activities.

25. Unlike the standard deduction, the personal exemption incorporates no age adjustment at present. *Compare* 26 U.S.C. § 63(c)(3) (providing an additional standard deduction for the aged), *with id.* § 151 (setting forth the statutory framework for the personal exemption and not including any provision increasing the size of the exemption for older taxpayers). The personal exemption amount is adjusted for inflation, *see id.* § 151(c)(4), and was $3650 for 2010, *see Personal Exemptions and Dependents*, INTERNAL REVENUE SERV., http://www.irs.gov/publications/p17/ch03.html (last updated Mar. 23, 2011).

26. Increasing the personal exemption would only affect marginal rates for taxpayers who moved into a lower bracket as a result of the reform.

27. *Cf.* Kremer, *supra* note 14, at 26 n.21 ("One problem with lowering marginal tax rates for senior citizens is that workers just below the age of eligibility might arrange with their employers to postpone receiving income until after they are eligible for the program.").

II. DISTRIBUTIVE EQUITY AND AGE-ADJUSTED TAX RATES

Distributive equity stands side-by-side with efficiency as an objective of the Tax Code.[28] Commentators on tax policy often classify equity concerns into two categories: "horizontal equity" (the premise that "[u]nits with the same level of well-being should be liable for the same tax"[29]) and "vertical equity" (the premise that "people with greater income [should] pay greater amounts of that income in tax"[30]). At first glance, age-adjusted tax rates might seem to conflict with the principle of horizontal equity, as a forty-year-old and a sixty-five-year-old with the same income would face different tax bills. Yet this fact only raises horizontal equity concerns if an individual's "well-being" is measured according to annual income. If horizontal equity is judged over the course of a lifetime,[31] the forty-year-old may end up paying just as much total tax as his older counterpart.

Admittedly, age-adjusted tax rates may generate disparities between individuals whose lifetime earnings are front-loaded (for example, those who garner the majority of their income in the first few decades of their working lives) and individuals whose earnings are spread more evenly over the course of a long career. Under an age-adjusted tax system with reduced rates for older workers, an individual who earns $40,000 a year over the course of fifty years would pay less in lifetime taxes than would an individual who earns $400,000 a year for five years and then retires. However, even if the time value of money is zero, horizontal equity does not demand equal tax treatment of these two hypothetical cases. The early retiree does not necessarily have the "same level of well-being" as the lifelong worker. Rather, the early retiree substitutes leisure for income but still experiences "well-being" (albeit in an untaxed form) after exiting the workforce. Thus, from a horizontal equity perspective, the status quo "undertaxes" early retirees and "overtaxes" individuals with longer careers

28. *See* Louis Kaplow, *How Tax Complexity and Enforcement Affect the Equity and Efficiency of the Income Tax*, 49 NAT'L TAX J. 135, 135 (1996) ("[I]deal tax policy . . . is concerned about the equity (distributive effects) and efficiency of the tax system.").

29. Robert Plotnick, *A Measure of Horizontal Equity*, 63 REV. ECON. & STAT. 283, 283 (1981). *But see* Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139 (1989) (doubting whether horizontal equity can be justified as an independent objective for tax policy).

30. MICHAEL J. GRAETZ & DEBORAH H. SCHENCK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 28 (6th ed. 2009).

31. *See* Plotnick, *supra* note 29, at 285.

(who consume less leisure over the course of their lifetimes).[32] In this respect, age-adjusted tax rates, rather than undermining horizontal equity, may actually offset the inequitable effects of the nontaxation of leisure.[33]

One lingering concern regarding age-adjusted tax rates is that such a policy does run the risk of penalizing individuals who exit the workforce early on account of poor health; such individuals would accumulate lower levels of savings, because they would pay higher taxes in their productive years. However, this concern is mitigated by the finding that "economic factors rather than health play the major role in retirement decisions."[34] Moreover, even if health is a dominant determinant of early retirement, and even if the redistribution of wealth from the healthy to the sick is a policy priority, more effective tools exist to accomplish this end (for example, Social Security Disability Insurance and subsidies for long-term health care). It may still be optimal to shift more of the tax burden to prime-age workers–and to couple that shift with targeted programs for the sick and disabled–rather than retaining the current system of age-insensitive marginal rates.

Not only are age-adjusted tax rates potentially compatible with concerns regarding horizontal equity, but age-adjusted tax rates can also facilitate further redistribution of wealth. If society sets the level of redistribution such that the marginal benefits of additional redistribution offset the deadweight loss of additional taxation,[35] then reforms that reduce the deadweight loss of taxation should increase the quantity of redistribution. This argument springs from the realization that if more of the tax burden fell on the middle-aged (rather than the elderly), the effect of revenue-raising on economic output would be less dramatic. Since revenue-raising would be less costly (in terms of

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32. *See* Ross Parish & Yew-Kwang Ng, *Monopoly, X-Efficiency and the Measurement of Welfare Loss*, 39 ECONOMICA 301, 307 (1972) (lamenting the "obvious" inefficiency that arises from the "under-taxation of leisure").

33. Individuals whose lifetime earnings are front-loaded already suffer from the tax penalty on income volatility. *See, e.g.*, Lily L. Batchelder, *Taxing the Poor: Income Averaging Reconsidered*, 40 HARV. J. ON LEGIS. 395 (2003). Whether the tax penalty for income volatility and the tax subsidy for leisure fully offset each other–or whether age-adjusted tax rates must be added to the mix in order to achieve horizontal equity–is a question too complex to address within the space constraints of a Comment.

34. *See* Gloria J. Bazzoli, *The Early Retirement Decision: New Empirical Evidence on the Influence of Health*, 20 J. HUM. RESOURCES 214, 232-33 (1985). *But see* Debra Sabatini Dwyer & Olivia S. Mitchell, *Health Problems as Determinants of Retirement: Are Self-Related Measures Endogenous?*, 18 J. HEALTH ECON. 173, 188 (1999) (noting that "health problems . . . have a potent influence on encouraging earlier retirement," although "[e]conomic effects remain statistically significant after controlling for health problems").

35. *See* Edgar K. Browning, *The Marginal Welfare Cost of Income Redistribution*, S. ECON. J., July 1978, at 1 (developing measures of the marginal welfare cost of redistribution).

its total economic impact), then the notion of raising an additional one dollar in revenue through taxes and redistributing to the poor through transfer programs would seem more attractive. In other words, making the tax system more efficient may be an important first step toward making the distribution of wealth more equitable.

III. POLITICAL AND CONSTITUTIONAL CONSIDERATIONS

One persistent shortcoming of optimal taxation theory is that it often generates policy prescriptions that are politically infeasible and/or constitutionally impermissible. For example, economists recognize that married women are more likely than other demographic groups to curtail their output of labor in response to high tax rates;[36] thus, the inverse elasticity rule would suggest that married women should be taxed at a lower rate than men and single females.[37] But such a policy would raise serious constitutional questions; as it would appear to discriminate on the basis of gender[38] (and on

36. *See, e.g.*, James J. Heckman, *What Has Been Learned About Labor Supply in the Past Twenty Years?*, 83 AM. ECON. REV. 116, 117-18 (1993) (reviewing the relevant literature and concluding that "[m]arried female wage and income elasticities . . . are generally . . . somewhat larger in absolute value than male labor supply elasticities").

37. *See* Nancy C. Staudt, *The Theory and Practice of Taxing Difference*, 65 U. CHI. L. REV. 653, 654 (1998) (reviewing EDWARD J. MCCAFFERY, TAXING WOMEN (1997)); *see also* Alberto Alesina, Andrea Ichino & Loukas Karabarbounis, *Gender Based Taxation and the Division of Family Chores* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 13638, 2007), *available at* http://www.nber.org/papers/w13638 ("The labor supply of women is more elastic than the labor supply of men. Therefore, tax rates on labor income should be lower for women than for men.").

38. *See* United States v. Virginia, 518 U.S. 515, 532-33 (1996) (stating that the government must proffer an "'exceedingly persuasive'" justification for "official classification based on gender," and that the government "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); Craig v. Boren, 429 U.S. 190, 202 (1976) (noting that the Supreme Court "has consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on . . . predictive empirical relationships"). Two years before *Craig v. Boren* was decided, the Supreme Court voted 6 to 3 to uphold a Florida statute granting an annual five-hundred-dollar property tax exemption to widows but not to widowers. Kahn v. Shevin, 416 U.S. 351 (1974). It is not clear whether the current Court would follow *Kahn*. Well before she became a Justice, Ruth Bader Ginsburg—who represented the widower challenging the constitutionality of the Florida statute in *Kahn*—suggested that the case was wrongly decided. *See* Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 7-8 ("*Kahn* indicated a Court without sharp perception of the root causes and fundamental unfairness of gender lines in the law. . . .").

the basis of marital status[39]). Even if such a policy passed constitutional muster, "it [w]ould be professional suicide [for a politician] to advocate a policy that goes so far as to reduce the tax rate on women below that imposed upon men."[40] Other applications of optimal taxation theory are even more far-fetched: for example, N. Gregory Mankiw and Matthew Weinzierl have argued quite cleverly (and "somewhat facetiously"[41]) that optimal taxation theory supports a tax on human height, since height is a (rough) proxy for income but, unlike income, is exogenous to the tax rate.[42] In other words, whereas high-ability individuals can reduce their tax bill by reducing their labor output (which in turn yields deadweight loss), it would be difficult for tall individuals to avoid the height tax. Yet even Mankiw and Weinzierl acknowledge that "[m]any readers will find the idea of a height tax absurd," even though it "follows ineluctably from . . . the dominant modern approach to optimal income taxation."[43] It is not surprising, then, that even defenders of optimal taxation theory acknowledge that the "theory has supplied little in the way of *concrete* guidance concerning the design of actual tax systems."[44]

Age-adjusted tax rates, by contrast, exploit demographic differences in economic behavior and can be reconciled with political and constitutional constraints. Unlike height-adjusted tax rates, age-adjusted tax rates do not lie in the realm of the absurd. During the 2008 campaign, then-Senator Obama touted a plan to "eliminate all income taxation of seniors making less than

39. *Cf.* Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (holding that a law violated the Equal Protection Clause because it "provid[es] dissimilar treatment for married and unmarried persons who are similarly situated"). Note, however, that federal courts have consistently upheld provisions of the Internal Revenue Code that establish different rate structures for married and unmarried individuals. *See, e.g.*, Druker v. Comm'r, 697 F.2d 46 (2d Cir. 1982); Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978); McCarty v. United States, No. 01-4942, 2004 U.S. Dist. LEXIS 2921 (D.N.J. Jan. 29, 2004); Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976).

40. Staudt, *supra* note 37, at 680 (also noting that a "tax law that provided incentives for women to work in the waged labor force" could be caricatured as "anti-family").

41. *This One's for All the Little People Out There*, ECONOMIX (Sept. 23, 2009, 3:14 PM), http://economix.blogs.nytimes.com/2009/09/23/this-ones-for-all-the-little-people-out-there.

42. N. Gregory Mankiw & Matthew Weinzierl, *The Optimal Taxation of Height: A Case Study of Utilitarian Income Redistribution*, 2 AM. ECON. J.: ECON. POL'Y 155 (2010). By one estimation method, each extra inch of height yields $728 to $897 in additional annual earnings. Timothy A. Judge & Daniel M. Cable, *The Effect of Physical Height on Workplace Success and Income: Preliminary Test of a Theoretical Model*, 89 J. APPLIED PSYCHOL. 428, 435 (2004).

43. Mankiw & Weinzierl, *supra* note 42, at 156.

44. Richard Arnott, *Reflections on Optimal Tax Theory*, *in* MODERN PUBLIC FINANCE 257, 257 (John M. Quigley & Eugene Smolensky eds., 1994).

$50,000 per year."[45] Although President Obama has let this proposal remain dormant since his inauguration,[46] the Tax Code already contains (modest) age-related provisions. For example, taxpayers who are sixty-five and older are entitled to an additional standard deduction of $1100 on top of the $5700 standard deduction for all filers.[47] This deduction does not yield relief for older taxpayers who itemize their deductions,[48] and there is no indication that it was motivated by optimal taxation theory,[49] but, nonetheless, the very existence and persistence of age-conscious provisions in the Tax Code suggest that age-adjusted rates are politically feasible and robust to constitutional challenges.

Importantly, the immediate beneficiaries of this Comment's proposal are also a politically powerful constituency: the AARP is "one of the most powerful lobbying groups in Washington,"[50] and Americans between ages sixty-five and seventy-four are more likely to vote than their counterparts in any other age range.[51] Senior citizens (sixty-five and older) constitute about thirteen percent of the U.S. population but accounted for twenty-one percent of the 2010

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45. OBAMA FOR AM., BARACK OBAMA'S COMPREHENSIVE TAX PLAN 2 (2008), *available at* http://www.barackobama.com/pdf/taxes/Factsheet_Tax_Plan_FINAL.pdf. Obama made no mention of deadweight loss or the inverse elasticity rule at the time. *See* Senator Barack Obama, Tax Fairness for the Middle Class, Remarks at the Tax Policy Center, Washington, D.C. (Sept. 18, 2007), *available at* http://www.taxpolicycenter.org/upload/20070918_obama.pdf.

46. Angie Drobnic Holan, *No Proposal To End Taxes for Seniors Making Less than $50,000*, ST. PETERSBURG TIMES POLITIFACT.COM (Apr. 15, 2009), http://www.politifact.com/truth-o-meter/promises/promise/24/end-income-tax-for-seniors-making-less-than.

47. *See supra* note 23.

48. Taxpayers who itemize their deductions are not eligible for the additional $1100 standard deduction. *See* 26 U.S.C. § 63 (2006); *see also Standard or Itemized Deductions*, INTERNAL REVENUE SERV. (Mar. 10, 2010), http://www.irs.gov/newsroom/article/0,,id=105101,00.html ("Most taxpayers have a choice of either taking a standard deduction *or* itemizing their deductions.").

49. *See, e.g.*, S. REP. NO. 88-830, at 30 (1964), *reprinted in* 3 LEGISLATIVE HISTORY OF THE REVENUE ACT OF 1964, at 2532 (1966) (offering a "[g]eneral explanation" of the proposal to increase the standard deduction for taxpayers over age sixty-five and making no mention of the inverse elasticity rule).

50. *See* Brian Dakss, *AARP's Clout, and Social Security: Potent Machine Pointed Against Bush's Proposed Changes*, CBSNEWS.COM, Aug. 26, 2005, http://www.cbsnews.com/stories/2005/08/26/60II/main797804.shtml.

51. *See* THOM FILE & SARAH CRISSEY, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2008: POPULATION CHARACTERISTICS 4 tbl.2 (2010), *available at* http://www.census.gov/prod/2010pubs/p20-562.pdf.

midterm electorate,[52] suggesting that their political power is disproportionate to their (growing) numbers. Age-adjusted tax rates are consistent with interest group politics and optimal taxation theory–a rare (and perhaps unique) congruence.

Moreover, whereas the constitutionality of gender-based taxation schemes[53] would be subject to "heightened scrutiny,"[54] age is not "a suspect class for purposes of equal protection analysis."[55] The Supreme Court has said it will only overturn age-related distinctions if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[56] The Tax Court has repeatedly rejected suits challenging tax statutes on age-discrimination grounds. For instance, in *Woolf v. Commissioner*, the Tax Court considered a challenge to a provision that allowed certain individuals over age fifty-five to sell their homes without paying taxes on the capital gains.[57] The court concluded that the preferential treatment of older taxpayers was part of "a reasonable attempt by Congress to provide adequately for those individuals who, because of their age and particular situation in life,

52. Steven Thomma & William Douglas, *The 2010 Electorate: Old, White, Rich, and Republican*, McClatchy Newspapers, Nov. 22, 2010, http://www.mcclatchydc.com/2010/11/22/104144/the-2010-electorate-old-white.html.

53. *See* Alesina et al., *supra* note 37.

54. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) ("[S]tatutory classifications that distinguish between males and females are subject to heightened scrutiny. For a gender-based classification to withstand such scrutiny, it must 'serv[e] important governmental objectives,' and 'the discriminatory means employed [must be] substantially related to the achievement of those objectives.'" (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).

55. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (stating that a "suspect class for purposes of equal protection analysis" is "'one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,'" and concluding that "[w]hile the treatment of the aged in this Nation has not been wholly free of discrimination, such persons . . . have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities" (quoting San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

56. Vance v. Bradley, 440 U.S. 93, 97 (1979) (upholding a federal statute that imposed a mandatory retirement age of sixty on Foreign Service members and certain other State Department employees).

57. 1981 Tax Ct. Memo LEXIS 458 (June 11, 1981).

may desire to change residences."[58] Similarly, in *Baldwin v. Commissioner*, the Tax Court considered a challenge to a program under which individuals whose incomes fluctuated dramatically year-to-year were allowed to average their incomes over a five-year period (and thus reduce their marginal tax rates).[59] Individuals age twenty-five and over were eligible for income averaging as long as they had been out of school for at least four years since age twenty-one.[60] The Tax Court roundly rejected a constitutional challenge brought by a taxpayer who was ineligible for income averaging because he had not been out of school for four years and had not yet reached age twenty-five. According to the court, the Revenue Act's restrictions on income averaging "b[ore] a rational relation to a legitimate government purpose" by "provid[ing] income averaging relief to those persons who, in fact, have been unemployed."[61] With decades of economic theory supporting the rationality of age-adjusted tax rates, it seems unlikely that the courts would deviate from the deferential approach established by *Baldwin* and *Woolf*.

CONCLUSION

Although the inverse elasticity rule has been a central tenet of optimal taxation theory for the better part of a century, tax law scholars are beginning to realize that the optimal tax system might incorporate age-adjusted rates.[62] In particular, the idea of lower relative rates for older workers has received short shrift from the tax law community. This Comment seeks to rectify that oversight. It shows why reduced rates for older workers are desirable from the perspective of economic efficiency, consistent with distributive equity, and feasible in light of political and constitutional constraints. While much work remains to be done regarding the implementation details of an age-adjusted tax system, this Comment shows that age-adjusted tax rates represent a rare instance in which optimal taxation theory can generate practicable policy prescriptions.

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58. *Id.* at *10. In *Bartley v. Commissioner*, 1998 Tax Ct. Memo LEXIS 324 (Sept. 10, 1998), the Tax Court reaffirmed its holding in *Woolf*.

59. 84 T.C. 859 (1985). *See generally* Richard Schmalbeck, *Income Averaging After Twenty Years: A Failed Experiment in Horizontal Equity*, 1984 DUKE L.J. 509, 512-23 (explaining the mechanics of income averaging).

60. *Baldwin*, 84 T.C. at 866; *see* Revenue Act of 1964, Pub. L. No. 88-272, § 232(a), 78 Stat. 19, 107 (repealed 1986).

61. *Baldwin,* 84 T.C. at 869.

62. *See* sources cited *supra* note 14.