

TAXING THE FAMILY WORK: AID FOR AFFLUENT HUSBAND CARE

MARTHA T. MCCLUSKEY*

ABSTRACT

The income of the classic breadwinner married to a homemaker receives a tax advantage under federal income tax law. The conventional wisdom holds that any resulting inequities to unmarried persons or dual-earning marriages cannot be corrected without producing similarly problematic inequities. This Article challenges that dilemma by analyzing the inequity of the marital tax system from a new perspective. This Article argues that the perceived "bonus" for breadwinner-homemaker marriages is best understood as an implicit policy of "aid for affluent husband care." Recent tax reforms (up for renewal in 2010) that partly reduced the "marriage penalty" for some dual-earning couples are inequitable not simply because these reforms exclude upper-income and lower-income marriages while penalizing single persons. More fundamentally, this Article shows how these tax reforms increase a regressive system of support for the family caretaking labor on which income earning depends. This Article aims to show how a change to individualized, more progressive rates could more equitably treat income earning and informal caretaking labor regardless of family status.

INTRODUCTION

How should family status affect income taxes? In 2001, Congress began a series of changes to federal income tax law aimed at reducing the so-called "marriage penalty" on dual-

earning middle class income tax payers.¹ These marriage tax reforms, set to expire in 2010 under a sunset provision,² enjoy continuing approval across the political spectrum.³ The reforms reduced taxes for many dual-earning married couples by

*Professor of Law and William J. Magavern Faculty Scholar, State University of New York at Buffalo. This Article benefited from discussions of earlier versions and related work at conferences and workshops at Washington University, the University of Toronto Law School, Hofstra University Law School, the University of Connecticut Law School, Harvard Law School, the University of Texas Law School, the University at Buffalo Law School, and the University of Maine Law School, as well as at the Law and Society Association 2002 Annual Meeting and the Association of American Law Schools 2001 Annual Meeting's Socioeconomics session. I am particularly grateful for comments on ideas in this paper by Lisa Philipps, Jeremy Paul, Janet Halley, and Duncan Kennedy. Special thanks to Martha Fineman and the Feminism and Legal Theory Workshop for numerous insightful discussions of these issues, and to Lucinda Finley for sparking and supporting my initial interest in this topic.

¹Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 10716, § 301, 115 Stat. 38, 45 (2001) (gradually expanding the fifteen percent tax bracket and standard deduction for married taxpayers) [hereinafter EGTRRA]; The Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 10827, 117 Stat. 252 (2003) (accelerating those marital tax changes) [hereinafter JGTRRA]; Working Families Tax Relief Act of 2004, Pub. L. No. 108311, 118 Stat. 1166 (2004) (extending the marriage penalty reforms of EGTRRA and JGTRRA through 2010).

² See EGTRRA *supra* note 1, § 901(a).

³ See, e.g., Paul Krugman, *Now That's Rich*, N.Y.TIMES, Aug. 22, 2008, at 19 (noting that despite some disagreement on tax policy, presidential candidates Obama and McCain both agreed on retaining the Bush administration marriage tax reforms); JAMES R. HORNEY, CTR. ON BUDGET & POLICY PRIORITIES, AN ANALYSIS OF THE HOUSE AND SENATE BUDGET PLANS, Apr. 1, 2009 (noting that the budget plans of the House, Senate and President all agreed on retaining the Bush administration's marriage tax cuts).

increasing what has been called the “marriage bonus.”⁴ That bonus, however, does not go to all married taxpayers. Instead, it particularly directs tax benefits toward relatively affluent breadwinners married to spouses with relatively little or no market earnings. That is, the tax system privileges the traditional—and traditionally white, male, and heterosexual—family provider married to a homemaker.⁵ By analyzing this recently enhanced marital tax preference as “aid for affluent husband care,” this Article reveals problems with the recent marriage tax reforms and the longstanding marital tax system. Instead, the tax system should be changed to support caretaking for workers regardless of family status.

Tax scholarship and popular commentary have extensively criticized the inequities resulting from past and present

⁴ See Susan Kalinka, *Highlights of the 2003 Jobs Growth and Tax Relief Reconciliation Act: Economic Stimulus Or Long-Term Disaster?*, LA. L. REV., Winter 2004, at 219, 223–32 (explaining the marriage bonus resulting from reduced marriage penalties); Lawrence Zelcnak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 340 (1994) (explaining the marriage bonus as the degree of income splitting created by the tax rates applied to joint marital tax returns); EDWARD J. MCCAFFERY, TAXING WOMEN 16–18, tbl. 4 (1997) (explaining how the joint marital tax rates in effect from 1948 through the late 1990s created a bonus for traditional breadwinner-homemaker marriage while marriage brings penalties or no tax change for equal-earning couples).

⁵ See Wendy Richards, *An Analysis of Recent Tax Reforms from a Marital-Bias Perspective: It is Time to Oust Marriage from the Tax Code*, 2008 WIS. L. REV. 611, 617 (explaining how the recent marriage reforms perpetuated the tax system’s bias toward traditional breadwinner-homemaker families); Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287, 295–96 (1999) (explaining how at every level of income, a smaller percentage of married African-Americans than married white couples receive marriage bonuses); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 791–99 (exploring the marriage penalty as part of an analysis of race in tax policy).

marriage-linked tax penalties⁶ and bonuses.⁷ These inequities have been heightened as demographic change has eroded the tax-favored breadwinner-homemaker marriage both as an ideal and as an empirical reality.⁸ Why has such a seemingly outdated and inequitable marriage-based tax scheme not only endured but also gained so much political ground while alternative policies remain off the table of serious examination and debate?

This Article argues that a different analytical lens would help clarify the persisting problems of principle and politics grounding current marriage tax policy. In the classic framework, family taxation poses an inescapable dilemma between “marriage neutrality” and “married couples equality.”⁹ On the

⁶ See generally Adam Carasso & C. Eugene Steuerle, *The Hefty Penalty on Marriage Facing Many Households with Children*, 15 THE FUTURE OF CHILD 157 (2005) (explaining that “huge” penalties on marriage persist for lower income earners despite recent reforms); see also Edward J. McCaffery, *Marriage-Penalty Reform Still Has Long Way to Go*, WALL ST. J. ONLINE, May 26, 2003, <http://online.wsj.com/article/SB105398237190213100.html> (last visited July 5, 2010) (explaining that the law retains “marriage penalties” for upper and lower income dual-earning married taxpayers); Sue Shellenbarger, *Ask The Juggler: Dealing with the Marriage Penalty and Taxes*, WALL ST. J. ONLINE, Feb. 25, 2009, <http://blogs.wsj.com/juggler/2009/02/25/ask-the-juggler-dealing-with-the-marriage-penalty-and-taxes> (last visited Feb. 16 2010) (discussing tax disadvantages of marriage for some dual-earning couples with joint incomes over \$132,000 despite recent reforms).

⁷ See Shari Motro, *A New “I Do”: Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1513–30 (2006) (arguing that functional economic unity, not formal marriage, would be a more equitable basis for the tax system’s income-splitting “bonus”); Brown, *supra* note 5 (showing that the tax system’s “marriage bonus” is racially skewed in favor of white, married couples because it does not apply to the dual-earning patterns predominant among African Americans); *Federal Income Taxes*, CURRENT ISSUES (Alternatives to Marriage Project) July 3, 2009, <http://www.unmarried.org/federal-income-taxes.html> (last visited Apr. 20, 2010) (explaining that the income tax bonus for married couples means two similarly-earning workers can get different take-home pay for the same work because unmarried persons are denied the tax benefits of marital income splitting).

⁸ See CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX, 38–40 (June 1997) (analyzing labor market and demographic changes affecting distribution of marriage-based penalties and bonuses).

⁹ Zelenak, *supra* note 4, at 342.

surface, both of these principles seem to be reasonable measures of equitable taxation. "Marriage neutrality" holds that individuals with the same income should be taxed the same regardless of marital status, while "married couples' equality" holds that married couples with the same joint income should be taxed the same regardless of individual income distribution within the marriage. From this perspective, the current system of marriage-linked bonuses and penalties represents one of several historic policy attempts to weigh these two seemingly competing goals.¹⁰ Major change in the family tax system appears neither intellectually nor practically compelling in the face of what conventional tax wisdom treats as an insolvable conflict among equities.

But this apparent dilemma of equities dissolves when one more precisely analyzes how homemaking wives' unpaid caretaking labor provides "affluent husband care." Tax scholarship has discussed the problem of failing to count the traditional homemaker's unpaid labor as income for tax purposes.¹¹ This Article shifts that discussion to examine informal domestic labor as a gain to the traditional breadwinning husband. This change in focus shows that the "married couples' equality" principle is flawed because it fails to give *normal* tax recognition to the market income of primary breadwinning husbands, not because it fails to give *special* tax recognition to informal homemaking.

Discussions of family tax policy tend to be obscured by the assumption that homemaking wives' unpaid caretaking goes mainly to *dependents*. Instead, this Article considers how tax policy addresses family caretaking for breadwinning *husbands*, that is, those typically identified as quintessentially *independent*

¹⁰ See Lawrence Zelenak, *Doing Something about Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 4-8 (2000).

¹¹ See Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1426 (1975) (framing the problem as the failure to tax imputed income); JULIE A. NELSON, FEMINISM, OBJECTIVITY & ECONOMICS 104-05 (1996) (explaining how tax policy and theories of marriage taxation ignore and misconstrue household production).

providers for others.¹² This shift in frame reveals that the affluent breadwinner-homemaker family form often held out as the model of self-sufficiency instead relies on special government tax support amounting to over thirty billion dollars a year.¹³

Furthermore, that dollar amount exceeds the level of government spending on the classic former family welfare program, Aid to Families with Dependent Children (AFDC),¹⁴ suggesting a policy preference for “aid for affluent husband care.” AFDC’s support for low-income single parent families was replaced in 1996 with a new system centered on the goal of moving impoverished single mothers from informal family caretaking to formal market work.¹⁵ That welfare policy change narrowing public support for unpaid caretaking in low-income families contrasts with the recent expansion of tax support for unpaid caretaking by middle and upper income married homemakers.

Though this Article joins others criticizing the unfairness of this tax privilege for breadwinners with homemaking spouses, it takes this criticism in a new direction by advocating further expansion, rather than elimination, of tax aid for family caretaking of breadwinners. All income earners, not just those with substantial income and not just those married to non-

¹² See Martha T. McCluskey, *Caring for Workers*, 55 ME. L. REV. 317 (2003) (discussing family caretaking for non-dependents).

¹³ Jane G. Gravelle, *Federal Income Tax Treatment of the Family* 19–24 (CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS ORDER CODE RL 33755, Dec. 19, 2006) (discussing various calculations of the marriage bonus over time and based on different assumptions of a couples’ income with and without marriage).

¹⁴ See MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 318 (2001) (citing H. COMM. ON WAYS AND MEANS, GREEN BOOK, at 447–48, tbls.8–15 (1996)) (noting that in the early 1990s the annual government spending on AFDC was \$22 billion).

¹⁵ See Martha T. McCluskey, *The Politics of Economics in Welfare Reform*, in *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW AND SOCIETY* 193, 193–224 (Martha Albertson Fineman & Terence Dougherty eds., 2005) (summarizing these reforms and critiquing the economic rationales for them).

earners or low-earners, deserve more substantial tax support for the caretaking costs related to market labor. Though the current system of “aid to affluent husbands” is highly inequitable, it correctly recognizes that producing and maintaining successful market earnings typically requires substantial resources, both monetary and non-monetary. Family tax policy does not require a choice between favoring wives’ (or others’) formal market earnings over informal family caretaking (or unpaid leisure). Instead, replacing the current system of “aid for affluent husband care” with equitable tax support for breadwinner care could lead to more equitable and effective support for informal family caretakers as well.

Fair tax support for breadwinner care could be achieved through a policy change to individual taxation of work income combined with increased progressivity. By identifying the goal as fair tax support for all breadwinners, in place of “aid to affluent husbands,” this Article aims to further clarify and develop existing arguments for an individualized tax system.

The political resilience of the tax preference for relatively affluent breadwinner-homemaker marriages is partly a problem of an ideological frame that, intentionally or not, limits imagination about alternative schemes by obscuring the contested values and politics on which the marital tax scheme depends. By identifying this tax break as “aid for affluent husband care,” this Article links the current inequities to specific political interests and social values, not just formal tax principles or the technical complexities of adapting the tax system to social change. Furthermore, this framework turns the moral and political debate away from the deeply divisive questions of whether to favor “marriage” at the expense of single individuals, to support “working wives” at the expense of full-time homemakers or to support tax relief for dual-earning professional married couples at the expense of struggling “traditional” breadwinner-homemaker families with modest incomes. Instead, by redefining the reform goal as more equitable aid for breadwinner care in general, this Article shows how the majority of workers and family caretakers would benefit from rejecting the current marriage tax scheme.

Finally, by identifying the family tax system as a problem of support for “affluent husband care,” this Article aims to clarify broader issues of tax policy and ideology. The recent marital tax reforms are perhaps most significant not for their increased subsidy to higher-earning “husbands,” but for their political role in leveraging upper-middle class support for much more lavish tax cuts directed at the very rich.¹⁶ Underlying the marriage tax debate is the bigger question of how to treat the costs of producing monetary gains. Who deserves to command public and private support for their economic production, and whose economic production should be directed toward serving others’ gains?

The history and continuing operation of the family tax system, viewed through the lens of “aid for affluent husband care,” shows how tax policy has singled out the market work of the paradigmatic affluent white married man for special support. Taken in context of the recent upper-class tax cuts, the recent marriage tax reforms may represent a shift toward an ideal privileging the wealthiest as the quintessential producers of societal gain, and therefore those most deserving of public support.¹⁷ By replacing the current marriage tax system with a fairer system of tax support for the costs of work, we could take a step toward a different vision. Reforming tax “aid for affluent husband care” could help advance an idea of economic well-being and fairness based on workers’ ability to care and earn for themselves, their families and their communities.

This Article begins by comparing two breadwinners, one married to a homemaker and one single, to show how the tax preference works. It then explains how this preference is better

¹⁶Lawrence A. Zelenak, *The Declining Progressivity of the Federal Income Tax*, in *LAW AND CLASS IN AMERICA: TRENDS SINCE THE COLD WAR* 163, 182–83 (Paul D. Carrington & Trina Jones eds., 2006) (explaining that marriage penalty reforms were part of three small tax reductions that appear to have bought off the middle class in the interest of major tax cuts for the wealthy).

¹⁷See Martha T. McCluskey, *Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP* 267 (Linda McClain & Joanna Grossman, eds., Cambridge Univ. Press 2009) (discussing marriage tax policy in the context of ideas about gender, economic class, and citizenship).

understood as tax aid for affluent husband care, rather than as a “marriage bonus.” Putting this “husband care” tax support in context, the Article draws on accounts of contemporary marriage, labor market data and family law history to show that the income tax system reinforces a broader policy system relying on valuable unpaid “husband care.” Part II analyzes the conventional rationales for this tax preference, first using the lens of “affluent husband care” to challenge the standard assumptions about the difference between married and single primary breadwinners. This Article then shows how a focus on “husband care” also sharpens our view of the equities in comparing the married primary breadwinner to breadwinners in dual-breadwinning marriages and to unmarried breadwinners with dependents. Part III considers how the recent marriage tax reforms build on past changes in marriage taxation to advance and exacerbate the longstanding problem of tax aid for affluent husband care. Part IV offers a solution to the inequities of the marital tax system that involves, first, individual taxation of work income and, second, increased progressivity. This Article concludes by suggesting that though this solution would provide fairer tax support for breadwinners and for their caretakers, it should be seen as part of a broader policy shift toward public support for more family providers and family caretakers.

I. Marital Income Splitting As Aid For Affluent Husband Care

A. Aid for Married Primary Breadwinners

1. Breadwinner Bob Gets a Bonus

Imagine a taxpayer, Breadwinner Bob, who has recently graduated from law school to begin work as an attorney earning \$100,000 a year. As a single earner, his \$100,000 in wage income would have given him a 2008 federal income tax bill of \$19,472, assuming a simplified return with no non-wage income and a standard deduction.¹⁸

¹⁸ Assuming an adjusted gross income of \$100,000, a personal exemption of \$3500, and a standard deduction of \$5450, taxable income would be \$91,472, producing a tax of \$19,472 under 2008 rates for single filing individuals.

Let's assume that after about a year on the job, Bob marries his college sweetheart Hannah, who quits her job teaching elementary school in another state to move in with Bob. After considering Bob's long work hours and the local job market for teachers, the couple decides that, for now, Hannah will remain out of the formal workforce and focus instead on taking care of their home life.

As they file their federal tax return covering their first tax year as a married couple, Bob is happy to realize that his new status as husband of Homemaker Hannah reduces his 2008 taxes to \$13,213, for a tax savings of \$6259 compared to what he would have paid as a single filer, assuming a simplified return.¹⁹ Bob reflects that having a homemaking spouse has not only brought him this annual tax bonus, but also has improved his quality of life and his economic well-being in many ways. Although his income now covers Hannah's living expenses as well as his own, he spends less money on outside domestic services like restaurant meals, laundry and housecleaning. In addition, Hannah's time spent on careful bargain hunting helps Bob save money on food, household goods and professional clothes. Hannah's homemaking also includes renovating, decorating and landscaping the couple's newly purchased house, and these improvements are likely to enhance their property's

¹⁹ Assuming an adjusted gross income of \$100,000, personal exemptions of \$7000, and standard deduction of \$10,900, the tax would be \$13,213 under 2008 rates for jointly filing married persons. Of course, it is likely that Bob and Hannah would have potentially deductible expenses from home ownership, such as home mortgage interest and property taxes. However, those home expenses are deductible only if a taxpayer makes itemized deductions instead of taking the standard deduction. The generosity of the marital standard deduction (\$10,900), increased under the recent marriage tax reforms, means that this standard deduction might be the best option for many married breadwinners. The average home mortgage interest deduction per return for taxpayers in the \$100,000–199,999 bracket in 2003 was under \$9000. See Gerald Prante, *Fiscal Fact No. 49*, THE TAX FOUNDATION, Feb. 6, 2006, available at <http://www.taxfoundation.org/research/show/1341.html>.

investment value.²⁰ Further, marriage to Homemaker Hannah has helped Bob nurture some important professional connections, as she has organized parties and dinners to entertain Bob's colleagues and clients on several occasions.

Having a spouse focused primarily on homemaking has also improved Bob's leisure time. He recalls his first year as a single law firm associate when he would come home in the evening after a ten to twelve hour work day facing errands, an empty fridge, dishes in the sink, bills to pay and general domestic disorder. Now, he can put in a long day at the office and know that Hannah will keep most home chores under control.²¹ Hannah also has time during the week to develop the couple's social connections, to arrange medical appointments,²² plan recreational activities and to otherwise help Bob relax and recharge from the stresses of his long and demanding work week.²³

Despite these benefits from their breadwinner-homemaker division of labor, Bob and Hannah are concerned that Bob's long work hours and lack of home involvement will put stress on their marriage and personal satisfaction, especially if they were

²⁰ See, e.g., Karen A. Stansbury, *Should Homemakers Keep Time Sheets? The Definition of "Contribution to Marriage" under Connecticut Law*, PROFESSIONAL WOMEN'S ALLIANCE OF CONNECTICUT (Dec. 13, 2009) <http://pwa-ct.com/2009/12/13/should-homemakers-keep-time-sheets-the-definition-of-%E2%80%9Ccontribution-to-the-marriage%E2%80%9D-under-connecticut-law/> (discussing how a homemaking wife in a divorce case could document her gardening and maintenance work as potential evidence of her contribution to the value of the marital home).

²¹ See PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* 77 (2007) (describing how breadwinning husbands with egalitarian values nonetheless may prefer homemaking wives because of the difficulties of managing household chores after long work days); see also *infra* notes 97–99.

²² See *infra* note 108.

²³ For a discussion of the often overlooked aspects of valuable household services by spouses, see Frank D. Tinari, *Household Services: Toward a More Comprehensive Measure*, 11 J. FORENSIC ECONOMISTS 253 (1998) (arguing for greater valuation for homemakers' services in wrongful death cases).

to raise children.²⁴ They also are concerned that if Hannah remains out of the workforce for long her earnings potential will soon erode significantly.²⁵ They realize they may need also her income in case of rising living expenses, setbacks in Bob's career or other crises.²⁶

2. Single Sophia Gets None

Now imagine that Bob has an unmarried law school classmate, Single Sophia, who gets a job at the same law firm as Bob. She is also paid \$100,000 a year and similarly works long hours in hopes of making partner in a few years. From Sophia's \$100,000 income, filing as a single taxpayer she will owe \$19,472 in 2008 federal income taxes, just like Bob would have before his marriage, provided she has no non-wage income and has a simplified return with standard exemptions and deductions.²⁷ But when she compares her tax bill to Bob's after his marriage, she is surprised to find that he now pays \$6259 less in taxes despite making the same income.²⁸

Comparing her available spending money and leisure time with Bob's, Single Sophia feels that her higher tax burden is unfair. Although she does not support another household member, she pays for many domestic services to support her

²⁴ See FRANCINE M. DEUTSCH, *HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS*, 229 (1999) (explaining how equal sharing can further marital and parental intimacy compared to breadwinner-homemaker marriages).

²⁵ See JOAN C. WILLIAMS ET AL., *CTR. FOR WORKLIFE LAW, UNIV. OF CAL., HASTINGS, "OPT-OUT" OR PUSHED OUT HOW THE PRESS COVERS WORK/FAMILY CONFLICT* 15–16 (2006) (explaining the often overlooked difficulties women face in returning to the workforce after periods of homemaking).

²⁶ See ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE* 55–70 (2003) (explaining how the homemaking wife has served as a safety net for one-earner middle-class families).

²⁷ See *supra* note 18 (giving calculations for single filing taxpayer under 2008 rates).

²⁸ For a further discussion of tax policy's unfair disadvantages toward single persons, see Lily Kahng, *One is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 *HASTINGS L. J.* 651 (2010).

busy work schedule, including housecleaning, professional laundering, frequent restaurant meals and yard work. Nonetheless, Single Sophia finds that her free time is often consumed by additional domestic tasks like taking care of household bills, shopping and car maintenance. After spending many late weeknights and weekends either at work or on home chores, Single Sophia is hard pressed to find time or energy for organizing social events with friends and family, much less for pursuing romantic relationships or for developing professional connections. She also worries that her long work hours will take a toll on her health and well-being. Despite her income and lack of dependents, she still has trouble controlling her credit card debt as well as saving for a cushion against possible future interruptions or transitions in her career.

3. Income Splitting Bonus for Married Primary Breadwinners

How does married Bob get an annual tax bonus that might exceed \$6000 compared to single Sophia despite their identical income? Two aspects of the tax code work together to give Breadwinner Bob this tax break for marrying Homemaker Hannah: joint marital taxation and the marital rate structure. First, since 1948 the United States tax system has treated married couples as a unit by combining their income.²⁹ This joint taxation system differs from the system of individual income taxation in the United States prior to 1948 and used in many other countries, although such systems may include various adjustments based on family status.³⁰ Second, along with joint taxation, in 1948 the United States also adopted a separate tax

²⁹ See *infra* Part III (discussing historical development of "aid for affluent husband care").

³⁰ See generally Joseph A. Pechman & Gary V. Engelhardt, *The Income Tax Treatment of the Family: An International Perspective*, 43 NAT'L TAX J. 1 (1990) (noting that France, Germany and the United States have been in the minority of nations that fail to tax married couples as individuals at least to some extent).

rate for married couples that treats marital income as if it were divided between the spouses.³¹

Under a (simplified) individual tax system, Bob would report \$100,000 in income while Hannah would have \$0 taxable income. But under the longstanding joint marital taxation, Bob is effectively taxed *as if* Hannah earned part of his income. Their income is taxed in the aggregate—as a marital unit—and the tax rates applied to that unit operate to treat that aggregate income as if it were divided between two individual earners.

This "income-splitting" matters because the tax rates are progressive: as income increases, a greater portion of that income is taxed. Under 2008 rates an individual earning \$100,000 gets taxed at \$19,472 (assuming a simplified tax return), but two single workers earning \$50,000 a year would pay roughly \$6606 each, for a combined tax of \$13,212, producing a tax savings of over six thousand dollars on the same total income of \$100,000.³²

Progressive tax rates arguably reflect the idea that individuals have a greater ability to pay as their income rises: the ninety-thousandth dollar of income earned is less valuable to the individual—and therefore more fairly shared with the community through taxation—than the nine thousandth dollar.³³ The first portion of individual income is essentially untaxed through the personal exemption and standard deduction, arguably recognizing that a person should be allowed to keep an initial portion of their earnings for very basic living expenses

³¹ See Motro, *supra* note 7, at 1560–68 (illustrating the history and workings of income-splitting); Zelenak, *supra* note 4, at 339–40 (explaining the income-splitting effect of progressive joint taxation).

³² Again, this tax amount assumes no dependents and no deductions or credits other than standard deduction of \$5450 and personal exemption of \$3500 and assuming only wage income, producing taxable income of \$41,050.

³³ See generally Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CALIF. L. REV. 1905 (1987) (using contemporary dominant economic ideology to analyze theoretical merits of progressive taxation); Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417 (1952) (giving the classic theory of progressive taxation).

before being required to share income with society in general.³⁴ Once income exceeds that basic tax-free threshold, tax rates are graduated so that income above certain levels gets taxed at a higher rate. Through these graduated tax rates, along with the tax-free income offset by the standard deduction and personal exemptions, each individual gets some "breaks" on the portion of their earnings that represents low and modest income—a "ride up the tax bracket."³⁵

The marital income-splitting system benefits breadwinner-homemaker couples like Bob and Hannah because an affluent breadwinner can essentially "shelter" income by shifting it to the non-earning or substantially lower-earning spouse and thereby take advantage of the tax breaks given to lower individual earning. In other words, married breadwinner-homemaker couples get a bonus of "two rides up the tax brackets,"³⁶ because they are taxed as if they were two individuals with lower earnings, rather than one individual with higher earnings. By marrying a non-earner, Breadwinner Bob gets the benefit of a \$50,000 earner's more progressive tax rates despite earning \$100,000.

This tax shelter is not available to all, or even to most, married breadwinners and, as such, the typical description of it as a "marriage bonus" is misleading. More precisely, this tax bonus primarily works to shelter the income of relatively affluent breadwinners with non-earning or low-earning spouses. That is, the income-splitting tax scheme works to benefit a special subset of marriages or, viewed from another angle, of breadwinners. Though not strictly accurate, calling this tax benefit a "marriage bonus" may appear to be a logical way of explaining its social significance. However, more precise

³⁴ In 2009, for example, the tax code allows a single person (under age sixty-five) a standard deduction of \$5700 and a personal exemption of \$3650, for a total of \$9350 of tax-free income. I.R.S. Publ'n 501 (Dec. 18, 2009), available at <http://www.irs.gov/pub/irs-pdf/p501.pdf>. This amount is just under the federal poverty threshold of \$10,830 for a single person. Annual Update of the HHS Poverty Guidelines, 74 Fed. Reg. 4199-04, 4200 (proposed Jan. 23, 2009).

³⁵ See MCCAFFERY, *supra* note 4, at 14–15, 32 (discussing the relationship between tax brackets and joint marital taxation).

³⁶ *Id.* at 32.

analysis reveals that this tax provision fits a broader pattern of socio-legal support not for marriage per se but for a traditional paradigm of "husband care."

B. Not a "Marriage Bonus"

1. Excludes Low-Income Marriage

First, this income-splitting bonus from marital rates is not available to low-income married couples. To benefit from a tax shelter, the breadwinner's earnings must exceed taxable income levels. Nearly forty percent of individual tax units (including single filers and households) earn incomes below taxable levels, and the majority of those with less than \$30,000 in annual income have no tax liability.³⁷ Nearly two-thirds of taxpayers in 2006 paid more in payroll taxes than in income taxes.³⁸ Lower income couples with dependent children are particularly unlikely to experience income-splitting as a bonus for marriage. At income levels below about \$40,000, for most taxpayers with children any tax advantages from marriage are more than offset by the negative impact of marriage on eligibility for transfer programs such as food stamps and government health insurance.³⁹

2. Targets One-Breadwinner Marriage

Second, to "shelter" income through this marital tax system, an income-earner needs to have a spouse with substantially lower (or no) taxable earnings, so that income-

³⁷ See TAX POLICY CENTER, T-08-0208, DISTRIBUTION OF TAX UNITS WITH ZERO OR NEGATIVE INCOME TAX LIABILITY BY CASH INCOME LEVEL, 2009, (2008), available at <http://www.taxpolicycenter.org/numbers/displayatab.cfm?Docid=1973&DocTypeID=7>.

³⁸ LEN BURMAN & GREG LEISERSON, TAX POLICY CTR., TWO-THIRDS OF TAX UNITS PAY MORE PAYROLL TAX THAN INCOME TAX (2007), available at http://taxpolicycenter.org/UploadedPDF/1001065_Tax_Units.pdf.

³⁹ See Carasso & Steuerle, *supra* note 6, at 159, 169 fig. 3. Although the EITC rewards low earnings with a refundable tax benefit, offsetting some of the potential tax gains of marriage to a higher earner for many low-earners, at very low income levels (below about \$10,000) EITC eligibility levels are expanded for married couples, producing an income-splitting bonus for marriage. *Id.*

shifting between taxpayers has a tax impact.⁴⁰ If a breadwinner marries a spouse with equal or higher taxable income, that spouse will have already fully used their tax breaks for their own income. For example, if Bob's law school classmate Dominic has a public interest law job earning \$50,000 and he marries Daniela, who also earns \$50,000, Dominic will not receive a tax break after marriage. Dominic and Daniela both would already have been taxed at the lower rates applicable to \$50,000 earners, and both would have already used their personal exemption and standard deduction, so that (unlike Bob and Hannah) dividing their combined income in half will have no tax impact. Both will continue to pay the same taxes after marriage as before (other things being equal).

To benefit from marital income splitting, one spouse must earn at least sixty percent of the marital income. The greatest benefits go to married breadwinners who earn all or virtually all of the marital income. For example, if Breadwinner Bob earns \$90,000 and Homemaker Hannah earns \$10,000, their annual gain from filing as married rather than single earners would be \$3346⁴¹ compared to the \$6259 tax savings for marriage if Breadwinner Bob earns one hundred percent of the couple's \$100,000 income. The marital income-splitting benefit is lessened as spousal incomes become more equal. If Bob earned \$80,000 and Hannah earned \$20,000, their tax gain from

⁴⁰ See MCCAFFERY, *supra* note 4, at 16 tbl. 2, 18 (explaining that equal-earning married couples receive no benefit or penalty under a tax system in which marginal marital rates are double marginal individual rates).

⁴¹ Based on 2008 rates and a simplified return with standard deduction and no dependents, a \$90,000 single filing earner would have \$81,050 taxable income for a tax of \$16,672, and a \$10,000 single filing earner would have taxable income of \$1050 for a tax of \$105, offset by an earned income credit of \$218 for a net credit of \$113, resulting in a combined tax of \$16,559 as two single filing taxpayers. As married jointly filing taxpayers with combined income of \$100,000, their tax liability of \$13,213 gives them a tax savings of \$3346 upon marriage.

marriage would be reduced to \$2146 a year.⁴² If Breadwinner Bob earned \$60,000 and Homemaker Hannah earned \$40,000, they would get an annual bonus of only \$150 as a married couple filing jointly, compared to what they would owe as single filers.⁴³ If Bob earned \$55,000 and Hannah earned \$45,000, they would owe the same combined taxes as single filing taxpayers as they would as a jointly filing married couple.⁴⁴

At more modest income levels, the division of spousal income generally needs to be even more unequal to reap substantial benefits from the income-splitting marriage bonus, again partly because of the countervailing protection for low earners from the Earned Income Tax Credit (EITC). With the most unequal division of income, a single breadwinner earning \$50,000 would get a tax savings of \$2593 simply for jointly filing with a spouse with zero income.⁴⁵ If a couple had the same total income but split earnings \$40,000 and \$10,000, after taking into account an EITC refund for the lower earner, the couple's

⁴² Based on 2008 rates and a simplified return with a standard deduction and no dependents, a single filing individual earning \$80,000 would have taxable income of \$71,050 for a tax of \$14,106, and a single filing individual earning \$20,000 would have taxable income of \$11,050 for a tax of \$1256, for a combined tax bill of \$15,358 for the unmarried couple compared to the tax of \$13,212 for a married couple filing jointly with \$100,000 income and the same assumptions.

⁴³ Based on 2008 rates and a simplified return with a standard deduction and no dependents, a singly filing individual earning \$60,000 would have taxable income of \$51,050 producing a tax of \$9106; a singly filing individual earning \$40,000 would have taxable income of \$31,050 producing a tax of \$4256, for a combined tax on the unmarried couple of \$13,362 compared to the \$13,212 tax on a married couple filing jointly with income of \$100,000.

⁴⁴ Based on simplified tax returns with standard deductions and no dependents, a single earner with \$55,000 in wages would have taxable income of \$46,050, for a tax of \$7856; and a single earner with \$45,000 in wages would have a taxable income of \$36,050 for a tax of \$5356.

⁴⁵ Based on 2008 rates and a simplified return with a standard deduction and no dependents, a singly filing individual earning \$50,000 would have a taxable income of \$41,050 with a tax of \$6606; after marriage to a non-earner, as a jointly filing married couple with \$50,000 income the tax would be \$4013.

tax gain from marriage would be \$356.⁴⁶ And two taxpayers earning \$50,000 in combined income with split earnings of \$30,000 and \$20,000 would get a marriage bonus of one dollar (other things being equal).⁴⁷

Sole-breadwinner families who reap the greatest benefit from marital income-splitting are a relatively small group of working-age married couples. In 2008, only about one-quarter of married couples fit the one-breadwinner model in which only one spouse was employed.⁴⁸ In just over half of marriages, both spouses are employed.⁴⁹ In 2005, wives earned an average of thirty-five cents of every dollar of married couples' income.⁵⁰

⁴⁶ Based on 2008 rates and a simplified return with a standard deduction and no dependents, a singly filing individual earning \$40,000 would have taxable income of \$31,050 producing a tax of \$4256 and a \$10,000 single filing earner would have taxable income of \$1050 for a tax of \$105, offset by an earned income credit of \$218 for a net credit of \$113, producing a combined tax on the unmarried couple of \$4369, compared to \$4013 for a married couple filing jointly with income of \$50,000 (which produces taxable income of \$32,100 after marital standard deduction and two personal exemptions).

⁴⁷ Based on 2008 rates and a simplified return with a standard deduction and no dependents, a singly filing individual earning \$30,000 would have a taxable income of \$21,050 with a tax of \$2756 and a single filing individual earning \$20,000 would have taxable income of \$11,050 with a tax of \$1256, producing a combined tax for the unmarried couple of \$4012, compared to a tax of \$4013 for a married couple filing jointly with income of \$50,000 (which produces taxable income of \$32,100 after marital standard deduction and two personal exemptions).

⁴⁸ BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2007 (2009) <http://www.bls.gov/news.release/famcc.htm> (counting 19.5% of marriages in which only the husband was employed, and 6.9% of marriages in which only the wife was employed, for a total of 26.4% of one-breadwinner heterosexual marriages).

⁴⁹ *Id.*

⁵⁰ BUREAU OF LABOR STATISTICS, CHARTING THE U.S. LABOR MARKET IN 2006 § 6 chart 6-5 (2007), <http://www.bls.gov/cps/labor2006/home.htm#families>.

Middle-income families in particular depend on substantial earnings by wives.⁵¹

3. Skewed Toward Relatively Affluent One-Breadwinner Marriage

The marital income-splitting tax benefit largely works to lower the tax liability of more affluent households (except for those at the highest income levels). Marriage itself is concentrated at higher income levels, so that a marital tax break is inherently regressive. In 2007, 78.9% of households with income in the top fifth of income levels and 83.5% of households in the top twentieth of income levels consisted of married couples, compared to only 17.1% of households in the bottom fifth of income levels and 49.3% of those in the middle fifth.⁵²

Furthermore, the benefits of the “marriage bonus” are concentrated among relatively affluent married couples. In a study of the pre-2001 marital tax system based on 1993 data, tax scholar Dorothy Brown showed that married couples earning more than \$120,000 (in 1993 dollars) were most likely to benefit from the “marriage bonus” because unequal-earning marriages were concentrated at those upper income levels (as well as at very low-income levels not subject to taxation).⁵³ By contrast, relatively equal-earning marriages, which do not benefit as

⁵¹ See, e.g., ECON. POLICY INST., INCREASED WORK BY WIVES CUSHIONS FALL IN FAMILY INCOME, STATE OF WORKING AMERICA 1998/99 (1999) http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_archive_03101999.

⁵² U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2008 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT tbl. HINC-05 (2008), available at http://pubdb3.census.gov/macro/032008/hhinc/new05_000.htm.

⁵³ Dorothy A. Brown, *Race, Class and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1499–1501 tbl. 3.3 (1997).

substantially from the income-splitting bonus, are concentrated at middle income levels.⁵⁴

Tax reforms implemented after 2001 have expanded the marriage bonus so that it reaches downward on the income scale to many more moderately earning families, but this expansion still directs the most generous tax benefits to a relatively small portion of marriages. Estimating the distributional impact of the marriage reforms (through 2010), the Tax Policy Center projected that nearly sixty-six percent of the gains from the changes would go to tax units with income between \$100,000 and \$500,000 (most of that going to moderately affluent tax units with income between \$100,000 and \$200,000), while only 14.4% of the gains would go to tax filers with income below \$75,000).⁵⁵

In the contemporary United States economy, relatively few families can sustain moderately affluent income levels with only one person's income. In the top two income quintiles, more than three-quarters of families have two earners,⁵⁶ although a portion of these dual-earning marriages consist of highly unequal spousal earnings benefitting from marital income-splitting.⁵⁷ In 2006, the median income for married couples with employed wives was \$86,773, while the median income for married couples with wives *not* in the paid labor force was \$56,815 (and the median income for married couples with wives as the sole

⁵⁴ *Id.* at 1504 tbl. 3.5, 1505 tbl. 3.6 (showing that relative equal 60/40 and 50/50 divisions of marital income are most common in white families earning between \$40,000 and \$90,000 and most common in African American families earning between \$30,000 and \$120,000).

⁵⁵ TAX POLICY CTR., EXTEND MARRIAGE PENALTY RELIEF, PRE-EGGTRA BASELINE WITH AMT FIX, DISTRIBUTION OF FEDERAL TAX CHANGES BY INCOME CLASS, 2010, tbl. T07-0027, (Aug. 26, 2008, 10:34 AM), <http://www.taxpolicycenter.org/numbers/Content/PDF/T07-0027.pdf>.

⁵⁶ U.S. CENSUS BUREAU, *supra* note 52, at tbl. FINC-06 (showing that 77.3% of families with incomes in the 4th income quintile, 81.1% of families in the top income quintile, and seventy-eight percent of families with the top five percent of income, had two or more earners).

⁵⁷ See Brown, *supra* note 53, at 1500 tbl. 3.3 (showing distribution of income between spouses at various income levels).

earner was \$47,846).⁵⁸ At 2008 tax rates, that median income level for marriages with sole-breadwinning husbands would produce a tax bonus of \$3,275 compared to a single taxpayer with identical earnings (assuming a simplified return).⁵⁹ That bonus provides a substantial benefit for middle-income taxpayers, but higher income married sole breadwinners can receive a marital income-splitting benefit reaching nearly \$10,000 a year. The marital income-splitting benefit concentrates benefits on relatively affluent taxpayers, however, not the very richest: it plateaus and phases out at very high income levels.

Table 1 below gives examples of how the income-splitting bonus under 2008 rates is skewed toward relatively affluent taxpayers with one-breadwinner marriages.

⁵⁸ U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS SERIES tbl. 678 (2007), available at www.census.gov/compendia/statab/2009/tables/09s0678.xls.

⁵⁹ See *infra* Table 1.

TABLE 1: Tax Benefit of One-Breadwinner Marriage by Income⁶⁰

| INCOME | TAX on single filing one-earner | TAX on one-earner married filing jointly | Income-splitting bonus for married one-earners |
|-----------|---------------------------------|--|--|
| \$400,000 | \$115,873 | \$106,414 | \$9459 |
| \$300,000 | \$82,182 | \$72,207 | \$9975 |
| \$200,000 | \$48,928 | \$39,732 | \$9196 |
| \$150,000 | \$33,472 | \$25,732 | \$7740 |
| \$100,000 | \$19,472 | \$13,213 | \$6259 |
| \$90,000 | \$16,672 | \$10,713 | \$5959 |
| \$75,000 | \$12,856 | \$7763 | \$5093 |
| \$56,815 | \$8310 | \$5035 | \$3275 |
| \$50,000 | \$6606 | \$4013 | \$2593 |
| \$45,000 | \$5356 | \$3263 | \$2093 |
| \$40,000 | \$4256 | \$2513 | \$1743 |
| \$30,000 | \$2756 | \$1210 | \$1546 |
| \$25,000 | \$2006 | \$710 | \$1296 |

4. Skewed to breadwinning Husbands

The income-splitting provision is gender neutral on its face, in that it is available to relatively affluent breadwinners married to non-earning or low-earning spouses regardless of the gender of the breadwinner. Nonetheless, taken in social context, it tends to target tax benefits to households with primary-breadwinning *husbands*. In the vast majority of relatively affluent heterosexual marriages with a breadwinner-homemaker division of spousal labor, it is the husband who is the primary breadwinner and the wife who is the non-earning or very low-earning specialized homemaker. In 2001, wives were the primary earner (the source of 60% or more of marital income) in only 12% of marriages in the United States, and the average

⁶⁰ This table assumes 2008 rates and a simplified return with standard deductions and no dependents.

percentage of marital income contributed by wives was 35.6%.⁶¹ As a result, even when wives are major family breadwinners, they are less likely than husbands to have a spouse with earnings sufficiently low to allow for substantial income-splitting benefits.

The highest rates of primary breadwinning by wives likely occur at income levels too low to benefit from the marital income tax break.⁶² Dorothy Brown found, for example, that less than ten percent of African American wives earned eighty percent or more of the marital income (based on 1993 data) at all household income levels above \$30,000 a year (in 1993 dollars).⁶³ Middle or upper income white wives in the paid labor force were even less likely than husbands to be primary breadwinners with marginally earning spouses. In Brown's analysis, only five percent or less of white wives in households with income over \$30,000 earned more than eighty percent of the household income in 1993.⁶⁴

Moreover, in one important respect, the tax system's income-splitting bonus is not gender neutral. As many have criticized,⁶⁵ breadwinners married to homemakers of the same sex cannot take advantage of marital income splitting, since the Defense of Marriage Act requires federal tax law to recognize

⁶¹ Sara B. Raley et al., *How Dual are Dual-Income Couples: Documenting Change from 1970 to 2001*, 68 J. MARRIAGE & FAM. 11 (2006). In 2008, wives were the sole earner in 6.9% of all marriages in the United States, while husbands were the sole earner in 19.5% of marriages. See BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2008 (2009), available at <http://www.bls.gov/news.release/famcc.htm>.

⁶² See LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 110 tbl. 1.33 (2003) (noting that wives of low-earning husbands contribute proportionately more to family income than do wives of high-earning husbands).

⁶³ Brown, *supra* note 53, at 1492 tbl. 3.1.

⁶⁴ *Id.* at 1496 tbl. 3.2.

⁶⁵ See, e.g., Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 469–71 (2000).

only "a legal union between one man and one woman as husband and wife."⁶⁶

But the inequities of the income-splitting bonus go beyond both this facial exclusion of primary breadwinners outside heterosexual marriage and the de facto exclusion of most primary breadwinning wives. The existence of such inequities requires a closer examination of the context and impact of the policy that favors relatively affluent breadwinner-homemaker marriages.

5. Skewed to White Husbands

The marital income-splitting provision also works to target tax benefits away from African American marriages and from African American breadwinners. Although race neutral on its face, in social context it produces a racially skewed impact, as Dorothy Brown has analyzed extensively.⁶⁷ That is because one-earner marriages are much less common among relatively affluent African Americans than white Americans, and because, even within dual-earning marriages, African American husbands and wives are much more likely than white spouses to earn relatively equal incomes.⁶⁸ Though this disparate racial impact may not have clearly or explicitly motivated the design of the income-splitting tax policy, this racial effect is unlikely to be a matter of simple accident or unforeseeable consequence. This tax scheme originated from a mid-twentieth century social context in which the breadwinner-homemaker family was typically associated with white racial identity and privilege.⁶⁹

⁶⁶ 1 U.S.C. § 7 (2000).

⁶⁷ Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997) [hereinafter Brown, *Bonus/Penalty*]; Brown, *supra* note 5; Brown *supra* note 53.

⁶⁸ Brown, *Bonus/Penalty*, *supra* note 67, at 1475 n.23–25; Brown, *supra* note 5, at 287 tbl. 1.2, 1.3.

⁶⁹ See, e.g., Dorothy A. Roberts, *Spiritual and Menial Housework*, 9 YALE L.J. 51, 53 (1997) (discussing the racial nature of the ideal of a domestic sphere of family homemaking labor separate from the market).

C. Not a Dependent Care Bonus

The target of the income-splitting tax bonus is therefore not marriage, but more precisely the relatively affluent breadwinner-homemaker marriage, commonly characterized by the ideal of a (usually white) wife whose husband's economic success allows her to concentrate on informal domestic family care rather than formal market earnings. Tax theory has sometimes suggested that the marital income-splitting benefit works (in effect if not by intent) as support for the unpaid family care labor typically done by homemaking wives in one-breadwinner marriages.⁷⁰ But the income-splitting benefit is not closely tailored to support the dependent care work typically identified as the specialty of non-earning or low-earning homemaking wives.

The income-splitting bonus reduces the taxable income of affluent breadwinners married to non-breadwinners (or low earners) regardless of the presence or absence of dependents, such as children or non-working persons with illness or disability. It is possible that a substantial portion or even most of the tax benefits of marital income-splitting go to married couples without dependents: according to 2007 census data, at all income quintiles except the lowest fifth, just over half of all families (defined as two or more persons living together and formally related by birth, marriage or adoption) have no dependent children.⁷¹

Even excluding married couples over age sixty-five who benefit from income-splitting, more than forty percent of marital families had no children under age eighteen in 2000.⁷² Furthermore, most marital families with dependents likely

⁷⁰ See Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2014–15 (1996) (asserting that the feminist goal of supporting family caretakers could be a justification for the marital income-splitting benefit single-earner couples); Bittker, *supra* note 11, at 1417 (stating that “once enacted, however, income splitting for married couples came to be seen as a tax allowance for family responsibilities”).

⁷¹ U.S. CENSUS BUREAU, *supra* note 52.

⁷² JERRY A. JACOBS & KATHLEEN GERSON, *THE TIME DIVIDE: WORK, FAMILY & GENDER INEQUALITY* 44 tbl.2.1 (2004) (based on 2000 U.S. Census Bureau Current Population Survey data).

receive little or no benefit from marital income-splitting because most spouses who provide informal family dependent care are also income earners who contribute to family breadwinning. In 2005, nearly seventy percent of married mothers of children under age eighteen were in the paid labor force, as were nearly sixty percent of married mothers of children under age six and slightly more than half of the married mothers of children under age one.⁷³ In 2000, wives with one or more children under age eighteen worked an average of 38.8 hours per week in paid labor.⁷⁴

In short, the marital income-splitting tax rates are both underinclusive and overinclusive as support for informal dependent caretaking within marital families. But focusing on homemaking labor does point toward a better way of understanding the income-splitting tax bonus and its inequities.

D. Aid for Husband Care

1. Caretaking for Husbands in Breadwinner-Homemaker Marriage

What social purpose is effectively served by a family tax shelter limited to breadwinners who fit the classic paradigm of a white affluent husband providing for a homemaking wife without substantial market earnings? As the breadwinner-homemaker division of marital labor has become less dominant as a demographic fact and social norm, the income-splitting tax benefit may seem to serve little rational social function. From such a perspective, the early twenty-first century expansion of this tax bonus for breadwinner-homemaker marriage appears particularly puzzling, other than as a reminder of the difficulty of updating tax systems designed for a previous social era.

⁷³ Sharon R. Cohany & Emy Sok, *Trends in Labor Force Participation of Married Mothers of Infants*, MONTHLY LAB. REV., Feb. 2007, at 9, 10–11 charts 1 & 2, tbl. 1; see also HEATHER BOUSHEY, CTR. ECON. & POLICY RESEARCH, ARE WOMEN OPTING OUT: DEBUNKING THE MYTH (2005) (arguing that evidence of a small recent decline in employment rates of married mothers suggests a falling general employment rate rather than significant withdrawal from the labor market by married mothers).

⁷⁴ JACOBS & GERSON, *supra* note 72, at 44 tbl. 2.1.

A missing piece that fits this puzzle can be found in close examination of the marital division of domestic labor aided by this policy. As discussed above, the tax bonus is not well targeted to support unpaid family dependent caretaking labor. However, it is closely tailored to support marriages in which homemaking spouses engage in unpaid caretaking labor for a primary breadwinner in lieu of substantial formal market earnings.

Although contemporary portrayals of wives “opting out” of paid labor typically focus on dependent care, especially for young children,⁷⁵ “husband care” labor is also central to the traditional legal and social identity of homemaking wives. The hypothetical of Breadwinner Bob and Homemaker Hannah suggests some of the ways in which non-earning homemaking spouses (disproportionately wives) may specialize in informal caretaking for spouses who are primary breadwinners (disproportionately husbands). A 2005 study of time diaries showed that married women without children spent six more hours per week on housework than single women, and more than twice as much time on housework as their husbands.⁷⁶ This increased housework for wives compared to their husbands as well as single women may reflect some combination of a shift in caretaking labor from men to women upon marriage, a net addition of caretaking work by wives upon marriage and a shift from paid domestic labor to informal caretaking upon marriage.

This unpaid “husband care” work by homemaking wives is not a problem simply of gender subordination or outdated gender socialization. Indeed, “husband care” work may be increasingly important to the economic and personal well-being of many husbands and wives in contemporary society. Time for leisure and personal caretaking is a significant issue for many

⁷⁵ WILLIAMS ET AL., *supra* note 25 (criticizing the popular media’s portrayals of women’s reasons for leaving the workplace to focus on home responsibilities).

⁷⁶ RELEASE, UNIV. OF MICH. INST. FOR SOC. RESEARCH, EXACTLY HOW MUCH HOUSEWORK DOES A HUSBAND CREATE? (2008), *available at* <http://www.ns.umich.edu/htdocs/releases/story.php?id=6452> (reporting findings of study led by economist Frank Stafford, based on data from the federally-funded Panel Study of Income Dynamics).

United States breadwinners. Although average work hours in formal paid employment have not significantly increased since 1970 in the United States, that measure masks an increased bifurcation by economic class in time spent on paid employment.⁷⁷ In 2000, 26.5% of employed men and 11.3% of employed women worked more than fifty hours a week in paid employment, compared to 21% of men and 5.2% of women in 1970.⁷⁸ In certain groups, long work weeks are particularly common: 38% of male college graduates and 19% of female college graduates work more than fifty hours week, as do 37.2% of men who work in professional, technical, or managerial occupations.⁷⁹ On the other hand, more men also report working less than thirty hours per week in 2000 than in 1970, with these low-hour workers concentrated at lower educational levels and in occupations other than professional, technical and managerial categories.⁸⁰

Even without dependents, higher income married couples are likely to face pressure to divide their labor into one primary breadwinner and one specialized homemaker to manage work and caretaking demands. Jerry Jacobs and Kathleen Gerson note in their study of work and family time pressures, a fifty hour work week means not only ten hours of formal work each day (if spread over five weekdays) but also additional time for lunch and commuting that typically can stretch those ten-hour days to more than eleven hours.⁸¹ Jacobs and Gerson found that about half of workers with formal jobs requiring fifty hours per week or more report that they regularly work on the weekends.⁸² Fifteen percent of workers with fifty hours or more a week in

⁷⁷ JACOBS & GERSON, *supra* note 72, at 32–39; *see also* Laura T. Kessler, *Getting Class*, 56 BUFF. L. REV. 915, 930–31 (2008) (arguing for more attention by legal scholars to sociological data on the family, using example of studies of class differences in market work hours).

⁷⁸ JACOBS & GERSON, *supra* note 72, at 34 tbl. 1.2.

⁷⁹ *Id.*

⁸⁰ *Id.* at 34–35 tbl. 1.2.

⁸¹ *Id.* at 32.

⁸² *Id.* at 35.

formal employment report that they usually work seven days per week.⁸³ Jacobs and Gerson found that over one third of workers “feel unable to get everything done at home because of their job” due to time pressures. Further they found that even with decreased housework and increases in purchased domestic services, a substantial portion of workers still feel they have insufficient time for tasks like paying bills and maintaining their homes and cars.⁸⁴

Although this study noted that long work hours put pressure on employed parents, they found that employed wives married to employed husbands would prefer reduced hours in formal employment regardless of whether the couple had preschool age children.⁸⁵ In a study consisting of in-depth interviews with a group of non-employed white married mothers who quit highly successful careers to be full-time homemakers, researchers concluded that “husbands had an arguably greater effect on women’s decisions to quit than the more immediately pressing and oft-cited “family” demands of children.”⁸⁶ This was because wives (often implicitly) made a priority of advancing their husbands’ careers and so wanted to free their husbands from home and parenting responsibilities.⁸⁷

Although women in upper income marriages have high rates of formal labor market participation,⁸⁸ rising income for very high-earning husbands can lead to decreased formal employment by wives.⁸⁹ Examples of high-income one-

⁸³ *Id.*

⁸⁴ JACOBS & GERSON, *supra* note 72, at 84.

⁸⁵ *Id.* at 68 tbl.3.2, 72.

⁸⁶ See STONE *supra* note 21, at 62.

⁸⁷ *Id.*

⁸⁸ WILLIAMS ET AL., *supra* note 25, at 25 (citing data showing that though wives of men in the top five percent of income levels are employed at lower rates than wives in the bottom ninety-five percent of earnings, more than half of these wives were nonetheless employed).

⁸⁹ *Id.* at 4–7.

breadwinner families show how breadwinning husbands can gain from increased informal services from wives who have withdrawn from formal employment. In one marriage where the wife left her job as a lawyer to become a full time homemaker, both spouses noted benefits to the high-earning husband as well as to the children. For example, the wife had increased time to plan vacations and decorate their home.⁹⁰ Similarly, in discussing his wife's change from an employed journalist to a full-time homemaker, another working husband expressed his pleasure that his wife could now "take care of 'the trivial stuff' such as car maintenance and grocery-shopping" and that her domestic work gives him more free time.⁹¹ An executive coach reports specifically that high-income men are often surprised by how much they gain when their wives withdraw from formal employment: "They get their wives back Now the focus can be on his career, his needs."⁹² Another high-income executive and husband with a non-employed wife explained his gain from having his wife take over household chores as a full time homemaker: "I was completely spoiled by my mom growing up. Now I've gotten back to that point."⁹³ These gains to husbands may also accrue in part to homemaking wives through opportunities to share the husbands' enhanced earnings.

Even when couples want to resist such a traditionally gendered division of domestic labor, they may forgo that choice in order to reap the economic benefits of concentrating marital investments in one career. Couples may reap joint economic gains from freeing one breadwinner to pursue career opportunities like travel or job relocation without having to accommodate the other spouse's competing employment

⁹⁰ Nancy Ann Jeffrey, *The New-Economy Family*, WALL ST. J., Sept. 8, 2000, at W1.

⁹¹ *Id.* (quoting John McCaskill, a design engineer whose wife had been out of the labor market for a year).

⁹² *Id.* (quoting Michelle Kremen Bolton, of ExecutivEdge in Silicon Valley).

⁹³ *Id.* (quoting software executive Kevin Fitzgerald).

responsibilities.⁹⁴ Furthermore, for higher income jobs, employers' expectations for unpaid support from wives may penalize or pressure breadwinners who lack such support. Journalist Ann Crittenden quotes an interview with one corporate consultant who explained, "[t]he presence of a wife at home to care for family and personal matters is almost as much a requirement in business today as it was a generation ago."⁹⁵ Law professor Mary Anne Case, describing her experience as the only one of five tenure-track junior faculty members at a prominent law school without a stay-at-home wife, notes that the law school planned to provide lunch only for faculty with homemaking wives whose home-cooked meals would otherwise deter their spouses from staying at work to dine with colleagues.⁹⁶

Other stories show how even without children or other dependents and even at middle or upper middle incomes, the demands of domestic care for breadwinning husbands can contribute to a wife's decision to substitute full-time informal homemaking for formal employment. In a journalist's report on childless non-earning wives, one former high school teacher explained that as a married homemaker she spent substantial weekly time on laundry, grocery shopping, housecleaning and running errands, although she also had significant time for her own leisure activities.⁹⁷ Another wife without children explained that a period of full-time homemaking allowed her to "clip coupons, do the chores, and make nice dinners" with reduced

⁹⁴ See Jonathan Kaufman, *Regaining a Balance: Back to the 50s*, WALL ST. J., Mar. 31, 1997, at 6 (explaining how executive Nicola Ganio's career "thrived" once his wife quit her paid employment).

⁹⁵ ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 18 (2001) (quoting a 1994 conversation with consultant Charles Rodgers).

⁹⁶ Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why and How the Burden of Care for Children Should be Shifted*, 76 CHI.-KENT. L. REV. 1753, 1763-64 n.30 (2001).

⁹⁷ Sarah Jio, *No Kids, No Jobs for Growing Number of Wives*, CNN (Aug. 5, 2008, 3:52 PM), <http://www.cnn.com/2008/LIVING/wayoflife/08/05/lw.nokids.nojob.wives/index.html?iref=allsearch>.

stress and tension.⁹⁸ Her husband noted that he was happiest when his wife was not employed because she had time for more cleaning, gardening, bargain shopping, as well as maintaining the couples' energy and emotional health. Another wife commented that going from a dual-earning household to a single-earning household with her husband as sole breadwinner means that their weekends can be spent running, watching movies, relaxing and being together as a couple, rather than doing errands, repairs, and other household chores.⁹⁹

In addition to performing typical homemaking services for their employed husbands, wives without substantial outside employment may informally contribute unpaid time and skill to their husbands' formal market work. Indeed, some firms appear to evaluate the potential informal contribution of executives' wives as a significant part of the executive hiring process even though such considerations can violate antidiscrimination laws.¹⁰⁰ Tax scholar Lisa Philipps analyzed data suggesting employees in a wide range of occupations and income levels may use their unpaid wives or other family members as informal workers or partners in their jobs.¹⁰¹ For example, wives who are not formally employed by their husbands' firms may host business events, engage in networking and increase business contacts by hosting social activities and participating in public relations activities.¹⁰² Wives of professionals who bring work home may similarly help with tasks like grading papers, maintaining the home office, editing manuscripts or assisting with word processing.¹⁰³ Husbands who run a business may

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Leslie Kaufman, *The Significant Other*, N.Y. TIMES, Sept. 28, 2008, at ST1.

¹⁰¹ Lisa Philipps, *Helping Out in the Family Firm: The Legal Treatment of Unpaid Market Labor*, 23 WIS. J.L., GENDER & SOC'Y 65, 85-98 (2008).

¹⁰² *Id.* at 67-75.

¹⁰³ See *id.* at 94 (noting literature on informal work by wives of academics, clergy, self-employed professionals and others whose jobs include work at home and tasks that seem like "women's work").

depend on their unpaid wives to help with tasks such as bookkeeping, decision-making, managing employees, marketing, or answering the phone.¹⁰⁴ Although the traditional small farm or small “mom and pop” business run by informal family labor is no longer the norm in the United States, Philipps argues that contemporary labor market conditions promoting self-employment and home-based work may also increase dependence on informal contributions by workers’ family members.¹⁰⁵

Besides taking over domestic chores, increasing leisure and informally contributing to spouses’ formal market work, homemakers may use their own time to invest in their spouses’ human capital—that is, their long term physical and mental well-being—in ways that increase a specialized breadwinner’s future earnings potential. Some data shows that husbands in particular reap non-economic benefits from marriage such as increases in healthy behaviors.¹⁰⁶ A journalist’s comparison of men recovering from heart attacks described how an unemployed wife was an important factor in one affluent man’s speedy return to good health.¹⁰⁷ His wife researched the best treatments, scheduled and managed medical appointments, handled communications with doctors, filled his prescriptions, monitored his symptoms, changed his diet and took charge of medical bills and insurance payments.¹⁰⁸

In sum, a defining characteristic of the specialized breadwinner-homemaker marriage, especially those that are relatively affluent, is that this specialization facilitates informal marital caretaking work for primary breadwinners, especially

¹⁰⁴ *Id.* at 78, 90–91.

¹⁰⁵ *Id.* at 88–90.

¹⁰⁶ See LINDA WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 164 (2000) (attributing particular benefits to husbands to unhealthy behavior by single men but not single women).

¹⁰⁷ Janny Scott, *Life at the Top in America Isn’t Just Better, It’s Longer*, N.Y. TIMES, May 16, 2005, at A1 (discussing the experience of Jean G. Miele).

¹⁰⁸ *Id.*

those in professional jobs that benefit from long work hours and substantial social capital or home support. It is true that the tax bonus from marital income splitting directs benefits to relatively affluent breadwinner-homemaker marriages simply because taxable marital earnings are unequally divided, and not because of any measurement or requirement of what the homemaking spouse actually does. Nonetheless, this structure of marital labor is widely perceived and practiced as a means of enhancing informal spousal caretaking services for primary breadwinners, typically husbands. For that reason, it makes sense to examine the breadwinner-homemaker tax bonus as a system that in effect, if not by intent, operates as tax support for caretaking services for breadwinners who are particularly likely to receive many of those services outside of the formal labor market from a non-breadwinning wife.

2. Tax Bonus in Context of Wage Premium for Husband Care

The theory that the tax bonus works as implicit support for “husband care” by unpaid homemaking wives of affluent breadwinners fits into the pattern of socioeconomic benefits for the status of paradigmatic husbands. Evidence of a wage bonus for husbands supports the theory that primary breadwinner husbands—particularly those who are white and affluent—typically enhance their real or perceived marketable labor or human capital through their wives’ caretaking. A leading longitudinal study that followed young white American men aged fourteen to twenty-four from 1966 to 1984 found that married white men earned about eleven percent more than never-married men (controlling for labor market experience, completed schooling, union status, year of birth, geography, presence of dependents and occupation).¹⁰⁹ Some studies suggest an even greater “white husband premium,” in the range of twenty to

¹⁰⁹ Sanders Korenman & David Neumark, *Does Marriage Really Make Men More Productive*, 26 J. HUM. RESOURCES 282, 287, 291 (1991).

thirty-two percent (based on 1977 data)¹¹⁰ or, in a recent study comparing identical twins, twenty-six percent.¹¹¹

At least some evidence supports the theory that this “husband premium” is not simply a relic of outdated gender roles or bygone stereotypes by old-fashioned employers, but that it persists in the early twenty-first century labor market.¹¹² A study of 2004 data on American men aged twenty-five to forty-nine found that without controlling for other differences, married men have a thirty-four percent earning advantage over never-married men and a twenty-one to twenty-four percent advantage over separated and divorced men respectively.¹¹³ Some evidence suggests that this “husband premium” is substantially higher for husbands whose wives do not work in the formal labor market,¹¹⁴ and for wage-working wives, the “husband premium” seems to decline as wives’ market work hours increase.¹¹⁵ Although most studies have focused on white men, some evidence has showed a wage bonus, though lesser, for married black men.¹¹⁶ By contrast, marriage is likely to bring a wage

¹¹⁰ Robin Bartlett & Charles Callahan, *Wage Determination and Marital Status: Another Look*, 23 INDUS. REL. 90, 90–96 (1984).

¹¹¹ Kate Antonovics, & Robert Town, *Are All the Good Men Married? Uncovering the Sources of the Marital Wage Premium*, 94 AM. ECON. REV. 317, 317–21 (2004).

¹¹² Avner Ahituv & Robert I. Lerman, *How do Marital Status, Wage Rates & Work Commitment Interact?*, in AMERICAN UNIV. INST. STUDY LABOR (IZA Discussion Paper No. 1688, 2005), available at <http://ssrn.com/abstract=773950> (discussing evidence that marital wage advantages have not withered away, countering the conclusions of some research).

¹¹³ *Id.* at 2.

¹¹⁴ Hyunbac Chun & Injac Lee, *Why Do Married Men Earn More: Productivity or Marriage Selection?*, 39 ECON. INQUIRY 307 (2001).

¹¹⁵ Kermit Daniel, *The Marriage Premium*, in THE NEW ECONOMICS OF HUMAN BEHAVIOR 121 (Mariano Tommasi & Kathryn Ierulli eds., 1995).

¹¹⁶ See Ahituv & Lerman, *supra* note 112, at 7, 21 (finding that married and remarried black men’s wages were “slightly higher” than comparable never-married black men’s wages but slightly lower than divorced black men’s wages); Daniel, *supra* note 115, at 121 (noting a larger marital wage premium for white men than for black men).

penalty for breadwinning white women and a much smaller wage bonus for black women.¹¹⁷ Because this wage effect is targeted at married *men*, the phrase “husband premium” seems a more appropriate description than the more common term “marriage premium.”

Researchers have debated the extent to which this “husband premium” results from wives’ informal domestic contributions to their husbands’ human capital rather than from wives’ selection of men with pre-existing intangible advantages in human capital.¹¹⁸ Nonetheless, husbands’ gains from wives’ domestic service plausibly account for at least some of husbands’ wage advantage. One analysis of the data, for example, found that men increase their formal work hours immediately after marriage, and that even though this work-hour advantage lessens over the long run (compared to single men), the additional early work hours represent an important investment in human capital for married male breadwinners that pays off over the long run with substantially higher work income.¹¹⁹ This analysis supports the idea that wives’ domestic services typically give husbands the physical, mental and social resources to work more hours more productively (or at least to *appear* to work more productively), so that husbands invest

¹¹⁷ Daniel, *supra* note 115, at 123 (summarizing evidence that marriage has a negative relationship with wages for white women and attributing this marital wage penalty to the effect of children on white women’s wages); Anne E. Lincoln, *Gender, Productivity, and the Marital Wage Premium*, 70 J. MARRIAGE & FAM. 806 (2008).

¹¹⁸ See, e.g., Daniel, *supra* note 115, at 114 (discussing alternatives to the theory that marriage raises wages because it increases husbands’ productivity).

¹¹⁹ Ahituv & Lerman, *supra* note 112, at 25–28.

more in their careers early on than otherwise comparable single breadwinning men and married breadwinning women.¹²⁰

Returning to our hypothetical, Breadwinner Bob will not only get a reduced tax rate after marrying Homemaker Hannah, but he can also expect a wage increase compared to a single earner with similar experience and skills. If so, he might view the marital income-splitting tax benefit as a special tax exemption for the expected marital income gain from his employer, or as a special tax exemption for the costs of enhancing his human capital via the services of his homemaking wife. Single Sophia, on the other hand, may be even more suspicious of the equities of a tax system that seems to echo and exacerbate the market's use of husband status as a proxy for merit (even though the tax system's rewards are not explicitly gender-linked). To further dig into the question of the equity of this tax benefit for breadwinner-homemaker marriage, this Article turns to the ideas and law underlying the structure of the breadwinner-homemaker division of labor traditionally identified with the status of husband.

3. Tax Bonus in Context of Family Law Protection for Husband Care

The tax system's marital income-splitting grows out of a legal regime in which the legal status of husband has traditionally involved a nonreciprocal entitlement to a wife's unpaid caretaking services. Martha Fineman has analyzed and criticized how law traditionally has made the marital relationship the foundation of the legal family rather than the relationship

¹²⁰ Although some interesting research has found no correlation between male time on housework and increased wages, which suggests that married men's increased wages may not be due to increased productivity from specialization in paid labor, wives' domestic services might nonetheless produce increased wages for husbands primarily due to changes in the nature and total quantity of domestic services for the husband. See Joni Hersch & Leslie S. Stratton, *Household Specialization and the Male Marriage Wage Premium*, 54 INDUS. & LAB. REL. REV. 78, 78-94 (2000) (finding little difference between married and unmarried men in total time spent on housework, but significant differences in the nature of housework done by married versus unmarried men).

between dependent child and parent.¹²¹ Similarly the tax code's income-splitting provision focuses family tax support centrally on the marital relationship, rather than on dependency relationships.¹²² Legal regulation of marriage, whether in family law or tax law, is not simply about promoting marriage per se, but about distributing resources within the marital family and among families. Examination of the legal construction of the marital breadwinner-homemaker relationship demonstrates how the tax bonus as a device that not only promotes marriage, but also distributes resources within the family and among families.

In the common law tradition of "coverture," wives' legal personhood, including rights to contract and own property, were subsumed under their husbands' authority.¹²³ The husband was entitled to his wife's earnings and to other economic gain from her labor, and he had the right to compel her service and obedience.¹²⁴ Legal historian Hendrik Hartog posits that the traditional legal duty of a husband to support his wife should not be understood as an exchange that recognizes the wife's right to reciprocal benefit for her unpaid service, but rather that it serves as a means to identify and legitimate the status of the husband.¹²⁵

Indeed, in the broader philosophical tradition that shaped American law, a man's political, economic and social status was intimately linked to his identity as a husband.¹²⁶ Classical political theory linked a man's status as a citizen with political and legal rights to a man's status as a household master

¹²¹ MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 2-5 (1995).

¹²² See *infra* Part II.C (comparing the marital income-splitting benefit to income-splitting and other tax supports for heads of households).

¹²³ See HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 136-37 (2000) (describing coverture in 19th century American law).

¹²⁴ *Id.* at 156, 150 n.36.

¹²⁵ *Id.* at 165-66; see also *id.* at 156-59 (explaining that despite rhetoric of the husbands' duty to support, husbands generally had unilateral private authority within marriage to determine wives' needs and benefits).

¹²⁶ *Id.* at 101.

commanding the service of a wife and servants.¹²⁷ The right to marry was crucial to differentiating citizens from slaves in antebellum America not only because marriage signified the freedom to enter into contracts but also because marriage established men's authority to be served by others.¹²⁸ When slavery was abolished, American law continued and even strengthened the idea that marriage is not only a private individual contractual right but also a relationship within which unequal gender status—namely a man's right to "his wife"—was important to public policy and civic virtue.¹²⁹ Historian Amy Dru Stanley analyzes how the dominant nineteenth century vision of abolition aimed to give the African American man freed from slavery "the birthright of all free men: Title not only to himself but to his wife—to her person, labor, and sexuality."¹³⁰

Although nineteenth century statutory reforms have modified the traditional doctrine of coverture, Reva Siegel argues that updated marriage laws nonetheless have preserved and modernized a husband's right to his wife's uncompensated domestic caretaking services as the "essence" of marital status.¹³¹ Despite rejecting the common law rule that a husband

¹²⁷ *Id.*; see also MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 3–8 (2005) (discussing the roots of American ideas of government in the classic idea of the head of household's unequal authority to govern his wife, children, servants, animals, and inanimate property within the household).

¹²⁸ AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 24–25, 27, 29 (1998).

¹²⁹ See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 94–95, 101 (2000) (discussing how Congress affirmed marital hierarchy after the Civil War on the theory that marriage was a public institution, not solely a private contract); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2182 n. 210 (1994) (concluding that "without exceptions" judges denied intraspousal contract claims regarding wives' domestic labor in cases under reformed late 19th century marriage statutes).

¹³⁰ STANLEY, *supra* note 128, at 29.

¹³¹ Siegel, *supra* note 129, at 2209–10.

is entitled to *all* the fruits of his wife's labor, the reformed laws have reinforced coverture's presumption that marriage is a status that entitles a husband to the fruit of his wife's domestic labor.¹³² The contemporary rule still remains, although in at least nominally gender-neutral form, that homemaking spouses owe domestic labor to their spouses as a matter of uncompensated marital duty, so that contracts to protect a homemaker's rights to property or income in exchange for those domestic services are unenforceable.¹³³ In contrast, contracts to protect a breadwinner's property or income from a homemaker's claims in divorce or death are now enforceable in most states.¹³⁴ As one court explained in refusing to honor a marital agreement by a husband to transfer property to his wife after his death in exchange for her performance of round the clock nursing care, domestic caretaking traditionally done by a wife for a husband must be done for free as a matter of marital duty, regardless of any agreement the spouses actually entered into.¹³⁵

This marital duty to provide uncompensated family caretaking services specifically focused, historically, on wives' services to breadwinning husbands, not just on wives' caretaking for dependents. For example, Wisconsin enacted legislation giving married women the right to earn income in 1872, but this reform denied wives the right to financial gain "accruing from labor performed for her husband or in his employ or payable by

¹³² *Id.* at 2203–04 (discussing courts' reasoning for refusing to enforce wives' contracts with husbands for compensation for domestic labor).

¹³³ *Id.* at 2131 (stating that under the reformed marriage laws, courts universally refused to enforce intraspousal contracts for compensation for domestic labor); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 31–33 (1996).

¹³⁴ Silbaugh, *supra* note 133, at 31–32 (explaining that almost all states will enforce premarital agreements limiting a homemaking spouse's rights to property and "the strong trend" among states is to enforce agreements to protect a breadwinning spouse's income from support obligations or alimony for a homemaker after divorce).

¹³⁵ *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Ct. App. 1993) (criticized in Silbaugh, *supra* note 133, at 32–33).

him.”¹³⁶ Similarly, Indiana’s 1879 marriage reforms granted wives rights to gain from “trade, businesses, services, or labor, other than labor for her husband or family.”¹³⁷ The modern era’s ideology of separate domestic spheres has emphasized the importance of wives’ caretaking services to breadwinning (white, affluent) *husbands*, whose market work would be enhanced by their wives’ creation of a spiritual haven at home.¹³⁸ The modernized “loss of consortium” action in tort specifically recognized the value of wives personal services to *husbands*, particularly emotional and sexual support.¹³⁹ Prior to late twentieth century civil rights protections, women were commonly deemed unfit for formal market work based on their particular status as *wives* of (white affluent) breadwinners rather than as *mothers* or other dependent caretakers.¹⁴⁰

In sum, legal protection of the breadwinner-homemaker marital division of labor is not an isolated quirk of tax law’s inability to adapt to demographic change, nor is it simply a simple reflection of consensus social practices. Instead, legal regulation has shaped the contested internal meaning and rights of the breadwinner-homemaker marital form by protecting and promoting spouses’ unpaid “husband care” for economically successful married breadwinners. Regardless of the conscious intentions of the proponents of this marital tax scheme, the effect is to continue to target special benefits toward primary breadwinners who fit the traditional paradigm of husband. The policy question is why this special protection for paradigmatic “husband care” should continue, even if in gender neutral form. To answer that question, this Article turns to a scrutiny of the reasons more overtly offered as justifications for this tax bonus.

¹³⁶ Reva B. Siegel, *Home as Work, The First Women’s Rights Claims Concerning Wives’ Household Labor, 1850–80*, 103 YALE L. J. 1073, 1180 (citing Act of Mar. 25, 1872, ch. 155, § 2, 1872 WIS. LAWS 218).

¹³⁷ *Id.* at 1181 (citing Act of Mar. 25, 1879, ch. 67, § 2, 1879 IND. ACTS 160).

¹³⁸ See Siegel, *supra* note 136, at 1133 (giving example of testimony by a women’s right advocate in favor of joint property rights for wives).

¹³⁹ Silbaugh, *supra* note 133, at 42–43.

¹⁴⁰ MCCAFFERY, *supra* note 4, at 33.

VII. Rationales For Marital Income Splitting

How, then, does tax policy defend Breadwinner Bob's tax break for his marriage to a low-earner or non-earner? Or, paraphrasing tax scholar Amy Christian, why does the government essentially pay a relatively affluent man to marry, or to stay married to, a woman with substantially lower or no income?¹⁴¹

Some defend this tax preference for married primary breadwinners by explicitly affirming the traditional ideology of family status.¹⁴² Circular logic can make special government assistance seem vital to maintaining the supposed independence that helps make these breadwinners appear uniquely and naturally morally superior.

More central to tax scholarship and policymaking, however, are attempts to rationalize the tax bonus for traditional affluent husbands as consistent with purportedly non-ideological principles of tax equity. In the conventional wisdom, this tax support is not a special privilege but simply a reasonable interpretation of the normal, neutral goal of taxing similar incomes similarly (*horizontal equity*) and different incomes differently (*vertical equity*), with income defined (in the foundational Haig-Simons principle) as consumption plus savings.¹⁴³ But a closer analysis of these seemingly neutral tax equity principles shows the rationales for income-splitting rest on ideological underpinnings similar to the overtly conservative rationales for privileging breadwinner-homemaker marriage.

¹⁴¹ Amy Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL. 241, 275 (1997).

¹⁴² See INST. FOR AMERICAN VALUES, A CALL FOR FAMILY-SUPPORTIVE TAX REFORM 7 (1999) (advocating full marital income-splitting as a means of supporting married men's superior productivity); see also ALLAN CARLSON, CONJUGAL AMERICA 100-08 (2007) (arguing for marital income-splitting as a way to promote the breadwinner-homemaker marriage as the ideal family).

¹⁴³ See Edward J. McCaffery, *A New Understanding of Tax*, 103 MICH. L. REV. 807, 821-22 n.29 (2005) (stating that "traditional tax theory begins, and sometimes ends, with the Haig-Simons definition of income," and citing classic treatises).

A. Equity Between Married and Single Breadwinners?

1. One Income, Two Consumers?

A common view is that a primary breadwinner married to a non-breadwinning homemaker deserves a tax reduction compared to the single breadwinner with the same income because the married primary breadwinner's income supports two people while the single breadwinner's income supports only one. More technically, tax equity theory has justified the income-splitting bonus by explaining that breadwinner-homemaker marriages involve "shared consumption."¹⁴⁴ For example, in their classic analysis of family taxation, Michael McIntyre and Oliver Oldman explain that the income-splitting bonus reflects the fact that married primary breadwinners divert some of the benefit of their income to homemaking spouses so that those married primary breadwinners consume or accumulate less than single breadwinners with comparable incomes.¹⁴⁵ For example, Single Sophia should owe more taxes than Breadwinner Bob, in this view, because she spends the entire \$100,000 on goods and services for herself while Bob shares (or at least should share) the same income with his homemaking spouse.

One obvious problem with this "shared consumption" argument is that the income-splitting tax benefit depends on the formal status of federally recognized marriage to a non-earner or low-earner, rather than to actual sharing of the breadwinner's income. Many breadwinners filing as single taxpayers in fact share their income in household partnerships not formally recognized by American tax law. They are therefore excluded from marital income-splitting tax benefits.¹⁴⁶ Furthermore, a breadwinner in a federally recognized marriage may not actually or fully share income with a non-earning or low-earning spouse

¹⁴⁴ See Motro, *supra* note 7, at 1523 (explaining and critiquing shared consumption as one of several justifications for marital income splitting).

¹⁴⁵ Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1596 (1977).

¹⁴⁶ Motro, *supra* note 7, at 1543-49 (advocating changing the income splitting tax benefit so that it is tied to functional income-sharing rather than formal marriage).

and may even live in an entirely separate household as a number of tax scholars have discussed.¹⁴⁷

A more fundamental problem with the comparison has received less close attention, however. Contrary to the standard analysis, it is not necessarily or typically true that the earnings of a single breadwinner *not* in an income-sharing household goes “only to support one person.” The “shared consumption” rationale for marital income-splitting implicitly relies on the problematic assumption that a homemaking spouse is an economic dependent, such as a child or other non-working person who consumes, but does not produce, family income. When instead recognizing that the primary breadwinning spouse typically shares income with a specialized homemaker as part of an *exchange* of domestic services for income, the single breadwinner no longer appears so different.

A single affluent breadwinner in a one-person household similarly can be expected to “share” income with others. Just as Breadwinner Bob is likely to provide monetary support for his homemaking wife’s consumption, Single Sophia also is likely to support the cumulative equivalent of an additional worker’s consumption of basic living expenses. A substantial portion of Single Sophia’s \$100,000 income goes to pay those who help provide her with domestic services—perhaps a house cleaner, laundry workers, condominium building maintenance staff, and restaurant workers. Like Breadwinner Bob’s homemaking wife, these service workers in turn use their share of Single Sophia’s income to purchase food, clothing, housing and other items for themselves.

Unlike Breadwinner Bob, however, to the extent Single Sophia purchases her various domestic services as market commodities, the income she distributes to these workers by

¹⁴⁷ For discussions of the empirical evidence of marital income pooling, see *id.* at 1523–25 (noting that the empirical evidence is not only scarce and unreliable, but also subject to varying interpretations); Marjorie E. Kornhauser, *Love, Money and the IRS: Family, Income Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 84–86 (1993) (arguing that finding that a significant portion of married couples and cohabiting couples in two surveys did not deposit earned income solely in joint accounts); Zelenak, *supra* note 4, at 348–54 (concluding “there has been remarkably little empirical research into the income-sharing patterns of married couples”).

buying their services will come out of her after-tax dollars and also will be taxable as income to the workers and may perhaps even be subject to sales tax. In typical tax theory, Single Sophia's allocation of some of her income to domestic service providers would be a personal consumption choice that counts *toward* taxable income, with greater consumption of domestic services generally reflecting a greater ability to pay taxes. After all, she could choose to do without these services, accepting a lower quality of domestic life, or she could do the work herself and sacrifice some combination of leisure, sleep and time devoted to her profession. Perhaps she could also garner unpaid services from family or friends.

Of course Breadwinner Bob similarly makes a choice to "spend" his income on a homemaking spouse, so the question remains why his consumption choice gets special tax treatment. One response might be that tax policy favors the choice of "marriage" as more socially beneficial compared to consumption of commodified services or goods. But, as discussed in Part II(B), the income-splitting marital tax scheme does not favor the choice of marriage, but rather the choice of a particular division of income within relatively affluent breadwinner-homemaker marriages.

This transfer of income to specialized homemaking spouses may seem to be a moral or legal responsibility of the breadwinning spouse rather than a contingent consumption choice. But the decision of a married breadwinner to transfer income to his or her homemaking spouse is not necessarily any more morally selfless, legally necessary, or socially beneficial than an unmarried breadwinner's choice to spend money on domestic caretaking services or to enhance the well-being of another non-earner or low-earner. Breadwinner Bob could choose to marry a homemaking spouse willing to forgo substantial personal consumption and live the kind of self-sacrificing lifestyle that some might deem appropriate for persons without substantial formal market labor—or that might allow Breadwinner Bob to reserve a greater share of his income for charity or for spending that generates further tax revenue to support public consumption (by generating income to service providers). Or, just as Single Sophia might decide not to exchange her income for domestic services, Breadwinner Bob

could choose to do the domestic chores himself or to forgo domestic comforts in order to free up his homemaking spouse's time and energy for pursuing market earnings that would accrue directly and legally to her individually and that could potentially bring greater benefits to society overall than her informal domestic services to Breadwinning Bob.

As for legal obligations, in common law states, married breadwinners retain sole title to their wages along with the right to exclude spouses from that income during the marriage—subject only to a rarely and loosely enforced requirement that breadwinners ensure spouses have access to bare necessities.¹⁴⁸ Even in community property states, breadwinning spouses are free to contractually opt out of their default obligation to share wage income during a marriage.¹⁴⁹ Indeed, family law doctrine continues to assume that a homemaking spouse in an ongoing marriage not only lacks a presumptive marital right to any particular share of a breadwinning spouse's income in exchange for homemaking, but also that a homemaker has no enforceable right even to privately bargain with a spouse for any income or assets in exchange for domestic services.¹⁵⁰

¹⁴⁸ See Motro, *supra* note 7, at 1519–21 (summarizing legal rules governing married wage earners' income); HARTOG, *supra* note 123, at 157 (explaining that in nineteenth century family law, husbands' duty to support a homemaking wife was enforced mainly during separation and that for married couples living together "courts never substituted their judgment as to the needs of the wife for that of her husband"); *id.* at 306 (explaining that through the twentieth century, wives' duty to be supported was limited by the husbands' right to decide how marital resources would be spent); Silbaugh, *supra* note 133, at 34 (explaining that a homemaking spouse can only seek enforcement of a support obligation against a spouse at divorce, and even then this obligation is typically minimal and temporary).

¹⁴⁹ See Motro, *supra* note 7, at 1521 (explaining that in both community property and common law states, statutes and courts typically affirm pre- and post-marital agreements so that any default rules of marital income-sharing are effectively optional); Silbaugh, *supra* note 133, at 32–34 (explaining that while family law has modernized the breadwinning spouse's support obligation so that it is essentially a matter of contractual choice, it has not similarly treated caretaking work typically done by wives).

¹⁵⁰ See Siegel *supra* note 129; Silbaugh, *supra* note 133, at 31–33 (discussing *Borelli v. Brusseau*).

After divorce, family law can require a breadwinner to share some property and income with a homemaking spouse, but generally these divorce awards to homemaking wives are treated as charity rather than as homemaker's rights to a breadwinner's resources. Though divorce statutes typically direct courts to consider homemakers' contributions to marital resources as one factor in dividing assets, courts tend to ignore this factor or to put a low value on domestic services so that primary breadwinners with significant assets usually are not required to split them equally.¹⁵¹ Furthermore, non-earning or low-earning homemakers rarely receive alimony in contemporary divorce proceedings, and even if they do it tends to be construed as temporary charity based on need, or perhaps on moral worth, rather than on a right to compensation for homemaking.¹⁵² Similarly, after death, statutory provisions in common law states may give surviving spouses rights to one-third of any estate in probate, but in practice homemaking spouses often are not well protected from disinheritance by this rule, which at any rate is not based on a theory of equal rights to the breadwinner's gains.¹⁵³

These legal rules exacerbate the practical advantages of affluent breadwinners in bargaining for marital resources with homemaking spouses. In a low-income marriage, most of a breadwinner's earnings will probably go to basic consumption and necessities readily shared by the homemaking spouse, such as housing, food, and furniture..¹⁵⁴ In contrast, a relatively

¹⁵¹ JOAN WILLIAMS, UNBENDING GENDER 120–21 (2000).

¹⁵² *Id.* at 121–22 (noting that only about eight percent of wives receive alimony awards at divorce, and that the awards that are granted are usually temporary and low). CRITTENDEN, *supra* note 95, at 149–61 (asking, “who owns the family wage?” after divorce and criticizing the current legal assumption that the breadwinner does).

¹⁵³ See Colby T. Roc, *Arkansas Marriage: A Partnership Between a Husband and a Wife, or a Safety Net for Support*, 61 ARK. L. REV. 735, 744–45, 758–759 (2009) (explaining that spouses are more likely to be protected under recent reforms in some states).

¹⁵⁴ Zelenak, *supra* note 4, at 352 (using data on household expenditures and income to conclude that pooling income is inevitable at the lowest income quintile).

affluent married breadwinner is likely to have significant opportunity to avoid sharing earnings with a homemaking spouse.¹⁵⁵ For example, Breadwinner Bob might divert much of his wage income to his exclusive consumption of luxury items, or to retirement funds or other assets that he controls or hides from his wife. Or, he might choose to pay down his credit card debt from his personal consumption prior to marriage. In contrast, the transitory and non-commodified nature of spousal domestic services means that a homemaking spouse will have less power to hoard, hide or divert those services to their own exclusive use in the present or future, with the result that the homemaker will have less practical power to bargain for more income-sharing within the marriage or to protect her contributions against the risk of divorce.¹⁵⁶ Although a dissatisfied homemaker married to a non-sharing breadwinner may be free to return to work¹⁵⁷ to procure her own income, after substantial periods of withdrawal from the formal workforce a homemaker's earning potential may be sharply constrained.¹⁵⁸ Furthermore, financial resources can be easier to hide or more costly to fully analyze than homemaking services, putting the homemaking spouse at a negotiating disadvantage.¹⁵⁹

¹⁵⁵ See Silbaugh, *supra* note 133, at 34 (explaining that the private power to enforce marital breadwinning-homemaking agreements is asymmetrical since income is easier to withhold than household services).

¹⁵⁶ See *supra* notes 151–53 (discussing the limited rights to property and alimony for homemakers in divorce).

¹⁵⁷ However, breadwinners sometimes enforce homemaking with violence directed at impeding women's return to formal market work. See Lisa D. Brush, *Battering, Traumatic Stress, and Welfare-to-Work Transition*, 6 VIOLENCE AGAINST WOMEN, 1039–1065, 1044 (2000) (discussing a study showing that nearly one-half of women seeking to transition from welfare to work were impeded by intimate violence).

¹⁵⁸ WILLIAMS ET AL., *supra* note 25, at 15–16 (reporting on the difficulty and long term wage penalties homemaking women face in procuring full-time mainstream employment after withdrawing from formal employment, even when they have high educational qualifications).

¹⁵⁹ One study of marriage and finance found that husbands often give much higher estimates of their family's financial resources than their wives, with half of all married couples differing as much as thirty-five percent in their perceptions of family finances. J.L. Zagorsky, *Husbands' and Wives' View of the Family Finances*, 32 J. SOCIO-ECON. 127 (2003).

Of course, in practice many primary breadwinning spouses do pool their income to allow shared consumption by a homemaking spouse, whether out of loving altruism, self-interest in inducing high quality homemaking and personal loyalty, or deference to social norms. But Single Sophia could similarly choose to be generous in sharing wage income with domestic service providers, whether out of altruism or self-interest in inducing quality service and personal connections. She might, for example, generously pay her house cleaners or restaurant servers to help them afford a middle-class lifestyle. Yet this income sharing would be treated for tax purposes as consumption by Single Sophia, counted toward her ability to pay taxes. Regardless of how much either single or married primary breadwinners give up or pay, formally or informally, in exchange for their consumption of domestic services, the question remains why the tax code should count only the married primary breadwinners' "sharing" as decreasing consumption rather than as a consumption gain.

One possible explanation could be that the "shared consumption" rationale treats the homemaker's income as a burden rather than a gain because it recognizes that in affluent marriages homemaking spouses are less likely to provide basic domestic services in return for income-sharing. For example, Breadwinner Bob and Homemaker Hannah might pay others for at least some housecleaning, lawn mowing, dry cleaning, home repairs, and restaurant meals. Given that both households are likely to use some paid domestic service, does it then make sense to give greater tax support for Bob's breadwinning than for Sophia's, since Bob will share his income with a spouse plus an array of service workers—maybe the equivalent of supporting two and a half or even three persons?

But married breadwinners can also reap substantial gains from the more "spiritual" rather than "menial" labor,¹⁶⁰ or even "leisure," likely provided by spouses of affluent primary breadwinners. Just as Single Sophia's indirect or intangible gains

¹⁶⁰ See generally Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997) (discussing how housework has been historically and ideologically divided so that white wives' labor appears to focus on high-value spiritual benefits to the household, with more menial tasks relegated to racialized low-waged female workers).

from paying above market rates for her domestic service providers would be considered consumption for tax purposes, a married primary breadwinner is still logically engaging in consumption when he or she receives less directly tangible gains from a homemaking spouse. If, for example, Homemaker Hannah's time is freed from cleaning floors or daily cooking she may have more time and energy to attend to Bob's emotional needs, socialize with his prospective clients or partners, enhance her appearance and health with gym and spa visits, attend to Bob's health,¹⁶¹ engage in social capital building through community volunteerism, entertain, or golf, proofread Bob's memos or moot his legal arguments, or improve their home. Even if these activities by a homemaking spouse do not necessarily help enhance Bob's long-term economic well-being, they may be a form of conspicuous consumption for the breadwinning spouse—like designer suits or fancy cars—that marks his class status.

If instead "shared consumption" by a non-breadwinning spouse is presumed to be a purely altruistic one-way transfer from the breadwinning spouse, the current tax rates inequitably favor such altruism by married primary breadwinners over similar altruism by unmarried breadwinners. The income-splitting "bonus" departs from standard tax equity principles by subtracting "gifts" to the non-breadwinning spouse from the primary breadwinner's income.¹⁶² Normally, gifts to family members or friends count as evidence of the gift-giving taxpayers' ability to pay higher taxes, not as a reason for *reducing* the donor's tax liability. While Single Sophia might similarly give some of her income to support several other

¹⁶¹ See Scott, *supra* note 107 (giving example of health care by affluent breadwinner's wife).

¹⁶² See Motro, *supra* note 7, at 1527 (analyzing the slippery line between gifts, personal consumption and business expenses in affluent breadwinner-homemaker marital income transfers).

people¹⁶³ her altruism, will not count as income-sharing that reduces her tax liability. Only gifts made to organizations formally tailored to satisfy criteria for charitable deductions will qualify, and these criteria in part aim to exclude “gifts” that in fact produce reciprocal personal gain to the donor.¹⁶⁴ For example, Single Sophia might get a tax deduction for her gift to the soup kitchen but not to needy family members or service providers. Furthermore, unlike the income-splitting tax break for married primary breadwinners, general tax deductions for charitable gifts only apply to the extent that documented qualifying tax deductions exceed the standard deduction level.¹⁶⁵ The income-splitting bonus for breadwinner-homemaker marriages, in contrast, allows full deduction of half of the breadwinner’s income, regardless of how much the breadwinner actually shares with the spouse, and requires no documentation of actual income sharing.

In short, the “shared consumption” rationale for marital income-splitting deviates from normal tax principles for counting consumption when it treats married primary breadwinners as consuming less than single breadwinners at similar income. By failing to count transfers of income from married primary breadwinners to homemaking spouses as gains shared by both the breadwinners and the homemakers, the “shared consumption” rationale ironically presumes that consumption is distinctly *not* shared in breadwinner-homemaker marriage. Further, this failure to count the consumption gains to the married primary breadwinner echoes the traditional master-servant relationship in which the status as husband was deemed to normally and naturally confer entitlement to others’ service such that this service was a matter of unequal duty rather than

¹⁶³ For example, she might buy medicine and groceries for her elderly aunt; she might provide a holiday bonus to her building staff and housecleaner (or perhaps even pay them at “family wage” levels sufficient to support their own non-earning spouses); she might buy school supplies for a niece and nephew; or she might support a local soup kitchen that provides free meals to people in poverty.

¹⁶⁴ See generally I.R.C. § 170 (governing tax deductions for charitable contributions); 170 (c)(2)(C) (excluding deductions for gains to private individuals).

¹⁶⁵ I.R.C. § 170(b)(1).

mutual contractual exchange.¹⁶⁶ Thus, by specially exempting the married primary breadwinner's household consumption from taxation, marital income-splitting implicitly continues and reinforces the assumption that those who conform to the affluent white husband paradigm deserve special status-based support for household service, whether menial or spiritual.

2. One Income, Two Producers?

An alternative approach to tax equity defends the income-splitting bonus by treating the primary homemaking spouse as a producer rather than a consumer draining family income. The joint contribution rationale for marital income-splitting explains that the income nominally and legally attributed to the breadwinning spouse should instead be partly allocated to the homemaker's labor.¹⁶⁷ In this view the tax code should treat the specialized-homemaker as directly earning, despite not legally owning, a portion of the breadwinner's wages, thereby discounting the breadwinner's nominal earnings.¹⁶⁸ The joint contribution theory, however, presumes that the primary homemaker contributes to the primary breadwinner's economic gains, especially over the long term, not as a wage-earning employee but more akin to a partner in a business or investment.¹⁶⁹

¹⁶⁶ See *supra* Part II.C.3; DUBBER, *supra* note 127, at 4–8 (discussing the continuing influence of the idea of a separate sphere of governance based on the ancient patriarchal household, in which a household master exercises authority over wives and household servants as economic resources); HARTOG, *supra* note 123, at 101 (explaining the importance of status as husband).

¹⁶⁷ See Motro, *supra* note 7, at 1518–22 (discussing and critiquing joint ownership rationale); *id.* at 1526–27 (discussing and critiquing the collective efforts rationale);

¹⁶⁸ See Bittker, *supra* note 11, at 1420 (explaining marital income-splitting as recognition of joint contribution by spouses to the income realized within the marriage).

¹⁶⁹ See INST. FOR AMERICAN VALUES, *supra* note 142, at 8 (stating that income-splitting tax benefits properly recognize marriage as “a joint venture of enormous social importance in which husband and wife make equal contributions”).

But if it makes sense to attribute part of Breadwinning Bob's \$100,000 income to Homemaker Hannah, on the theory that it is the product of her productive labor, then it would similarly make sense to attribute part of Single Sophia's identical earnings to the specialized service providers whose productive labor presumably contributes to her earning capacity. As Shari Motro has astutely observed, the dual-producer rationale for the income-splitting bonus presumes that married primary breadwinners uniquely deserve to have their personal expenses converted into deductible business expenses for tax purposes.¹⁷⁰ The tax system is structured to normally treat the costs of contributions to taxpayers' current or potential work income as personal consumption that *adds* to tax liability.¹⁷¹ Taxpayers cannot normally deduct from their taxable income expenses for food, clothing, housing, homemaking, gym memberships, recreation, routine health care, education or transportation even though each of these could arguably contribute substantially to present or future earning capacity.¹⁷² Although there are some exceptions to this principle—like the home mortgage interest deduction—the general theory holds that basic consumption expenses are recognized mainly through the standard deduction and personal exemption that protects initial earnings from taxation. Beyond this basic level, greater consumption on personal goods and services indicates a greater ability to pay, such that it determines rather than detracts from tax liability. The income tax system, in general, treats expenses that enhance business or investment gains differently from expenses that enhance individual gains from labor.¹⁷³

¹⁷⁰ Motro, *supra* note 7, at 1527.

¹⁷¹ I.R.C. § 262 (denying deductions for "personal, living or family expenses").

¹⁷² See Boris Bittker, *Income Tax Deductions, Credits and Subsidies for Personal Expenditures*, 16 J.L. & ECON. 193, 203–04 (1973) (explaining that it is impossible to neatly distinguish between personal and business expenses since some personal expenses will inevitably contribute to income production).

¹⁷³ See MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION: A LAW STUDENT'S GUIDE TO THE LEADING CASES AND CONCEPTS* 108 (11th ed. 2009) (concluding that "the tax law *never* has been interpreted to contemplate a deduction for the everyday expenses of being employed").

In effect, the joint contribution theory of marital income-splitting recognizes the costs of being employed only for those breadwinners who conform to the paradigm of the affluent, heterosexual white husband. Not only does the income-splitting policy effectively single out this group of breadwinners for a special tax deduction that is effectively for the costs of supporting market earning, but it also applies that special tax deduction in an unusually favorable manner. The income-splitting bonus gives the affluent married primary breadwinner what amounts to an expense deduction simply for *having* a spouse without other significant employment – in other words, it supports a *status* rather than productive *activity* or actual transaction. The typical tax deduction for business expenses generally would require a legally recognized exchange of payment for services or goods.¹⁷⁴ In contrast, under the current marital income-splitting system, Breadwinner Bob gets a deduction attributing part of his income to his spouse's labor regardless of the amount of income he *actually* transfers. Moreover, the joint contribution rationale for sheltering breadwinners' marital income seems dubious since that rationale is rejected to a great extent in legal treatment of homemakers' claims *against* breadwinners' income.¹⁷⁵

In addition, the special tax deduction for the married primary breadwinner's costs of breadwinning is especially generous because it rejects even the pretense of a distinction between leisure or luxury and more tangibly productive activities, in contrast to restrictions on business expense deductions that egregiously blur the line between entertainment and production.¹⁷⁶ Breadwinning Bob and Homemaking Hannah might hire paid workers for virtually all their domestic service, or do without, so that Hannah can spend her days writing poetry; pursuing her own education; volunteering at the local public

¹⁷⁴ See I.R.C. § 162(a)(1). (allowing deductions for business-related "salaries or other compensation for services actually rendered").

¹⁷⁵ See *supra* Part I.C.3 (discussing unenforceability of homemakers' contracts for spousal compensation); Part II.A.1 (discussing treatment of homemakers on divorce).

¹⁷⁶ See I.R.C. § 274 (disallowing certain entertainment, amusement, and recreation expenses not directly related to business purposes).

school; watching soap operas, getting manicures and shopping for expensive clothes, or running for political office. The income-splitting bonus rewards all of these activities equally as contributions to Breadwinner Bob's income.

While the marital income-splitting scheme therefore may seem designed to reward consumption rather than production, it also is logically consistent with an idea of "husband care" that blurs production and consumption for the privileged married primary breadwinner. The income-splitting bonus is effectively designed to recognize the distinctive productive value of the status-enhancing consumption typically provided by a non-earning (or low-earning) spouse to an affluent primary breadwinner. The income-splitting bonus arguably subsidizes the paradigmatic affluent white husband's enhanced social capital from attachment to a spouse able to pursue (if not attain) upper-class standards of health and beauty, luxury consumption, social connections or community power.¹⁷⁷

In sum, marital income-splitting does not equitably recognize the general fact that it typically takes more than one person to achieve and maintain a successful worker. Instead, the dual-producer rationale for income-splitting singles out the production of an often gendered, racialized, sexualized and class-based breadwinning status for special public support.

B. Equity Between Married Couples?

If the income-splitting bonus is unfair to single filing taxpayers, is this unfairness nonetheless a reasonable tradeoff necessary to achieve tax equity between married couples? One could argue that Single Sophia pays the price of a tax system that ensures Breadwinner Bob's household pays taxes equal to those of other married couples with the same total income. In the prevailing theory, the income-splitting bonus for one-breadwinner marriages represents a seemingly benign, if tragic, policy choice to resolve the problem that it is impossible to design a tax system that achieves both equity between married couples and marriage neutrality between married and single

¹⁷⁷ See Zelenak, *supra* note 4, at 356 (noting that husbands may gain from intangible services from a homemaking spouse, including enhanced status from a "trophy wife").

taxpayers.¹⁷⁸ The current system taxes married couples with similar combined incomes the same, regardless of income distribution within the marriage, by sacrificing neutrality between married and single breadwinners with the same income.

Critics have argued that the prevailing “married couples’ equality” theory gets the equities wrong by failing to compare the non-monetary gains of dual-breadwinner and one-breadwinner marriages.¹⁷⁹ Viewing this failure through the lens of “aid for husband care,” however, demonstrates that the “married couples’ equality” rationale favors rather than ignores non-monetary (or “imputed”) gains. Understanding the flawed reasoning of the married couples equality goal dissolves the classic family tax equity dilemma. Eliminating the income-splitting bonus would promote horizontal equity between both married couples and married and unmarried taxpayers.

Consider Breadwinner Bob’s classmate, Dominic, earning \$50,000 a year as a public interest lawyer, who is married to Daniela, a nurse also earning \$50,000 a year. Just like Bob and Hannah, Dual-Breadwinners Dominic and Daniela file jointly as a married couple with taxable income of \$100,000; just like Bob and Hannah, they owe \$13,213 in federal taxes on that income (assuming a simplified return under 2008 rates).¹⁸⁰ Their equivalent tax situation reflects the governing married couples equality principle.

Despite this supposed equality, shifting from a static comparison of couples to a dynamic view of the breadwinners reveals an inequity. Unlike Bob, neither Dominic nor Daniela gets a tax break when changing tax-filing status from single to married filing jointly. As a single taxpayer earning \$50,000, Dominic owed \$6606 in income taxes (just like Daniela,

¹⁷⁸ Bittker, *supra* note 11, at 1395; Zelenak, *supra* note 4, at 399–40; McIntyre & Oldman, *supra* note 145, at 1590–92.

¹⁷⁹ See Motro, *supra* note 7, at 1528–29 (arguing that “couples neutrality” does not support equal taxation of equal-income married couples “who spend different amounts of time performing wage labor”).

¹⁸⁰ Assuming a standard deduction of \$10,900 and personal exemptions totaling \$7000. See I.R.S. Publ’n 501 (Dec. 16, 2008) (their taxable income would be \$82,100). For a tax of \$13,213, see IRS, 2008 Tax Tables.

assuming a simplified return under 2008 rates). Together, they owe virtually the same in combined taxes, despite being married (under 2008 rates, assuming simplified return) because the marital rate is set at double the tax rate for a single filing individual earning one-half the marital income.

Comparing notes with Bob, Dominic might wonder why Bob's higher-earning career gives him a special tax bonus for marrying. Bob (whose tax law course is fresh in his mind) might explain that his marriage "bonus" is fair because it means that both couples pay the same taxes after marriage on their equal marital income of \$100,000, on the theory that it would be unfair for one-breadwinner marriages to be taxed more heavily simply because their income is earned by one person, not two.

1. Income Distribution Matters

However, Dominic might counter, it *should* matter for tax purposes that it takes two earners in the formal market, rather than one, to earn the same income. After all, Dominic is aware that progressive tax rates normally mean \$100,000 in income is treated differently if it is earned by one person rather than by two or more. Ten of Dominic's low-income clients who each earn \$10,000 would pay much less in combined taxes than Bob and Hannah despite the same combined income of \$100,000. Progressive tax rates recognize that if it takes ten, or two, rather than one person to earn \$100,000, that dispersed \$100,000 earnings is likely to be more costly in terms of monetary and non-monetary resources (time for leisure and informal labor) than the same earnings concentrated in one individual, therefore indicating a lower actual standard of living and lesser ability to pay taxes. Comparing regular monetary expenses related to work, for example, as two formal market workers Dominic and Daniela are likely to spend more than Breadwinner Bob and Homemaking Hannah on transportation to work (perhaps double the public transit fares, or double the parking, gas and car maintenance costs), and to have more aggregate costs for work-related food and clothing, leaving the dual-breadwinning couple

with a lower standard of living considering income left over for discretionary spending or savings.¹⁸¹

Similarly, beyond modest income levels, higher individual income typically reflects higher pay rates per hour rather than simply a greater number of work hours. Breadwinner Bob's \$100,000 income probably does not mean his formal market work consumes twice the hours as Dominic's at \$50,000, but instead that Dominic is compensated less per hour. At middle or upper income levels, dual-earner marriages typically involve at least one full-time breadwinner, rather than two workers who both have half-time commitments to formal jobs along with substantial time free from income earning.¹⁸² In the United States labor market, part-time jobs are heavily skewed toward low-security, low-benefit, and low-income work.¹⁸² For that reason, dual-breadwinning marriages above low-income levels generally have less total time free from market work for unpaid homemaking or leisure than one-breadwinner marriages with comparable combined income.

While Breadwinner Bob and Homemaker Hannah together can likely take care of much of their daily domestic labor and formal market work during the workday, leaving time for evening leisure or for long-term development of human capital, Dual-Breadwinners Dominic and Daniela will likely spend their evenings and weekends doing daily caretaking chores like

¹⁸¹ See Lawrence Zelenak, *The Income Tax and the Costs of Earning a Living*, 56 TAX L. REV. 39 (2002) (noting that studies on work expenses have not compared one-earner and two-earner couples); Sandra L. Hanson & Theodora Ooms, *The Economic Costs and Rewards of Two-Earner, Two-Parent Families*, 53 J. MARRIAGE & FAM. 622, 631 (1991) (finding work-related expenses may offset an average of sixty-eight percent of a higher-income wife's earnings, fifty-six percent of a middle-income wife's earnings, and forty-six percent for low-income wives); see also LINDA KELLEY, *TWO INCOMES AND STILL BROKE?* (1996) (giving popular advice for figuring the costs of substituting formal work for homemaking).

¹⁸² JACOBS & GERSON, *supra* note 72, at 132 (explaining that the U.S. dual-earning couples work an average of 81.2 hours a week, much more than in many other countries with better support for part-time work).

¹⁸² See MCCAFFERY, *supra* note 4, at 131 (explaining how fringe benefit rules "slant" the employment market to make part-time jobs particularly disadvantageous).

shopping, cooking, cleaning, laundry and home repairs. If Dominic shirks household chores and relies on Daniela to sacrifice her leisure or physical and mental well-being to give him both leisure and domestic services, he may risk losing both money income and non-commodified benefits if Daniela's double shift strains their marriage, her physical and mental health, or her income-earning potential. Even if Daniela is willing and able to sacrifice her own leisure or caretaking needs to maximize Dominic's gain, it will be difficult for a less-than-superhuman breadwinning spouse to provide comparable domestic services as Homemaking Hannah on top of the demands of market work.

Alternatively, Dominic and Daniela may "buy" more leisure by eating out and hiring a housekeeper or other domestic service providers, leaving less money for savings or other consumption spending compared to Breadwinner Bob and Homemaking Hannah. Or, the dual-breadwinning couple may skimp on domestic chores or sleep, sacrificing some quality of life or physical and mental well-being.¹⁸³ If they were to take on daily caretaking for a child or other dependent family members, they can expect to assume a big drop in income or a big increase in spending.

2. Not a Problem of "Imputed Income"

As this hypothetical suggests, a full-time breadwinner with a homemaking spouse who is freed from substantial market work likely has a higher standard of living at the same total household income than a full-time breadwinner who is married to another breadwinner also devoting substantial time to formal market work. But in the conventional theory, this disparity between marriages with equal income stems from the general

¹⁸³ See SUZANNE M. BIANCHI, JOHN P. ROBINSON, & MELISSA A. MILKIE, *CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 89–91 (2006) (finding that employed married mothers get an average of four hours less sleep per week and spend less time on some leisure activities than non-employed married mothers, and also finding that dual earning couples spend less time on housework).

problem of the income tax system's focus on money income.¹⁸⁴ In his foundational analysis of family taxation, Boris Bittker argues that it would be inequitable to increase taxes on one-breadwinner marriages to account for the value of unpaid household services when other households may similarly gain from comparably valuable but untaxed non-monetized services.¹⁸⁵

McIntyre and Oldman develop this defense of the married couples equality principle by arguing that the perceived advantages of one-breadwinner marriages rest on tenuous stereotypes and other subjective judgments that conflate increased leisure with increased non-commodified or "imputed" income in the one-breadwinner marriage.¹⁸⁶ As they explain, the one clear advantage that one-breadwinner marriages have over two-breadwinner marriages (and over single earners) with similar incomes is increased time free from market production.¹⁸⁷ But they argue that whether a married couple replaces purchased domestic services with their own labor rather than leisure depends far more on economic class and personal predilection than on whether the couple has two market incomes or one.¹⁸⁸ For example, Homemaker Hannah may watch soap operas or drink lattes at Starbucks all day while Dual-Breadwinner Daniela and Dominic, or Single Sophia, might spend late nights and weekends growing, canning and cooking their own food, doing their own home repairs, laundry and housecleaning.

McIntyre and Oldman conclude that taxing one-breadwinner marriages more than dual-breadwinner marriages with similar monetary income would amount to a tax on leisure

¹⁸⁴ See, e.g., Bittker, *supra* note 11, at 1425–26 (noting that Congress is not likely to change the law to value such services for inclusion in taxable income); see also Zelenak, *supra* note 4, at 375 (noting that the non-taxation of "imputed income" is a general rule not limited to wives).

¹⁸⁵ Bittker, *supra* note 11, at 1426.

¹⁸⁶ McIntyre & Oldman, *supra* note 145, at 1614–17.

¹⁸⁷ *Id.* at 1617.

¹⁸⁸ *Id.* at 1614–16.

time inconsistent with general tax equity principles.¹⁸⁹ After all, if time free from labor market demands is treated as taxable gain, then many of the lowest-income persons, such as the unemployed, students, children, retired persons and people too ill to work—as well as full-time homemakers—deserve higher taxes. A number of tax scholars have taken that approach, suggesting that imputed income can and should be measured and should require taxing non-earning or low-earning homemakers and others more heavily than others.¹⁹⁰

But evaluating the fairness of equal taxation of one-breadwinner and two-breadwinner affluent marriages does not require resolving the inevitably subjective question of whether low market income reflects high non-monetized gain rather than simply low economic resources or leisure. Applied consistently, progressive taxation of monetary income arguably can serve as a good proxy for ability to pay considering both monetary income and non-commodified resources like informal domestic labor. In principle, a policy of progressively taxing only monetary (or otherwise commodified) gain can reflect a reasonable assumption that informal, unpaid gains often have particular disadvantages in the current complex, capitalist, monetized economy. Non-commodified gains are likely to be more difficult than monetary income to save, control, trade, invest, transfer, hoard or protect from risk or from sharing with others.¹⁹² Some, but certainly not all, low-monetary-income artists, students, subsistence farmers, homemakers or community activists may be happier and arguably more productive for society than many high-income earners. Nonetheless, a higher tax burden for higher-income earners, regardless of this income's "real" value to self or society, can appropriately reflect the progressive principle that increased monetary income brings a generally increased ability and obligation to transfer some of that monetary income to others in the form of taxes.

¹⁸⁹ *Id.* at 1617.

¹⁹⁰ See Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1623–24 (1996) (arguing for taxation of women's informal household labor by increasing taxes on households with wives or mothers, based on number of family members and women's market work hours).

¹⁹² See *supra* notes 154–59 and accompanying text.

Furthermore, progressive taxation limited to commodified income can reflect that, beyond modest income levels, higher income typically means higher pay rates (and often more flexible work hours). It can also reflect that at higher pay rates each formal dollar earned requires less sacrifice of time for informal domestic labor or leisure. The minimum wage worker earning \$10,000 a year typically will not have ten times more time free from market work than one taxpayer earning \$100,000 a year. Progressively taxing one earner's concentrated \$100,000 money income more than the ten \$10,000 earners combined recognizes that the same nominal dollar amount of income can have different "real," including nonmonetary, costs and benefits depending on the distribution of income among individuals.

3. Ignoring Exchange of Income for Services

This view of progressive tax rates shows that, contrary to conventional theory, the principle of married couples equality fails to count the *monetary* advantage that comes from being an affluent, primary breadwinner married to a primary homemaker as taxable gain. The prevailing married couples equality theory elides the fact that the one-breadwinner household's economic advantages over dual-breadwinning marriages with the same "pooled" monetary income come not from *non-monetary* gain in itself but from specialization and exchange.¹⁹¹

The standard analysis describes the non-monetary advantages of one-breadwinner affluent marriages as "imputed income," typically defined as "self-performed" goods and services.¹⁹² That standard characterization obscures the breadwinner's gains from the primary homemaker's specialized labor. The non-breadwinning homemaker spouse typically

¹⁹¹ Note, *The Case for Mandatory Separate Filing by Married Persons*, 91 YALE L.J. 363, 377-78 (1981) (explaining that understanding of the breadwinner-homemaker marriage as an exchange of income for domestic services leaves little justification for joint filing on grounds of horizontal equity between married couples).

¹⁹² See McIntyre & Oldman, *supra* note 145, at 1614 (discussing the problem of unpaid household labor as imputed income from "self-performed services"); Zelenak, *supra* note 4, at 362 (discussing the advantage of a one-breadwinner marriage as increased "imputed income" from "self-performed" household services).

provides informal services not just for herself or himself, but also for a spouse who does less informal household labor.¹⁹³ The crucial economic advantage of the one-breadwinner affluent marriage is that the gains from the homemaker's labor typically are *not* simply "self-provided" but rather are produced by a presumed *exchange* between two individuals, one specializing in money gains and one in non-monetary gains.

It is arguably consistent with progressive tax principles to exempt an individual's informal services to herself or himself from taxable income, such as the value of Single Sophia's non-commodified labor of preparing her own meals. To the extent informal work by Single Sophia, or by Dual-Breadwinners Dominic and Daniela, contributes to "human capital"—the ability to produce monetary gain by working—that gain will not be taxed until it is realized in the form of market earnings. Non-commodified gains that are *in fact* self-produced impose particular costs on that person such as the difficulty of transferring and liquidating those gains and the fact that limited individual time and mortality requires tradeoffs between time spent on leisure, informal labor and market labor.

In contrast, it is fair and logical in a progressive income tax system focused on realized gains¹⁹⁶ to treat gains from *exchanges* of services for money as taxable events. If Dual-Breadwinner Dominic or Single Sophia pays a restaurant for a meal, he or she will be taxed on the earnings used to buy the services and the restaurant workers will also be taxed on the income they receive from this payment. With an exchange, the question of the nature and amount of the gain becomes moot since the exchange itself establishes both the value and the fact that it counts as a service. For tax purposes, it does not matter whether the chef who provides the food is motivated by love or

¹⁹³ See, e.g., David Hasen, *Liberalism and Ability Taxation*, 85 TEX. L. REV. 1057, 1072 (2007) (stating that the income-splitting system taxing the married couple as a unit makes the normative assumption that the "*nonworking spouse* does not derive an income-like benefit from the fact that he does not work" (emphasis added)).

¹⁹⁶ For a discussion of how imputed income from consumption of personal services fits the general principle of taxing only realized income, see Mary Louise Fellows, *A Comprehensive Attack on Tax Deferral*, 88 MICH. L. REV. 722, 781–86 (1990).

money, thinks of the food preparation work as leisure or labor, or even whether Dominic or Sophia throws out the food after paying for it because they only want to enjoy the ambiance of the restaurant, to cultivate friendships with the chef or other patrons or to support the chef. Regardless of purpose or wisdom of the trade, the money Dominic or Sophia spend in exchange for services counts as after-tax consumption. In contrast, if Breadwinner Bob relies on Homemaking Hannah to cook his meals while he brings home the money she uses to consume other goods—or even if he does the cooking or goes out to eat but shares his money with her simply for her companionship—the income-splitting provision exempts his transfer of money to Hannah from his income *as if* it were a deductible expense.¹⁹⁴

Perhaps the married couples equality rationale assumes formal marriage creates a unitary entity, erasing what would otherwise seem to be an exchange between two persons such that Hannah's services should be treated as self-produced, untaxable "imputed income" just like Sophia's preparation of her own meal. But the income-splitting provision has it both ways: it erases the spousal exchange of money for services just as it counts it. Marital income splitting treats the primary breadwinner's monetary gain as if it were shared between two persons—shifting half of Breadwinner Bob's income to Homemaker Hannah. But then marital income-splitting rates effectively collapse the marriage into a single person, erasing the transfer from Bob to Hannah, by taxing that money on a pre-tax basis as if Bob, and his gains from the breadwinning-homemaking exchange, did not exist.

In sum, the income-splitting bonus for one-breadwinner affluent marriages *violates* rather than conforms to the generally equitable tax principle of using monetary income as the measure of ability to pay progressive monetary taxes. The marital income-splitting scheme monetizes the homemaker's unpaid labor by attributing some of the breadwinner's monetary income directly to the spouse specializing in non-monetary gain. At the same time, the income-splitting scheme gives special treatment to the monetary gains in one-breadwinner marriages by *exempting* the breadwinning spouse from the progressive tax

¹⁹⁴ See Motro, *supra* note 7, at 1527 and accompanying text.

rates that would normally accompany individual specialization in monetary earnings.

By comparing married couples as aggregate units, the married couples equality rationale for marital income-splitting covers up this policy's deviation from the principle that distribution matters for tax equity purposes. Tax scholarship has often attributed the supposed dilemma between couples equality and marriage neutrality as a failing of a progressive tax system, because without progressive rates couples equality would not lead to marriage bonuses or penalties.¹⁹⁵ But that view gets it backwards: The married couple's equality rationale poses a problem in a progressive system precisely because it *rejects* standard progressive tax principles without acknowledging that it does so. The married couple's equality rationale implicitly assumes that affluent husbands deserve special, regressive tax support for their gains from domestic services by non-breadwinning wives.

C. Equity For Breadwinner-Dependent Households?

1. Earning and Caring for Dependent

Imagine that Breadwinner Bob has another law school classmate, Heather, who is single and also works at his law firm, earning an identical salary of \$100,000. Assume that the same year Bob gets married, Heather becomes a single parent. Heather, like Bob, now provides monetary income supporting two people in her household. Like Bob, Heather's tax status changes with her new family status. Heather now files as a "head of household," paying a tax of \$15,719 on her income of

¹⁹⁵ See Zelenak, *supra* note 4, at 339 (describing the inequities of marriage taxation as a problem of progressivity and joint returns).

\$100,000,¹⁹⁶ compared to her previous tax of \$19,479 on the same income as a single person with no dependents.¹⁹⁷

But heads of households are taxed at a higher rate than jointly filing married couples with the same income. The head of household tax rate is about sixty percent of the marital income-splitting rates. In addition, a dependent gets a lower standard deduction than a spouse or single filing person. A head of household with one dependent gets standard deductions totaling \$8000 for two people while a marital household gets double the single deduction of \$5,450, for a total of \$10,900. Although Head of Household Heather and Breadwinner Bob each support a non-earner on equal \$100,000 incomes, Heather pays \$2407 more in annual taxes (\$15,719 compared to \$13,312, assuming a simplified return under 2008 rates).¹⁹⁸

Although these disadvantages are somewhat offset by the availability of other deductions or credits for dependents, family tax breaks targeted to care for dependents tend to be substantially less generous than the income-splitting benefit to family care for affluent breadwinners. In the example above, Head of Household Heather would get a maximum credit for child care expenses of \$600 (assuming more than \$3000 of paid expenses), a benefit not available to married couples unless both have earned income.¹⁹⁹ Yet this is far less than the greater standard deduction and income-splitting available to some married couples. Most heads of households, like married parents, will be able to also get a child tax credit of \$1000 per child, but these credits are phased out at a lower income level—\$75,000 for single parents and \$110,000 for married

¹⁹⁶ A Head of Household with standard deduction of \$8000, total exemptions of \$7000, under 2008 rates would have a taxable income of \$85,000; for a tax of \$16,319, minus a child care expenses tax credit of \$600. *See* I.R.S. Publ'n 501 (Dec. 16, 2008) and the 2008 Tax Table. Taxable income of \$85,000; tax of \$16,319, minus credit of \$600 for a total tax of \$15,719.

¹⁹⁷ A single individual with a \$100,000 income, a standard deduction of \$5,450 and a personal exemption of \$3500 would have taxable income of \$91,050; for a 2008 tax rate of \$19,479.

¹⁹⁸ *See supra* notes 199, 200.

¹⁹⁹ I.R.C. § 21(d) (2010).

breadwinners with one or more children.²⁰⁰ As a result, this benefit would be available to Bob and Hannah if they had a dependent, but not to Heather and her child with the same \$100,000 income. Furthermore, the income-splitting benefit has a major structural advantage over typical exemptions, deductions and credits because the tax reduction from income-splitting automatically rises with inflation without the need for Congressional action. For this reason, the tax support directed specifically for dependents has eroded in value over the last several decades,²⁰¹ unlike the marital income-splitting rate providing “aid for affluent husband care.”

Besides owing higher annual taxes than Breadwinning Bob on the same income, Heather’s time for caring for herself is likely to change significantly when she becomes a caretaker for a dependent. One can imagine that Heather comes home from her demanding work day not to a well-organized house with dinner on the stove and the laundry folded, but to a person in need of comprehensive care. To maintain both her job and her child, Heather will need to enlist one or more caretakers, with high quality paid care likely to cost at least \$10,000 a year for day care centers and \$15,000 or more for an in-home nanny.²⁰² As a result, while Breadwinner Bob supports two people on his \$100,000 earnings, Head of Household Heather is likely to effectively support three people (or perhaps four, counting the cleaners, restaurant workers, and maintenance people that Heather probably needs to rely upon even more than Single Sophia). Moreover, even with full-time child-care help, parenting is likely to cut into Heather’s work time, due to child’s

²⁰⁰ I.R.C. § 21(b)(2) (2010).

²⁰¹ C. EUGENE. STEUERLE, URBAN INST., TAXING QUESTIONS FOR ALL THE FAMILY (2001), *available at* <http://www.urban.org/url.cfm?ID=1000003> (explaining that the declining value of dependent exemptions through the 1980s has not been fully offset by new tax allowances for families with children).

²⁰² A January 2009 survey of child care costs found that the costs of full time center-based care in 2008 averaged over \$10,000 in many states (not considering quality), and that the highest state average (that of Massachusetts) was \$15,895. NACCRRA, PARENTS AND THE HIGH COST OF CHILD CARE: 2009 UPDATE app. 1 22–23 (2009) (surveying child care referral centers nationwide). A nanny paid the required federal minimum wage of \$7.25 an hour for a forty-five hour work week for fifty weeks would cost \$16,312.50.

medical and educational appointments, illnesses, vacations and scheduling conflicts, among other things.²⁰³

2. Privileging Husband Care over Dependent Care

Comparing her tax payment with Breadwinner Bob's, Head of Household Heather might wonder why tax policy gives more public support to sole family breadwinners receiving caretaking from non-earning homemakers than to sole family breadwinners without non-earning spouses who also take care of dependents. Breadwinner Bob might respond by explaining that if he and Hannah have a dependent child, he will not be able to split his income with his child *and* his wife. Tax policy generally rejects income-splitting with dependents in keeping with the normal progressivity principle barring taxpayers from shifting income to someone in a lower tax bracket, except as an after-tax transaction like a gift or payment for services.²⁰⁴ For example, the "kiddie tax" restricts the amount of income affluent parents can shelter from high tax rates through property transfers to minor children.²⁰⁵

In contrast to extensive discussions of "married couples' equality," tax scholarship and policy has been conspicuously silent on the reasoning for different tax rates for married taxpayers and heads of households. MacIntyre and Oldman's classic family tax article describes the head of household tax rates as tax support for a "phantom spouse," who receives a lesser part of the breadwinner's income than a "real"

²⁰³ See JOAN C. WILLIAMS & HEATHER BOUSHEY, CTR. FOR AMERICAN PROGRESS, THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 54-55 (2010) (explaining the difficulties, discrimination and costs parents face in seeking to accommodate parenting responsibilities in a professional career).

²⁰⁴ See Stephanie Hoffer, *Adopting the Family Taxable Unit*, 76 U. CIN. L. REV. 55 (2007) (criticizing current policy and advocating full income splitting as a pro-natalist policy encouraging families of affluent breadwinners to bear more children).

²⁰⁵ Tax Reform Act of 1986, Pub. L. 99-514, § 1411, 100 Stat. 2085 (1986) (codified as I.R.C. § 1(g) (2010)).

homemaking wife.²⁰⁶ Lawrence Zelenak concludes that the differential has no rational basis in terms of tax equity, but is simply the historical result of a political compromise.²⁰⁷ When Congress instituted the income splitting marital rates in 1948, some argued that *not* having a homemaking wife made a breadwinner most deserving of tax support through reduced rates, especially if the breadwinner had dependents needing caretaking as well as income support, such as children, elderly parents or other relative disabled from work.²⁰⁸ As one comment noted in hearings on the 1948 reform, marital income-splitting would leave out:

[T]he many thousands of cases where the father of minor children would after his wife's death, be deprived of her aid and companionship at the very time that his Federal taxes would be increased up to 40 percent because he no longer is in the favored group.²⁰⁹

This comment suggests how the head of household tax rate was shaped by concern with caretaking for affluent *husbands*.

In the early 1950s, Congress responded to concerns about the disparity between breadwinners with homemaking spouses and unmarried breadwinners with dependents by adding reduced rates for a narrow group of surviving spouses as well as for heads of households.²¹⁰ With these changes, widows or widowers with dependents effectively continue to receive the

²⁰⁶ McIntyre & Oldman, *supra* note 145, at 1602.

²⁰⁷ Lawrence Zelenak, *Children and the Income Tax*, 49 TAX L. REV. 349, 404 (1994); see also Bittker, *supra* note 11, at 1417–18 (discussing Congress's interest in partially extending income-splitting benefits to single breadwinners supporting dependents).

²⁰⁸ ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 196–99 (2001).

²⁰⁹ *Id.* at 196–97 (citations omitted).

²¹⁰ Bittker, *supra* note 11, at 1418.

full income-splitting benefit that would be available to a breadwinner-homemaker marriage for two years after the death of one spouse, unless the spouse remarries.²¹¹ This provision effectively works to continue the “aid for affluent husband care” during a period of transition after death to allow some time to secure a new homemaker spouse, although it also (temporarily) benefits surviving spouses of dual-breadwinner marriages with dependents. In addition, it can be understood to allow an affluent married breadwinner with a homemaker spouse to continue to provide tax-favored income after death to support the homemaker in a period of transition from homemaker to breadwinner or to marriage to a new breadwinner. This exception implicitly rejects the theory of income splitting as compensation for the costs of a non-earning spouse’s consumption or income-pooling, because then the death of such a spouse would provide a net financial gain to a primary.

What policy goals, then, are served by providing only partial income-splitting benefits for heads of households, who incur the costs of dependent care without the informal gains from a homemaker spouse? By making the tax shelter for unmarried dependent caretaking generally less valuable than the tax shelter for homemaking, the head of household tax rates logically operate as a kind of “husband care insurance” for married primary breadwinners with dependents. Some members of Congress were concerned that full income-splitting would create incentives for divorce by married parents with two children who could divide into two breadwinner-dependent households.²¹²

In reality, the economic burdens of combining both breadwinning and dependent caretaking in the current American context are so substantial that the denial of full income splitting is not an issue relevant to most single parents or other sole breadwinners caring for dependents. Only twenty percent of all single parents with dependent children generate enough income to pay any federal income tax, and many of those households

²¹¹ See I.R.C. § 1(a)(2) (2010) (stating requirements for inclusion of surviving spouses in marital rates).

²¹² KESSLER-HARRIS, *supra* note 211, at 199 (discussing the Senate’s rejection of a proposal for full income-splitting for heads of household in 1951).

will pay so little tax that income-splitting would not provide a substantial benefit.²¹³ Even for married breadwinners with dependents, where two parents are available to divide market earning and family caretaking, an income-splitting tax break for dependents would not work well to support dependent care, since nearly half of all children live in households with income too low to pay income tax.²¹⁴

²¹³ WILLIAM G. GALE, TAX POLICY CTR., TAX BRACKET AND TAX LIABILITIES FOR FAMILIES WITH CHILDREN (2004), *available at* http://www.taxpolicycenter.org/UploadedPDF/1000707_Tax_Fact_11-22-04.pdf.

²¹⁴ *Id.*

In short, by favoring affluent breadwinners with non-earning spouses over those with non-earning dependents, tax policy directs support for unpaid domestic care to married primary breadwinners—usually husbands—more than to dependents. Because most high-earners married to non-earners are white men, and because most unmarried, dependent-caretaking heads of households are women (though at these high income levels perhaps less so), more favorable spousal income-splitting rates compared to head of household income-splitting rates work to particularly aid wives' unpaid care for affluent white husbands over unpaid care for children by mothers.

VIII. Current Policy Updates Historical Inequities

The current marital income-splitting rates are a product of historical contingencies as well as theories of equitable taxation.²¹⁵ This system should be understood not as an unfortunate leftover from an uncontested or accidental past, but instead as a strategic political revival of problematic values and inequitable policies privileging “affluent husband care.”

A. Joint Taxation as Support For Unpaid Affluent Husband Care

The 1948 change to joint marital taxation at income-splitting marital rates did not simply have the effect of protecting the breadwinner-homemaker marital family that was both a widely accepted ideal and a demographic trend in the postwar period.²¹⁶ Nor did this 1948 change simply restore geographical uniformity after federal tax law was interpreted to allow marital income-splitting only for residents in states with community

²¹⁵ Zelenak, *supra* note 4, at 347.

²¹⁶ See Dennis J. Ventry, Jr., *Saving Scaborn: Ownership as the Basis of Family Taxation*, in UC DAVIS LEGAL STUDIES RESEARCH PAPER SERIES 87-93 & nn.556-557 (Research Paper Ser. No. 166, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1374493 (discussing the vision of the marital family that shaped the shift to marital income splitting). Ventry notes that although married couples comprised 80% of all households at this time, the income splitting benefits “accrued disproportionately to a small cohort of wealthy taxpayers.” *Id.* at 93 & nn.556-557.

property laws.²¹⁷ The particular method Congress chose to achieve the policy goals of supporting national protection for breadwinner-homemaker marriage privileged a particular, contested vision of the breadwinner-homemaker marriage centered on affluent husbands' entitlement to caretaking by unpaid wives.²¹⁸

The 1948 federal income-splitting reform extended the tax benefits of community property to affluent husbands in other states²¹⁹ but did so in a way that protected the existing common law rights of breadwinning husbands to control marital income. Carolyn Jones explains that popular media stories of this time often defended this common law regime with horror stories of hard-working husbands losing "their" money to selfish and immoral wives under community property laws.²²⁰ In reality, homemaking wives' rights to earnings from breadwinning husbands tended to be more a matter of form rather than

²¹⁷ See *Poe v. Seaborn*, 282 U.S. 101 (1930) (holding that federal tax law should treat marital income as equally divided among spouses for married couples in community property states).

²¹⁸ Even though other policies arguably would have better promoted feminist goals, organized women's groups did not necessarily challenge the move to income-splitting, which was consistent with the immediate interests of some homemaking wives' in reducing taxes on their affluent husbands' earnings. See Stephanie McMahon, *To Save State Residents: States Use of Community Property for Federal Tax Reduction*, 27 L. & HIST. REV. 585, 596–97, 612–13 (2009).

²¹⁹ See Zelenak, *supra* note 4, at 345–46 (citing legislative history explaining the goal of "geographic equalization" and identifying husbands' interests as the central issue).

²²⁰ Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 270–71 (1988).

substance under community property laws.²²¹ Congress could have achieved the goals of tax uniformity and tax savings for breadwinner-homemaker families by linking marital tax benefits to substantive income sharing, as in one proposal that Jones explains.²²² Proponents of that alternative explain that a substantive income-splitting requirement “rewards a wife for substantial services contributed toward the accumulations of the marriage” while a general income-splitting tax rule would do “nothing in the way of improving the wife’s position in society.”²²³

Legislative history provides some evidence that Congress joined popular defenders of husbands’ common law status in understanding income-splitting as a policy aimed at maintaining the homemaking wife’s position as financial dependent serving the husband rather than as an equal financial partner in the marriage.²²⁴ One reason the Senate Finance Committee report gave for supporting the 1948 income-splitting scheme was that it would reduce incentives for more substantive marital income-shifting through trusts, joint tenancies and family partnerships.²²⁵ Jones argues that Congressional rejection of a substantive income-shifting requirement was motivated not only

²²¹ McMahon, *supra* note 221, at 592, 604–05, 620 (discussing the change to community property in Western states and in Pennsylvania as motivated by tax and other purposes rather than by women’s rights). Although *opposition* to women’s marital economic equality motivated some of the resistance to community property that does not mean *proponents* of community property conversely aimed to empower women. *Id.* at 616. Nonetheless, this lack of support for homemaking women’s marital rights among politically powerful voices on both sides of the debate underscores, rather than negates, the political importance of gender ideology and interest in shaping the resulting tax policy.

²²² Jones, *supra* note 223, at 295.

²²³ *Id.*

²²⁴ Some suggest that family harmony would be weakened if homemaking wives gained rights to share income from a breadwinning husband. *Id.* at 271 (quoting a Nebraska newspaper editorial arguing that community property laws undermined the economic pressure that can keep families together in times of stress).

²²⁵ *Id.* at 294 n.252 (citing S. Rep. No. 1013, 80th Cong., 2d Sess. 26 (1948)).

by concerns of administrative difficulties, but also by a particular ideology of gender and marriage.²²⁶ For example, she notes that tax expert and legislative counsel Stanley Surrey explains this reform would be beneficial because wives would not need to “continue to master the details of the retail drug business, electrical equipment business, or construction business, but may turn from their partnership ‘duties’ to the pursuit of homemaking.”²²⁷

Moreover, the 1948 income-splitting reform did not simply target the demographically prevailing breadwinner-homemaker family for tax support, but instead skewed tax benefits toward an affluent minority of breadwinners at the expense of the majority of breadwinner-homemaker families of the time. Post-war federal tax reforms could have given tax relief to most breadwinner-homemaker married couples by restoring the highly progressive pre-war income tax through expanded personal exemptions or an expanded bottom tax-free bracket.²²⁸ Edward McCaffery explains that the 1948 introduction of joint marital rates directed about 15 percent of the total post-war peace dividend to no more than 10 percent of all married taxpayers.²²⁹ In 1951, for example, only those with marital income over \$10,000 (the equivalent of over \$84,000 a year in 2008

²²⁶ *Id.* at 294.

²²⁷ *Id.* at 296 (quoting Stanley Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1111 (1948)). Historian Alice Kessler-Harris argues that Congress dismissed concerns about the impact on women, quoting a member of Congress explaining that “[t]he wife’s position in that joint income tax return . . . is in there for the purpose of reducing taxes of the husband.” ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH CENTURY AMERICA*, 196 (2001) (quoting California Representative Bertrand W. Gearhart, *Revenue Revisions*, 1947, part 2, 888).

²²⁸ KESSLER-HARRIS, *supra* note 211, at 194.

²²⁹ MCCAFFERY, *supra* note 4, at 54.

dollars²³⁰) could benefit from the income-splitting tax shelter.²³¹ McCaffery notes that Senator Hubert Humphrey unsuccessfully attempted to replace the 1948 reform several years later with an alternative benefit aimed at helping the more typical “married man.”²³²

B. The Marriage Penalty as Protection for Affluent Husband Care

In 1969, Congress replaced the full marital income-splitting system with rates conferring a reduced income-splitting benefit on married primary breadwinners in order to reduce the higher tax rates on single breadwinners with similar income.²³³ Ironically, the recent marriage tax reforms have largely reversed this change, reviving the 1948 system’s marital income-splitting rates as the way to update the tax system for the twenty-first century family.²³⁴

The 1969 marital tax system’s dual-breadwinning “marriage penalty” was an easy target for criticism, especially given the increasing dependence of middle class families on wives’ earnings in the subsequent decades.²³⁵ Because the reduced income-splitting benefit of that system taxed relatively equal-earning spouses *as if* their income were somewhat unequal, many dual-breadwinning married couples lost the benefits of progressivity that they would have received as two single taxpayers with relatively equal incomes. Under the 1969

²³⁰ See BUREAU OF LABOR STATISTICS, CPI INFLATION CALCULATOR, http://www.bls.gov/data/inflation_calculator.htm, (last visited July 5, 2010).

²³¹ See MCCAFFERY *supra* note 4, at 59 (citing Senator Eugene Millikin in a discussion of 1951 reforms proposed by Senator Hubert Humphrey).

²³² *Id.* at 59 (citing RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 611–13 (1954)).

²³³ See Zelenak, *supra* note 10, at 6 (explaining the history of the “marriage penalty”).

²³⁴ See *infra* Part III.C.

²³⁵ See *supra* notes 57–60; Part I.B.5.

reform, a husband and wife who each earned \$50,000 could be taxed *as if* one earned roughly \$70,000 and the other \$30,000.²³⁶

Contrary to conventional wisdom, the 1969 goal of reducing the “singles penalty” did not in itself produce this regressive effect on equal-earning marriages. As part of the 1969 reform plan, Congress created a new rate which taxed separately filing married persons at a higher rate than single filing persons.²³⁷ Without closing off the option of separate marital filing at single rates, which existed prior to 1969, equal-earning married couples would seek to take advantage of the lower singles rates.²³⁸ However, as Boris Bittker explains, Congress rejected such an option out of concern that it would restore the pre-1948 marital disparity that favored affluent breadwinners who transfer (or at least appear to transfer) substantive rights to monetary income to their homemaking wives.²³⁹

The 1969 changes took a specific additional step beyond adjusting the gap between single and married primary breadwinners to also *preserve* a gap between one-breadwinner affluent marriages and dual-breadwinner marriages. The new system ensured that all married couples with the same joint income paid the same joint taxes. But “married couples equality” was achieved by taking *away* the benefits of progressive rates for married equal-earning breadwinners compared to what they otherwise would have received filing singly or separately, *preserving* special protection from progressive tax rates for married high-earners in unequal-earning marriages compared to

²³⁶ *Id.*

²³⁷ Bittker, *supra* note 11, at 1429.

²³⁸ *Id.*

²³⁹ *Id.*

what those breadwinners would have received if single or separately filing.²⁴⁰

C. Enhanced Aid for Unpaid Husband Care in the 2001-04 Reforms

By the end of the twentieth century, political concern about the penalty on dual-breadwinning marriages led to the enactment of comprehensive marriage tax reforms in 2001 through 2004.²⁴¹ Problematically, these reforms solved the dual-breadwinning “marriage penalty” problem of the 1969 regime by undoing the system’s protection for single breadwinners without addressing the more fundamental problem that the 1969 system privileged one-breadwinner affluent marriages under the guise of “marriage equality.” As a result, even while eliminating the 1969 system’s overt “marriage penalty” for most middle-class taxpayers, the reforms reinforced a system of family tax support skewed against most non-wealthy breadwinners and homemakers, both single and married.

1. Expanding Tax Aid for Unpaid Husband Care

First, the reforms of the early 2000s raised married taxpayers’ joint standard deduction to twice the amount for single taxpayers, up from 1.67 times the single taxpayer’s standard deduction under the 1969 system.²⁴² This change means that dual-breadwinning marriages no longer lose part of their tax-free earnings compared to what they would get as single

²⁴⁰ Of course, if Congress had not penalized equal-breadwinning marriages by closing the option of filing at the more progressive singles rates, the 1969 singles reform would have been more costly in terms of lost revenue. But that means Congress chose to increase support for affluent single breadwinners, and also to preserve support for affluent husband care, at the expense of support for breadwinners in equal-earning marriages.

²⁴¹ See sources cited *supra* note 1.

²⁴² See Susan Kalinka, *Highlights of the 2001 Jobs and Growth Tax Relief Reconciliation Act*, 64 LA. L. REV. 214, 223–24, 228 (2004) (discussing the standard deduction changes in EGTRRA and JGTRAA); William G. Gale & Peter R. Orszag, *An Economic Assessment of Tax Policy in the Bush Administration, 2001–2004*, 45 B.C. L. REV. 1157, 1162 (2004) (explaining how EGTRRA changed the marital versus single standard deduction); see also I.R.C. § 63 (2010) (codifying standard deduction changes).

taxpayers when they do not itemize deductions. This change also means that married primary breadwinners gain an even greater tax-free portion of earnings compared to what they would get as single taxpayers when they do not itemize deductions.

Second, Congress gradually expanded the fifteen percent tax bracket for married couples to reach twice the income for single taxpayers in that bracket increasing from 1.67 times the previous single taxpayer rates.²⁴³ In addition to the support for married breadwinners, the 2001 legislation provided more modest help for the support of dependents by expanding the child tax credit from \$500 to \$1000.²⁴⁴ These family tax reforms were scheduled to expire in 2010, and this sunset date has been extended for two more years.²⁴⁵

As a result of the return to the pre-1969 full income-splitting rates, dual-breadwinners Dominic and Daniela get taxed at the same progressive rates as single taxpayers with the same income. But the reforms of 2001 through 2004 continue to penalize these modest-earning, married dual-breadwinners by denying them the tax advantage given to breadwinners of equal individual income who marry a non-earner or a low-earner. Indeed, by returning to the 1948 system of full marital income-splitting for most taxpayers, the recent marriage reforms substantially *increase* the tax bonus to one-breadwinner marriages that effectively supports unpaid “husband care.”

2. Reinforcing Support for Affluent Husband Care

Although the 2001–04 marriage tax reforms did reduce tax rates for most middle-class married breadwinners, the largest

²⁴³ Kalinka, *supra* note 245, at 227.

²⁴⁴ *Id.* at 232–33.

²⁴⁵ See Gregg Escnwiien, *Extending the 2001, 2003, and 2004 Tax Cuts*, CRS REPORT FOR CONGRESS, RS21992, June 10, 2005 (explaining that this sunset provision was included to avoid a Senate rule governing “extraneous matter” in budget reconciliation legislation). In 2010, a political deal extended the sunset date for the Bush administration’s package of tax cuts, including these marital tax reforms along with upper income tax reductions. See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub.L. 111-312, 124 Stat. 3296.

direct gains from these family-based reforms went to relatively affluent married breadwinners with non-earning (or low-earning) spouses. Lower-income families continue to face marriage penalties from the EITC, and with incomes near or below taxable levels their main gain from the reforms came from the partially refundable child tax credit.²⁴⁶ Expanding the fifteen percent marital tax bracket cost twice as much as the child credit and standard deduction changes combined.²⁴⁷ Married couples filing jointly with cash incomes greater than \$100,000, in 2003 dollars, reaped seventy-three percent of the savings from the expanded bracket.²⁴⁸ Married couples earning between \$40,000 and \$100,000 got the remaining twenty-seven percent.²⁴⁹

The average annual household tax reduction from the marriage tax reforms, in 2003 dollars, was \$385 for married couples earning between \$40,000 and \$100,000, \$117 for married couples earning less than \$40,000, and \$827 for married couples with incomes over \$100,000.²⁵⁰ Less than twenty percent of married taxpayers filing jointly had an adjusted gross income over \$100,000 in 2003,²⁵¹ so although many of these taxpayers are far from rich they are still relatively affluent. In one projection of the 2010 distribution of the marriage tax reforms of 2001-2004, the top fifth income group will receive an

²⁴⁶ Carasso & Steuerle, *supra* note 6, at 162.

²⁴⁷ JOEL FRIEDMAN, CTR. ON BUDGET AND POLICY PRIORITIES, REVISED HOUSE TAX-CUT BILL SWELLS DEFICIT AND CONTINUES LESS FAVORABLE TREATMENT OF LOWER-INCOME COUPLES, Apr. 29, 2004, <http://www.cbpp.org/cms/index.cfm?fa=view&id=1843>.

²⁴⁸ *Id.* (basing income figures on cash income, and noting that much of this benefit for married couples with over \$100,000 in joint income might be cancelled out by the Alternative Minimum Tax, depending on how it is modified).

²⁴⁹ *Id.*

²⁵⁰ *Id.* at tbl.2.

²⁵¹ INTERNAL REVENUE SERV., 2003 IRS STATISTICS OF INCOME, INDIVIDUAL INCOME TAX RETURNS BY MARITAL STATUS tbl.1.2 (2003), available at <http://www.irs.gov/taxstats/indtaxstats/article/0,,id=96978,00.html> (based on 51,510,779 total returns with married filing jointly status).

average benefit of \$1064, while the next highest-income fifth will receive an average benefit of \$148.²⁵²

While the preceding family tax reforms primarily target support to the upper middle class, they exclude the very highest earners. Because the reforms of 2001 through 2004 did not expand the marital tax brackets over fifteen percent, the dual-breadwinning marriage penalty still applies to married couples with joint incomes over \$131,450 under 2008 rates and after personal exemptions and deductions. In addition, these higher-earning dual-breadwinning married taxpayers face further penalties compared to what they would pay as two individuals filing singly or as heads of household because some family-based deductions and credits get phased out as incomes rise.

And for those with adjusted gross income levels beginning at \$357,700 in 2008 rates, marital tax rates shift from the partial income-splitting scheme to a full income-stacking system that penalizes dual-earning marriage. As a result, tax policy eliminates aid for affluent husband care at the highest income levels, ending the disadvantages of single status for the highest-earning breadwinners as compared to marriage to a non-earner or low-earner, while increasing the disadvantages of dual-earning marriage compared to single status. At these highest income levels, breadwinners, whether married or not, are likely to benefit from affirmative tax support for the expenses of producing income from capital, which—unlike the expenses of producing human labor—tend to be excluded from taxable income.

D. From Husband Care to Capital Care

1. Leveraging Support for Upper-Class Wealth

Far outstripping the economic value of the family tax reforms, the 2001 through 2004 tax reforms provided substantial tax reductions skewed to favor the rich. The 2001 reform package reduced tax rates for high earners. These reforms, like

²⁵² TAX POLICY CTR., EXTEND MARRIAGE PENALTY RELIEF, PRE-EGTRRA BASELINE WITH AMT RELIEF, DISTRIBUTION OF FEDERAL TAX CHANGE BY CASH INCOME PERCENTILE, 2010, tbl. T07-0028, Jan. 19, 2007, <http://www.taxpolicycenter.org/numbers/displayatab.cfm?DocID=1431>.

the family tax reforms, were phased in gradually and were subject to the 2010 sunset provision, which has been extended for two additional years. For all those with incomes exceeding the fifteen percent bracket, the law reduced the tax rates, changing the bracket progression from twenty-eight percent to twenty-five percent; from thirty-six percent to thirty-three percent, and from 39.6% to thirty-five percent.²⁵³ The current top rate contrasts sharply to the mid-twentieth century top tax rate of just over ninety percent that was in effect in 1948.²⁵⁴ The 2001 law also benefited upper-income taxpayers by gradually eliminating the phase-out of the personal exemptions and itemized deductions at high income levels.²⁵⁵ Furthermore, that reform package provided for gradual reduction of estate and gift taxes, and for eliminating the estate tax in 2010.²⁵⁶ Finally, in the 2003 reform package, Congress reduced the tax rate on long-term capital gains to fifteen percent, the lowest level since World War II, and applied this favorable tax rate to dividends that were previously treated as ordinary taxable income.²⁵⁷

With these provisions reducing taxes for upper income breadwinners, the direct impact of the early twenty-first century tax reforms is a dramatic upward redistribution of tax support for income production. Analyzing the combined impact of tax reform legislation from 2001-2006, the Tax Policy Center determined that annual after-tax income will increase by an average of 0.3% (\$20) for taxpayers in the bottom income quintile; 2.5% (\$744) for those in the middle quintile; and 4.1%

²⁵³ See I.R.C. §1(a) (2010) (giving marital tax table); TAX POLICY CTR., MAJOR ENACTED TAX LEGISLATION SINCE 2000 (2010), <http://www.taxpolicycenter.org/legislation/2000.cfm#EGTRRA> [hereinafter MAJOR ENACTED TAX LEGISLATION].

²⁵⁴ LEONARD BURMAN & DEBORAH KOBES, TAX POLICY CTR., PREFERENTIAL CAPITAL GAINS TAX RATES (2004), available at http://www.taxpolicycenter.org/UploadedPDF/1000588_TaxFacts_011904.pdf (comparing historical change in capital gains and ordinary income tax rates).

²⁵⁵ MAJOR ENACTED TAX LEGISLATION, *supra* note 256.

²⁵⁶ *Id.*

²⁵⁷ BURMAN & KOBES, *supra* note 257.

(\$5790) for top quintile taxpayers.²⁵⁸ For those with the top one-tenth of one percent of income levels, the average increase in after-tax income is 6.2% (\$230,136).²⁵⁹

Taken in this context, the increased “husband care” aid from the 2001 through 2004 tax reforms served to buy off middle class political resistance to a major tax policy shift toward increased “aid for wealth care.”²⁶⁰ Rather than reflecting outdated policy lagging behind demographic change, the tax bonus for breadwinner-homemaker households may be particularly salient to the current times. As middle-class male breadwinners and their caretakers become even less secure and more squeezed in the market, policies subsidizing the breadwinner-homemaker family may seem to offer hope for lost comfort and security within the home.

2. Burdening Family Breadwinning with the AMT

Another significant change in early twenty-first century tax policy contributes to making the increased “aid for affluent husband care” in the recent reforms an illusory, or at least shaky, consolation prize for those left out of the shift toward “wealth care” policies. As the recent family-based middle-class tax reductions take effect, regular income tax is at risk of being replaced by a “shadow tax” with special tax *penalties* on upper middle class taxpayers, particularly those who are married or who care for dependents.²⁶¹ Federal tax law’s Alternative Minimum Tax (AMT) provision requires taxpayers with adjusted gross incomes above a certain level of exempt income to

²⁵⁸ GREG LEISERSON & JEFF ROHALY, TAX POLICY CENTER, THE DISTRIBUTION OF 2001-2006 TAX CUTS, UPDATED PROJECTIONS 2-4 (2006), available at <http://www.taxpolicycenter.org/publications/url.cfm?ID=411378> [hereinafter DISTRIBUTION OF 2001-2006 TAX CUTS] (discussing tbl. 7 using 2006 dollars). In addition to the 2001-2004 tax reform packages that included family tax relief, 2005 legislation extended the capital gains rate reductions through 2010).

²⁵⁹ *Id.*

²⁶⁰ See Zelenak, *supra* note 16, at 182-84 (discussing the politics of the tax cuts).

²⁶¹ *Id.* at 172.

calculate taxes under a separate system in addition to the regular income tax, and then to pay whichever produces the higher tax bill.²⁶² The AMT was established in 1969 to ensure upper income taxpayers would not use tax credits, deductions and other “loopholes” to avoid substantial income tax liability.²⁶³ Unlike regular income tax, the AMT’s exempt income levels and rate brackets are not indexed for inflation, contributing to an increasing downward shift of the tax burden. AMT now applies primarily to the upper middle-class rather than to the very rich, and, if unchanged, it could reach substantial portions of the middle class.²⁶⁴ While less than one percent of taxpayers paid under the AMT in 2000,²⁶⁵ if Congress does not change exemption levels by 2010 more than a third of taxpayers will be subject to the AMT,²⁶⁶ with two-thirds of these AMT taxpayers having incomes between \$75,000 and \$200,000.²⁶⁷

Since 2001, Congress has regularly enacted a series of temporary “patches” raising the level of income exempt from the AMT to protect more moderately affluent middle-class taxpayers from its steeper rates.²⁶⁸ For 2009, the exemption levels were temporarily changed to \$46,700 for single filers and heads of

²⁶² See I.R.C. § 55 (2010).

²⁶³ Zelcnak, *supra* note 16, at 172; see Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (establishing AMT); see also Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (revising AMT).

²⁶⁴ GREG LEISERSON & JEFFREY ROHALY, TAX POLICY CTR., THE INDIVIDUAL ALTERNATIVE MINIMUM TAX: HISTORICAL DATA AND PROJECTIONS (2008), available at http://www.taxpolicycenter.org/UploadedPDF/411703_individual_amt.pdf.

²⁶⁵ Cong. Budget Office, *The Alternative Minimum Tax*, 4 REVENUE & TAX POL’Y BRIEF, Apr. 15, 2004 at 2.

²⁶⁶ LEISERSON & ROHALY, *supra* note 267, at tbl. 1.

²⁶⁷ *Id.* at 7.

²⁶⁸ TAX POLICY CENTER, QUICK FACTS: ALTERNATIVE MINIMUM TAX, tbl. 1 (2010), available at http://www.taxpolicycenter.org/taxtopics/quick_amt.cfm (listing tax legislation and resulting exemption level changes).

households, and \$70,950 for married persons filing jointly.²⁶⁹ Without these “patches,” the exemption amounts would fall to \$33,750 and \$45,000 respectively.²⁷⁰ But Congress faces political pressure to “buy” these temporary fixes protecting the middle class with tax and spending policies likely to primarily benefit the upper-class.²⁷¹ For example, the AMT “fix” for 2009 was tied to reductions in proposed funds for public education and Medicaid,²⁷² while the 2008 AMT adjustment helped clinch Democratic support for highly unpopular legislation rescuing failing financial institutions.²⁷³ Despite the political unpopularity and seemingly irrational policy of maintaining an AMT system requiring regular but temporary, incomplete and costly “fixes,” major change in the AMT increasingly depends on politically difficult fundamental change in the overall tax system.²⁷⁴ Indeed, it is likely that the revenue costs of repealing the AMT soon could exceed the costs of repealing the regular income tax while keeping the AMT.²⁷⁵

²⁶⁹ I.R.C. § 55(d)(1)(a) (2010).

²⁷⁰ DISTRIBUTION OF 2001-2006 TAX CUTS, *supra* note 261, at 4.

²⁷¹ See Leonard E. Burman, *The Alternative Minimum Tax*, MILKEN INST. REV. 19 (Fourth Quarter 2007) (explaining that pork barrel spending is often attached to AMT relief).

²⁷² Alce MacGallis, *Despite Stimulus Funds, States to Cut More Jobs*, WASH. POST (suburban ed.) May 12, 2009, at A04.

²⁷³ Cheryl V. Jackson, *Illinois House Members Jackson Jr., Rush, Biggert Change Vote On Bailout from 'No' to 'Yes', But Six Others Are Unconvinced*, CHI. SUN TIMES, Oct. 5, 2008, at A6.

²⁷⁴ In the 2008 presidential election, both nominees' tax plans focus on maintaining the AMT with some protections for some of the middle-class rather than eliminating it. See LEN BURMAN ET AL., TAX POLICY CTR., AN UPDATED ANALYSIS OF THE 2008 PRESIDENTIAL CANDIDATES' TAX PLANS, REVISED AUGUST 15, 2008, 9-10 (2008), <http://www.taxpolicycenter.org/publications/url.cfm?ID=411749> (describing McCain's plan for AMT reform); see also *id.* at 13-14 (describing Obama's AMT reforms).

²⁷⁵ LEISERSON & ROHALY, *supra* note 267 (explaining that if the regular income tax were repealed, the AMT would replace all but a projected \$51.7 billion of the revenue lost from the income tax, compared to a \$87.6 billion revenue loss if the AMT were repealed to return taxpayers to the regular income tax system).

For those subject to it, the AMT works to take back a large portion of the 2001-04 tax cuts provided to the more affluent middle-class.²⁷⁶ The AMT revokes the rate reductions and the expanded fifteen percent marital tax bracket that produced the bulk of the middle class “marriage tax” breaks, instead imposing two tax brackets of twenty-six percent and twenty-eight percent without any standard deduction or personal exemptions.²⁷⁷ The AMT applies the same income brackets to married and single taxpayers,²⁷⁸ so that marital income is effectively stacked rather than split. As a result, the AMT eliminates much of the regular tax system’s “aid for affluent husband care.”

But this elimination of some marriage-based family support measures does not mean the AMT represents a fairer and more marriage-neutral measure of support for either breadwinning or informal caretaking. Instead, the AMT particularly penalizes married couples among the more affluent middle class. Because married couples are taxed as a unit with income-stacking rates, dual earners, even with highly unequal earnings, are severely penalized compared to a similarly earning single couple. Dual earning marriages are also penalized by the structure determining the amount of income exempt from the AMT because the amount of income allowed before the AMT kicks in—with its higher rates—is less than one and a half times that of a single taxpayer.²⁷⁹ For example, two single breadwinning taxpayers like Dominic and Daniela would each get \$46,700 of adjusted gross income free from AMT (under 2009 rates), for a combined exemption of \$93,400. If those

²⁷⁶ *Id.* at 15, tbl. 7 (projecting that by 2010 the AMT will cancel forty percent of the tax cuts for taxpayers with income between \$100,000 and \$200,000 and seventy-one percent of the tax cuts for taxpayers with income between \$200,000 and \$500,000).

²⁷⁷ The twenty-six percent rate applies to net income up to \$175,000 beyond the exempt amounts; for income above that level, the twenty-eight percent rate applies. LEONARD E. BURMAN, WILLIAM G. GALE & JEFFREY ROHALY, TAX POLICY CTR., *THE EXPANDING REACH OF THE INDIVIDUAL ALTERNATIVE MINIMUM TAX 3* (2005), available at http://www.taxpolicycenter.org/UploadedPDF/411194_expanding_reach_AMT.pdf.

²⁷⁸ I.R.C. § 55(b)(1)(A)(i) (2010).

²⁷⁹ LEISERSON & ROHALY, *supra* note 267, at 6.

breadwinners were married with the same income, they would lose part of their income exemption, reducing the income threshold at which the AMT kicks in to \$70,950—a difference of \$22,450.

The AMT also penalizes middle class breadwinners with dependents compared to similar earners with homemaking spouses. Heads of Households lose their partial income-splitting benefit under the AMT, both in the rates and in the level of income exempt from the AMT. Head of Household Heather, for example, would be subject to the AMT beginning at \$46,700, just like Single Sophia, while Breadwinner Bob's marriage to Homemaker Hannah would allow him to shelter an additional \$24,250 in income from the AMT under 2009 exemption levels (though he would lose his income-splitting benefit for income subject to the AMT). On top of cancelling out much of the 2001-04 marital tax benefits, the AMT system removes personal exemptions, a primary source of income tax support for taxpayers providing or caring for dependents. For 2008, personal exemptions are \$3500, so a family of four could lose \$14,000 of exemptions in the AMT compared to the income tax system. In addition, the AMT restricts the regular income tax system's credit for dependent care expenses, though that credit has been temporarily restored in AMT "fixes." Without an extension of the AMT "patch" to raise the income level triggering the AMT calculation, by 2010 the AMT would have replaced the regular income tax system for 43.5% of tax filers with two children, and almost half of those with three or more children.²⁸⁰

While the AMT overrides much of the income tax system's family-based tax support, it maintains special tax support for capital owners and upper income taxpayers. First, the AMT's top rate of twenty-eight percent is less than the regular income tax's upper rate of thirty-five percent. Upper income taxpayers therefore are less likely to be subject to the AMT, allowing them to take advantage of family support provisions within the regular income tax, although at the highest income levels some of these phase out. Second, although the AMT originally worked to close tax shelters for capital gains, it now works to *favor* capital gains

²⁸⁰ *Id.* at 5–6. The 2010 legislation extending the 2001-04 tax cut package included a continuing patch to the AMT. Pub.L. 111-312.

over income from labor.²⁸¹ The AMT maintains the current income tax system's preferential fifteen percent rate for capital gains and dividend income even as it revokes tax support for family breadwinning and caretaking.

As argued by Lawrence Zelenak, the AMT appears to work as a back-handed way of charging the tax cuts for upper-class "wealth care" in the early 2000s to the more affluent middle-class.²⁸² In effect, the 2001–04 marriage tax reforms "bought off" the upper middle-class with a "bad check": A tax break structured to turn into a tax penalty as many get swept out of the regular income tax into the AMT (at least without temporary legislative fixes). As Zelenak explains, even with temporary "fixes" that, in practice, spare middle-class taxpayers for now by maintaining a broader AMT on paper, Congress can give the appearance of higher revenue projections to defer political confrontation over the real costs of the upper-class tax increases.²⁸³

IX. Toward Fair Tax Aid For Breadwinner Care

The inequitable tax system of aid for affluent husband care—and increasingly, for wealth care—should be replaced with a scheme that recognizes and values the caretaking and caretakers of all workers in relation to their ability to pay. Marriage tax reform must be guided by two general principles that cover familiar ground but together serve as the basis for a reformed vision of fair aid to breadwinners and their caretakers. First, joint marital tax rates should be replaced by individual taxation of employment income. Second, individual taxes should be more progressive, reversing recent upper-income tax cuts that have contributed to a system valuing development of concentrated financial wealth over workers' human development. Building on

²⁸¹ See BURMAN, GALE & ROHALY, *supra* note 280, at 9; I.R.C. § 55(b)(3) (West 2010).

²⁸² See Zelenak, *supra* note 16, at 174.

²⁸³ *Id.*; see also AVIVA ARON-DINE AND ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, WHY THE COST OF AMT RELIEF SHOULD BE INCLUDED IN ESTIMATES OF EXTENDING THE PRESIDENT'S TAX CUTS, Feb. 20, 2007, <http://www.cbpp.org/2-6-07tax.htm>.

these two basic principles, tax law should aim to recognize real rather than nominal income-shifting between breadwinners and caretakers, and tax support for such exchanges should extend beyond marriage.

A. Individual Filing

The advantages of replacing marriage-based tax rates with individual filing have been a recurring subject of tax scholarship.²⁸⁴ Yet as Edward McCaffery comments, “separate filing remains a distant dream for a small handful of feminist-oriented reformers.”²⁸⁵ The lens of “aid for affluent husband care” can help counter the tendency to marginalize this idea in both tax theory and in tax politics.

1. Tax Equity, Not Just Social Equity

The merits of individual filing have been obscured by the supposed dilemma of competing equities that pit “married couples’ equality” against “marriage neutrality.”²⁸⁶ In the standard theory, the concept of “income” leaves open the question whether income should be measured at the level of the marital unit (taxing married couples with the same total income the same) or at the individual level (taxing individuals with the same income the same regardless of marital status).²⁸⁷ The

²⁸⁴ See, e.g., Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 95–98 (1971); Note, *supra* note 193; Laura Ann Davis, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197 (1988); Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL’Y 241 (1997); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); Kornhauser, *supra* note 147.

²⁸⁵ Edward J. McCaffery, *Tax’s Empire*, 85 GEO. L.J. 71, 148 (1996); see also, Stephen D. Sugarman, *What is a Family? Conflicting Messages from our Public Programs*, 42 FAM. L.Q. 231, 257–58 (2008) (noting the merits of individual filing but concluding that such a reform remains politically unlikely).

²⁸⁶ See *supra* notes 9–10 and accompanying text.

²⁸⁷ See MCCAFFERY, *supra* note 4, at 24–26 (explaining this prevailing theory but arguing for basing tax policy on social effects rather than simply on internal logic of income taxation).

empirical fact that many married couples, in practice, pool their income during marriage is often taken as a good reason to choose “married couples’ equality” as the preferable unit.²⁸⁸ On the other hand, empirical evidence also casts doubt on the extent of marital income pooling,²⁸⁹ and of course shows that income pooling is not unique to federally recognized marriage. Faced with competing facts and principles, conventional tax theory treats the choice between the two goals as a matter of subjective social and moral considerations (such as fairness to women) external to the tax system.²⁹⁰

Social goals and moral ideals are inevitably central to all of tax policy. Yet this conventional understanding of family taxation tends to construct individual filing as a uniquely vexing, contested and subjective choice that contrasts with tax code provisions logically derived from “neutral” tax principles. The theory that individual filing advances the status of women, for example, is complicated by the problem that it would benefit some women at the expense of others, as Ann Alstott discusses.²⁹¹

But we can shed clearer light on contested social goals by unearthing and analyzing the inescapable moral assumptions *internal* to supposedly neutral tax policy principles. By identifying “aid for affluent husband care” as the implicit policy underlying the seemingly benign couples equality principle, the social and political controversies about family taxation may not be quite so intractable. From this perspective, individual filing would not simply promote “external” social goals but instead would apply general tax equity principles more consistently and coherently.

²⁸⁸ See, e.g., Don Fullerton & Diane L. Rogers, *Lifetime Versus Annual Perspectives on Tax Incidence*, 44 NAT’L TAX J. 277, 280 (1991).

²⁸⁹ See Motro, *supra* note 7, at 1523.; Kornhauser, *supra* note 147, at 102; Zelenak, *supra* note 4, at 351–53.

²⁹⁰ See Bittker, *supra* note 11, at 1392, 1463; MCCAFFERY, *supra* note 4, at 24–26 (arguing that the choice of the goal of couples equality is wrong because it leads to “massive discrimination against women”).

²⁹¹ Alstott, *supra* note 70, at 2014–15.

2. Not Only “Secondary Earner Bias”

Tax scholar Edward McCaffery has extensively and insightfully discussed the social harm of the marital tax system as a problem of “secondary earner bias” that discourages market work by wives of affluent breadwinners.²⁹² As McCaffery explains, the system of joint marital taxation necessarily requires married couples weighing the tax effects of increased income to assume that one spouse’s income is the primary baseline and that the other’s income is secondary, added on to that baseline.²⁹³ The secondary earner’s income will be taxed at a higher marginal rate than the baseline income in a progressive system, so that the secondary earner’s increased income will produce less marginal gain for the couple. Considering the additional monetary expenses of work as well as the lost time for valuable informal domestic services, this “secondary earner bias” may rationally discourage many spouses of relatively high-income earners from pursuing substantial market earnings. Although the “secondary earning bias” is formally gender neutral, McCaffery explains that, in practice, it is likely to disproportionately apply to *wives’* earnings because married women’s earnings are typically lower, meaning their earnings will typically be perceived as secondary and more discretionary.²⁹⁴

McCaffery acknowledges that individual filing would remedy this problem of secondary earning. Nonetheless, he prefers a different solution that would directly target married women for special tax support on the theory that the real problem is not tax recognition of marriage but the tax disincentives for formal market work by wives.²⁹⁵ McCaffery’s analysis of the “secondary earner problem” leads him to frame

²⁹² MCCAFFERY, *supra* note 4, at 19–20.

²⁹³ *Id.*

²⁹⁴ *Id.* at 21 (noting that married women’s income is about sixty percent of married men’s income); see also Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 994 (1993) (noting that married women’s earnings have historically been considered more marginal than husbands’ earnings, and that men are five times more likely to be the earners in one-earner marriages.).

²⁹⁵ McCaffery *supra* note 297, at 994 n.36.

the case for reform as a case for taxing married women less and taxing married men more.²⁹⁶ This reasoning risks making individual filing seem not only anti-marriage, but also anti-male.²⁹⁷ Even for those who share McCaffery's compelling concern for women's workplace equality, this formulation of the problem of family taxation and its solutions can seem to raise difficult questions about the competing merits of women's market work versus informal family caretaking.²⁹⁸

The case for individual filing is much stronger on equity grounds if the goal of reform is not simply to tax married women less than married men in order to encourage wives' market work, but rather is to replace "aid for husband care" with more equitable, progressive tax support for the caretaking needs of all breadwinners. By focusing primarily on married women with discretion to choose between formal market earnings and informal labor or leisure, policies aimed at reducing "secondary earner bias" will seem to inequitably favor marital households who are disproportionately white, relatively affluent and heterosexual. Single taxpayers face even higher marginal tax rates than married secondary earners. For example, a single taxpayer (like Single Sophia) earning \$100,000 and considering a promotion or second job that would add \$30,000 in market income would lose \$8400 of that additional income to taxes,²⁹⁹ whereas a non-earning wife (like Homemaker Hannah) considering earning \$30,000 in addition to her husband's \$100,000 income would lose only \$7500 to taxes (based on 2008

²⁹⁶ McCaffery, *supra* note 4, at 277.

²⁹⁷ *Id.* at 278 (countering objections of "male-bashing").

²⁹⁸ Alstott, *supra* note 70, at 2035–36; see also Laura Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 21–23 (discussing black women's informal caregiving as resistance to exploitative wage labor caring for others' families); RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005).

²⁹⁹ A single earner with standard deduction and no credits with \$100,000 in wage income would owe \$19,472 in taxes under 2008 rates; that tax liability would increase to \$27,872 if the wage income was \$130,000.

rates with a simplified return).³⁰⁰ Increased tax support for married women would further disadvantage unmarried dependent caretakers and unequal-earning couples who are not in a federally-recognized marriage and are therefore excluded from the marital income-splitting benefit.

Furthermore, the justification for replacing “aid for unpaid affluent husband care” with tax support for “fair breadwinner care” should not depend on incentive effects or behavior changes. If well-off married women’s greater market work participation or well-off husbands’ greater involvement in informal caretaking requires further changes in culture or policy, it will still be fairer to shift more of the tax burden to relatively affluent, unequal-earning breadwinners based on their greater ability to pay those taxes without sacrificing basic human needs. The goal of “fair breadwinner care” is not to reduce marital specialization of labor, but to more fairly distribute the gains and risks of that specialization. This Article’s hypothetical comparison of Breadwinner Bob and Homemaker Hannah to others shows not that the breadwinner-homemaker family form is wrong but that it does not deserve special tax protection from normal principles of progressive taxation.

B. Increasing Progressivity

Linking substantially increased progressivity to “marriage tax reform” is crucial because the marital income splitting system undermines tax progressivity while seeming to support it. In principle, marital income splitting is anti-progressive, as explained in Part II: it treats two people with highly unequal incomes as if the income were redistributed more equally. In practice, the recent expansion of marital income-splitting eased taxes for some middle class taxpayers, providing a leaky and narrow life raft against a rising tide of inequality swelled by the looming AMT, upper-income tax cuts and other upwardly redistributive spending and regulatory policies.

The pseudo-progressivity of the marital income-splitting system should be replaced with real progressivity by adopting a

³⁰⁰ A married couple filing jointly with standard deduction would increase their tax liability from \$13,213 on \$100,000 in wage income to \$20,713 on \$130,000 in combined wage income.

more progressive individualized rate system. If marital income taxation were eliminated so that all breadwinners were taxed at the current individual rates, the result would be increased revenue from the increased taxes on breadwinners married to non-breadwinning spouses due to the loss of their income-splitting benefit. This revenue savings, combined with reversals of recent tax breaks targeting wealthy households, could be directed toward reducing taxes for breadwinners with more modest incomes as well as for their caretakers. Tax support for breadwinner care should be uncoupled from marriage to become a matter of a generally progressive rate structure.

Although exact rate details are beyond the scope of this Article, the general principle could be achieved by changes such as expanding the individual personal exemption and standard deduction amounts to make more initial earnings income tax-free (phasing out at high income levels), reducing tax rates in the lowest brackets and increasing refundable earned income credits for low-income taxpayers. Furthermore, the AMT should be redirected to its original progressive purpose by eliminating the reduced rates for capital gains and dividend income, and exchanging temporary increases in the exemption level for an increased inflation-indexed exemption level based on individual, not marital, income.³⁰¹ In addition, increased progressivity should include raising the capital gains tax rate to reduce support for wealth over work.

By linking tax support for “breadwinner care” to individual income, rather than to marital status and marital division of labor, tax policy will better capture the relationship between personal caretaking services and ability to pay income taxes. At the upper income levels currently favored by the marital income-splitting system of “aid for unpaid affluent husband care,” breadwinners have more ability to support important caretaking needs from their own income without additional tax support—and more ability to share their income to support others’ caretaking needs.

³⁰¹ For discussion of progressive proposals to reform the AMT, see AVIVA ARON-DINE, CTR. ON BUDGET & POLICY PRIORITIES, MYTHS AND REALITIES ABOUT THE ALTERNATIVE MINIMUM TAX, Feb. 14, 2007, <http://www.cbpp.org/cms/?fa=view&id=1063>.

Of course, recent anti-progressive tax reforms underscore the problem that policies supporting increased progressivity run counter to much theory that is recently prominent as well as recently powerful politics. But linking the broad issue of progressivity to the issue of marriage taxation could help to question those politics and ideas. Rather than treating increased progressivity as a question simply of class-based economic “distribution,” the framework of equitable support for breadwinner care can help defend progressive rates as productive support for workers and for informal family caretaking.

The idea of better promoting care for human well-being also can be part of a general ideological challenge to the assumption that equal “distribution” undermines overall economic “growth.” Conventional definitions of economic growth emphasize short-term capital concentration and accumulation. However, the current economic crisis underscores the illusory and insecure nature of such gains and perhaps provides an opening for alternative measures of societal welfare. Re-envisioning economic growth to understand the value of caretaking for human beings could counter the general argument that taxing capital accumulation is bad for growth.³⁰² Furthermore, the recent economic crisis and a changing political context may have increased policy interest in protecting middle class security and in economic equality more generally. Focusing tax policy on fair support for “breadwinner care” could help reveal the overall anti-progressivity of current marriage taxation as well as the potential benefits for many higher-income taxpayers, such as dual-earning married couples, from a reform combining individual taxation with increased progressivity.

C. Breadwinner-Caretaker Income Transfers

Will individual taxation undermine progressivity by allowing affluent primary breadwinners to shift income to lower-taxed spouses? Joint marital filing at income-splitting rates, of course, makes such anti-progressive spousal income-shifting

³⁰² See Martha McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U.J. GENDER SOC. POL’Y, & L. 115, 137–38 (explaining that the idea of “efficiency” as aggregate economic gain requires assumptions about what counts in measuring aggregate gain).

normal. To replace that “aid for husband care” with fair aid for breadwinner care, tax reductions for “sharing” income in exchange for caretaking should depend on substantive shifts in income from breadwinners to caretakers.

One concern is that individual taxation would undermine progressivity by taxing a non-earning spouse of a high-earner the same as a person living in poverty, even though the high-earner’s spouse lives in luxury and leisure.³⁰³ This problem could be addressed by treating some marital income-sharing as taxable gifts, following the principle of tying taxes to substantive ownership and control.³⁰⁴ But this problem could also be partly mitigated by linking individual taxation to substantially increased progressivity. The greater unfairness, arguably, is a tax system that allows individuals with legal rights to high incomes and extensive wealth to avoid paying for government programs and social and physical infrastructures that contribute to their opportunity for gain. To the extent that non-earning spouses share the economic conditions of their upper-income breadwinners, a change to more progressive individual taxation could lead to less luxury spending by homemaking spouses of affluent earners. That result would then yield more substantive fairness than the current system in which those non-earning spouses nominally pay taxes as part of a marital unit for the purpose and effect of reducing upper-income families’ taxes. The current system switching from income-splitting to income-stacking at very high income levels limits this unfairness by capping tax-reducing nominal income-shifting.³⁰⁵ But the income-stacking policy’s nominal treatment of income as if it were earned by the highest earning spouse creates a substantive penalty on increased earnings by the lower earning spouse, a penalty particularly burdensome for those who lack the marital

³⁰³ See, e.g., DANIEL SHAVIRO, MAKING SENSE OF SOCIAL SECURITY REFORM 18–19, 160 n.10 (2000) (using the example of Bill Gates’ wife to dismiss individual taxation).

³⁰⁴ See Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 759, 797–99 (2004) (advocating separate tax treatment of spouses for federal gift and estate taxes at high income levels as a means of increasing progressivity and other equities).

³⁰⁵ See *supra* Part III.C.2.

power to bargain for a fair share of the marital resources and who seek to increase their economic independence from their spouses.

If a spouse does not share in a marital high-earner's gains or hold independent rights to income-producing capital, a low, or no, tax burden resulting from a change to individual taxation arguably reflects that spouse's long-term substantive individual economic insecurity. Indeed, it is more progressive and consistent with the tax principles to ignore the informal partial income-sharing of a homemaking wife of a high-earning husband, taxing her on her individual income, than to ignore half the formal economic gains of a high-earning husband with homemaking wife under an income-splitting joint tax system.³⁰⁶ While it is true that individualized taxation could mean that low-earning wives of high-income breadwinners get "welfare," such as refundable EITC credits, the current system effectively gives many higher-earning breadwinners (typically husbands) "welfare" via the income-splitting "aid for affluent husband care," up to the high income level at which income-splitting ends³⁰⁷

However, a shift to individual taxation would create the problem that high-income married breadwinners with property or business income can avoid high progressive tax rates through marital transfers based more on appearance than reality. In contrast, pre-tax transfers of employment income between spouses are prohibited under a rule established prior to joint marital taxation in 1948.³⁰⁸ Preserving this general rule under individual taxation would be consistent with the tax treatment of unmarried breadwinners or married dual-breadwinners, who also

³⁰⁶ See *supra* Part II.B.3 (explaining that income-splitting ignores formal market gains, not "imputed" income).

³⁰⁷ See *supra* Part III.C.2 (discussing income-stacking change at very high income levels).

³⁰⁸ See *Lucas v. Earl*, 281 U.S. 111 (1930) (ruling, under the pre-1948 system of individual marital taxation, that a husband could not reduce his taxes by assigning half of "his" salary to his wife on the theory that this salary was joint marital property).

cannot deduct the cost of domestic services from income³⁰⁹ save for limited dependent care expenses.³¹⁰ Indeed, this Article's goal of fair support for breadwinner care aims to provide more equitable tax recognition of the costs for workers, as well as their caretakers, of their caretaking but to do so through progressive taxation of individual formal market earnings rather than through marital income-splitting.

Several measures could help mitigate the problems of tax-favored, potentially abusive marital transfers of property and business income while still minimizing administrative burdens in an individualized system. Prior to 1948, federal tax treated residence in community property states as sufficient ground for marital income-splitting.³¹¹ However, this approach favored marriages with property or business income and overlooked the lack of substantive rights of homemakers to marital income under many such laws.³¹² Instead, fairer tax support for breadwinner care could be achieved by extending federal rules currently governing allocation of income among family members to ensure substantive rather than sham distribution.³¹³ In addition, tax penalties could be designed to link allocation of income for tax purposes to long-term ownership rights. For example, a high-income spouse could be required to repay tax advantages, with interest, if that spouse claims a greater share of ownership of a family business upon divorce than during a marriage. Although the full details of such a system are beyond the scope of this Article, I will outline two adjustments to individualized taxation that could help more equitably and accurately recognize substantive breadwinner-homemaker

³⁰⁹ See Motro, *supra* note 7, at 3 (explaining that marital income-splitting effectively treats a homemaking spouse's labor as a deductible business expense for a married primary breadwinner).

³¹⁰ I.R.C. § 21 (2010).

³¹¹ See *supra* note 220 and accompanying text (discussing the *Poc v. Scaborn* ruling that federal tax law should treat marital income as equally divided among spouses for married couples in community property states).

³¹² See *supra* note 149 and accompanying text.

³¹³ See Davis, *supra* note 287, at 246–48 (discussing possible tax rules for evaluating marital transfers under an individualized system).

exchanges than the current system while improving progressivity in general.

First, to recognize that unearned income poses particular risks of sham marital transactions, married persons' unearned income, distinct from wage and salary income, could be taxed at the rate applicable to the spouse with higher earned income, perhaps simplifying and targeting such an approach by applying it only to persons with income above a certain threshold. If Breadwinner Bob earns \$1000 a year in interest income from savings of his earned income, and if his earned income is above any threshold level, it would be taxed at an individual higher tax rate even if he shares that income with his non-earning homemaking wife.³¹⁴ Exceptions could be made for separate taxation of certain unearned income with documentation of separate ownership, such as ownership of the asset prior to marriage, or perhaps for gains from certain types of assets particularly likely to represent shared marital contributions such as a marital residence.

By attributing unearned marital income to the higher-taxed primary breadwinner, this targeted modification of individual taxation would treat married primary breadwinners as if they did not pay for a homemaking spouse's services by transferring assets formally produced by the breadwinner's income. In effect, the current system withdrawing marital income-splitting and replacing it with income stacking at high income levels makes a similar assumption—without distinguishing among types of income, withdrawing “aid for husband care” for wealthier breadwinners' whose non-breadwinning spouses presumably are more likely to provide luxury services or class status than basic caretaking. However, unlike the current income-stacking marital rates, this proposed allocation of marital income would not penalize dual-breadwinning married couples for whom property income is more likely to represent combined market gains. To avoid disadvantaging and discouraging substantive breadwinner-homemaker marital exchanges, this constraint on tax recognition of marital asset transfers should be supplemented with a

³¹⁴ Such a distinction between allocation of earned and unearned income is already in place for certain narrow categories of married couples not subject to joint taxation. Theodore P. Scto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1586–87 (2008).

mechanism for more equitably and accurately recognizing such transfers.

A second step in protecting progressivity in an individualized tax system is an affirmative system of tax-recognized "caretaker accounts" modeled on existing individual retirement accounts that provide a simplified device for targeting tax support to substantive rather than sham exchanges of formal market income for caretaking. This would allow a married breadwinner, or any individual, to transfer income-producing assets into a specially designated account structured to ensure individual ownership by the lower-income spouse or other person, thus allowing income in that account to be taxed at that individual's lower rates. The amount of qualifying transfers could be capped to prevent tax support for spousal "caretaking" likely to involve primarily luxury services and class status. Alternatively, withdrawals from such accounts could be restricted to particular times or purposes, like current tax-favored accounts for retirement, education, and medical savings, to ensure benefits go for purposes primarily benefiting the homemaking spouse and to minimize informal appropriation by an exploitative spouse.

Such "caretaker accounts" could also extend tax benefits to those dependent on earned income by providing a limited earned income credit to those who deposit funds into such an account. Although the tax credit would work to split some employment income between homemakers and breadwinners, its support for breadwinner care would be more equitable than the current marital income-splitting system. This is because this affirmative tax aid would depend on *substantive*, rather than fictional, exchanges of formal earnings for domestic labor. Furthermore, it could be used to support breadwinner-caretaker exchanges regardless of marital status; to support paid market service providers as well as unpaid family caretakers; it would provide more progressive support for modest-income breadwinners; and it could equally support homemaking by dual-breadwinning couples. It could even be structured to support for "self care" by breadwinners making deposits into their own accounts, similar to current individual retirement accounts, thereby providing progressive support, on top of general progressive rates, for their own long term human capital development.

D. Winners and Losers from More Progressive Individual Taxation

1. Single Breadwinners

Individual filing at more progressive rates would provide more equitable support for the caretaking needs of breadwinners who are single or not in federally recognized marriages. In the current system, single taxpayers effectively subsidize "affluent husband care" by paying higher taxes than breadwinners married to non-earning or low-earning homemakers, except at the highest income levels. Changing to a system of more progressive individual taxation would mean that caretaking subsidies will instead run from upper income taxpayers to lower-income breadwinners regardless of marital status.

Shifting tax support from unequal-earning marriages to non-wealthy individual taxpayers—regardless of marital status—would allow single breadwinners to increase access to caretaking support through paid or unpaid services. For relatively high-income single taxpayers, the steeper tax rates would offset gains from ending the current "single's penalty" that exempts the richest taxpayers.³¹⁵ The loss for affluent single taxpayers would likely have a greater negative impact on luxury spending and capital accumulation than on basic human caretaking, consistent with the goal of fair support for breadwinner care. Furthermore, even some upper-income single filers might be persuaded that changing to more progressive individual filing offers some protection of their long-term interests and security, since this change would arguably tax them more fairly in the event of income loss or marriage to another high earner.

2. Dual Breadwinning Taxpaying Marriages

Compared to the recent reduction in the "marriage penalty," a change to progressive individual filing would be fairer for married dual-breadwinning taxpayers. The current system contains a hidden penalty on breadwinner caretaking for equal-earning taxpayers. Although dual-breadwinner marriages

³¹⁵ See *supra* Part III.C.2.

get tax rates equal to married one-breadwinner couples with equal income, this superficial equality masks the fact that dual-breadwinning marriages, like single filers, are denied the tax support for breadwinner care that is available to taxpaying one-breadwinner marriages. With more progressive individualized rates replacing the current "aid for affluent husband care bonus," married dual-breadwinners with modest incomes would benefit from tax reductions on both incomes. Two \$50,000 earners, like Dominic and Daniela, would each pay less in taxes under a more progressive and individualized system, easing the current squeeze on such typical middle-class families by freeing up more money for paid domestic services or for cutting back on work hours to allow for more unpaid domestic work.

3. Married Primary Breadwinners

Many married breadwinners with non-breadwinning spouses would also gain, or at least not lose substantially, from a shift to progressive individualized filing. Individualized filing would mean that one-breadwinner taxpaying marriages would lose their current "marriage bonus." But with substantially increased progressivity, that loss could be equaled or outstripped by a greater gain from generally reduced tax rates on modest income earners. For example, the current system resulting from the recent "marriage penalty" reforms provides a tax break that ranges roughly from \$1000 to just over \$2500 for one-breadwinner marriages with taxable incomes under \$50,000. A major increase in progressivity could offset or exceed that tax savings for modest income married taxpayers. Expanded refundable earned income credits would particularly help provide a net gain in caretaking support for breadwinner-homemaker couples at the lowest-income levels.

In addition, many affluent one-breadwinner married couples whom might gain little or nothing in the short term from replacing their current "bonus" with increased progressivity might nonetheless reap longer-term gains from such a change. For some marriages with modest or moderately affluent incomes, the one-breadwinner household labor division may be a temporary arrangement, with their so-called "marriage bonus" effectively serving as "aid for second breadwinner development" or "aid for temporary dependent development." For example,

some couples may become one-breadwinner families so that one spouse can improve earnings capacity through job training or higher education or an extended job search, or to allow for a temporary period of dependent caretaking for young children, or for family illness. For many such married couples, this period of spousal unemployment is likely to be better supported by progressive individual provisions that will target support both during that spouse's period of low earnings (especially through refundable credits) and when that spouse becomes a second breadwinner (under more progressive tax rates). In contrast, under the current system, a homemaking spouse's death, divorce or increased earnings will mean a substantial tax hike for a specialized earner like Breadwinner Bob, and this tax increase will come just at a time when expenses and domestic needs might also significantly increase. In short, increased progressivity and individualized rates could provide a safety net for moderately affluent one-breadwinner marriages that brings long-run economic returns well worth the cost of modest short-term tax increases.

4. Heads of Households

A substantially more progressive individual rate system—particularly with an increased refundable earned income credit—would provide more support to the vast majority of unmarried breadwinners caring for dependents because such households are particularly likely to have low or modest incomes.³¹⁶ While it is true that a change to individualized filing would eliminate the partial income-splitting benefit of the current head of household rate, by directing support to higher incomes, marital status, and formal dependent ties, the current system of partial income-splitting does not adequately or equitably capture the effect of dependent caretaking on a breadwinner's ability to pay taxes.

Like marital income-splitting, head of household income-splitting operates as an exception to progressive rates by providing a tax shelter with increased value to increased earnings that is subject to a relatively modest income cap. Like the current marital tax shelter, in the bigger picture this income-splitting also cushions the burdens on some middle income

³¹⁶ See *supra* Part II.C.2.

taxpayers of a tax system that is not very progressive, thereby offering some semblance of progressivity to the particularly burdened group of middle income taxpayers who are unmarried with dependents. Increased progressivity would provide more equitable and meaningful tax support for heads of households by compensating for the effects of dependent care on market earnings. With that change, breadwinners get more support to the extent that they sacrifice market earnings to devote time and energy to dependent care, or, alternatively, to the extent that their earnings require difficult tradeoffs between paid dependent care and other basic spending needs. In contrast, the current head of household rates give unmarried breadwinners with dependents more tax support as they earn more (up to the income cap).

In addition, directing tax support by income level rather than by marital status would avoid the problem that the current head of household system excludes many breadwinners whose dependent caretaking reduces their earning and spending capacity. In the current system, a dependent-caretaking breadwinner who marries another breadwinner with relatively equal and modest earnings will lose the income-splitting benefit from filing as a "head of household" without gaining a marital income-splitting benefit. By providing equal support to married and unmarried breadwinners with dependent caretaking responsibilities, the suggested change to progressive individualized rates would recognize that lower and modest income married breadwinners with dependents may also sacrifice market earnings or spending capacity for dependent care.

A switch to tax support from a more progressive individual rates rather than head of household status will similarly allow an unmarried dependent caretaker to get support for a number of different caretaking options. The current head of household rate system makes formal ties to dependents the key to the breadwinner's tax shelter. Instead of making formal market income the key to breadwinner's tax support, more progressive individual rates would recognize that many of those who sacrifice market earnings to provide dependent care do not have such formal ties. For example, an unmarried breadwinner's domestic partner or the father of a non-marital child might accommodate job opportunities or work hours to provide

informal caretaking for a dependent, yet only the head of household in the current system would receive substantial tax support for that care.

Nonetheless, the switch to progressive individual rates would not in itself be sufficient to equitably address the affect of dependents on ability to pay taxes. The current system's use of marital status as a proxy for tax support for dependents conflates dependent care and non-dependent caretaking, and treats both groups inequitably and inadequately. Changing to a more equitable system of breadwinner caretaking could help to bring public attention to the need for a more equitable and direct system of tax support for dependent care. Dependents affect a family's ability to pay taxes in a way that is distinct from non-earners who provide services that are unpaid or compensated only informally. For example, dependents add expenses without producing offsetting economic gain (at least in the short run), and they are also persons in need of substantial daily labor and time from others. A more progressive, individualized tax system would be a step toward the goal of providing more equitable support for what Martha Fineman has identified as the "derivative dependency" of those who sacrifice their own market earnings—as well as personal caretaking and leisure—to provide informal dependent care.³¹⁷

This support could be complemented with a system of expanded and refundable credits for dependent care expenses allocated to individual taxpayers. A change to individual filing raises the question how to simply and equitably divide dependent credits among parents or other joint caretakers. Yet expanding non-marital default rules, such as household residency, that are already in place may be fairer than the current marital system, especially combined with more progressive individual rates that would reduce taxes for many who combine earning with dependent caretaking.

Furthermore, the goal of providing "fair aid for breadwinner care" rather than "aid for affluent husband care" emphasizes support for human development, as a central goal of an income tax system based on ability to pay. By more fairly

³¹⁷ FINEMAN, *supra* note 121, at 162.

recognizing the economic, personal and social value of human as well as capital growth, we can provide better ground to support expanded recognition of dependent care as well.

5. Breadwinners' Diverse Care Choices

By channeling tax support for work and family through general progressive rates rather than through a targeted subsidy for a particular family structure, this proposed "breadwinner care" tax policy purposefully accommodates diverse answers to the complex question of what should count as valuable "caretaking." A modest-earning breadwinner whose taxes are reduced by more progressive rates might, for example, use her tax savings to reduce her own formal market work somewhat, perhaps by choosing to quit a second job, to allow for more time for her own informal homemaking or personal caretaking. Alternatively, she could use that tax savings to increase her spending on paid domestic services without sacrificing other spending or savings. Or, she could share that extra money in exchange for informal caretaking help. That informal caretaking could come not just from a non-earning spouse, but also from a breadwinning spouse who combines earning and homemaking, an older relative retired from formal labor but not disabled from domestic labor, a cohabiting domestic partner or same-sex spouse, or relative or friend who is unemployed or underemployed in the formal market.

Alternatively, a modest-earning breadwinner could use reduced taxes to do without domestic services, such as a clean and organized house or good meals, and instead increase financial support to family members in another country or retirement savings, or to spend more on recreation with friends, consumer goods such as a better car or household appliances, or to replace some market earnings with community volunteer work. All of these choices could serve to nurture the present or future social, emotional, economic and physical capacities of the breadwinner, along with the caretaking needs of his or her family or community. Although any of these choices could, in some circumstances, be construed as destructive to the breadwinner or to her family and community, the goal of incorporating breadwinner care into principles of tax equity is not to supervise actual behavior but to better measure theoretical

ability to pay, considering breadwinners' need for caretaking services. Progressive rates do not guarantee that the person earning \$10,000 a year indeed spends more money on basic necessities rather than on harmful addictions, but instead recognizes that in general a person earning \$10,000 has proportionately less capacity than a person earning \$100,000 a year to share income with the public without risking sacrifices in basic necessities. Similarly, by increasing progressivity to also recognize that the first dollars of earned income require proportionately more personally and socially valuable caretaking services, progressive rates do not guarantee the amount or quality of actual caretaking.

6. Family Caretakers

Progressive, individualized taxation could overcome the perceived conflict between support for women as informal caretakers and support for women as market earners. Furthermore, the change from marital to individual taxation does not depend on a normative preference for individualistic, market gain, but instead could work to better support and encourage informal cooperative sharing within family and community. The goal of fair support for breadwinner caretaking can be a means of valuing a diversity of breadwinners and a diversity of caretakers, whether or not their work is commodified as market labor.

With more progressive individual taxation, the paradigmatic homemaking wife—and others specializing in informal labor—would pay at low tax rates on the income to which they have formal ownership, and perhaps even qualify for refundable affirmative tax support. Those specialized homemakers married to breadwinners above low-income levels would lose the “bonus” from current marital income-splitting (assuming those homemakers share in their spouse’s monetary gains). But, by linking substantially increased progressivity to individual taxation, many homemakers with income-pooling breadwinner spouses could nonetheless benefit more over the long term from replacing the superficial tax support of the “marriage bonus” with lower tax rates on modest income, especially given the risks of death, disability, divorce and breadwinner income loss.

In addition to bringing joint gains to many less affluent breadwinner-homemaker families, individual taxation with enhanced progressivity could benefit informal caretakers by shifting tax support to substantive income sharing. In marriages where the breadwinner retains primary control over marital spending or marital gains, the change could increase security for the low-earning caretaking spouse by giving her formal legal title to a refundable credit or to reduced tax liability and perhaps also the benefit of an individual “caretaker account.” A breadwinner would no longer get a tax advantage for using unpaid homemaking services to increase unshared income and assets, and instead would face increased tax liability—at progressive rates—on any increased market gains from the value of a caretaker’s informal services. Additionally, in the case where a specialized homemaker fears exploitation from a breadwinning spouse, individualized taxation would mean the homemaker might increase her own market earnings or even divorce without being subject to the steeper marginal tax rates on secondary earners within marriage or on single earners outside of marriage.

Furthermore, as discussed in Part IV.C, more progressive individual taxation could increase incentives for married high-earners to formally transfer legal rights to income from property or family business to a caretaking spouse. Nonetheless, as Ann Alstott has astutely discussed, tax incentives for formal legal income-sharing provide imperfect protection from exploitation of homemakers by breadwinning spouses, because formal title to income can often be trumped by informal power of an abusive spouse—especially one with formal title to greater income and assets.³¹⁸ Although individual taxation will not fully address the economic inequities facing informal family caretakers, increased incentives for formal income-sharing would provide more economic protection to caretaking spouses than the current system, which encourages concentration of formal control and formal gains in the breadwinner, thereby enhancing both formal and informal advantages of the breadwinning compared to the caretaking spouse.

³¹⁸ Alstott, *supra* note 70, at 2029–30.

CONCLUSION

By replacing the implicit policy of “aid for affluent husband care” with the goal of fair support of caretaking for breadwinners, the tax system could more equitably distribute resources among families and among individual breadwinners. An individualized, more progressive tax scheme would better support the caretaking services on which all workers depend, and would also better support family caretakers themselves, while more equitably recognizing the diverse, complex and variable family forms of this caretaking.

Reorienting tax support from “husband care” to “breadwinner care” could also help promote a view of family caretaking that goes beyond individualized private relationships, particularly the marital family, to broader economic and legal structures that help both families and workers flourish or flounder.³¹⁹ By analyzing the longstanding tax preference for “affluent husband care,” and thereby revealing some of the extensive but highly inequitable public support provided for some people’s breadwinning and caretaking, this Article contributes to criticisms of the idealized self-sufficient family as a myth.³²⁰ Openly acknowledging the tax system’s support for family and work, and making it more equitable, could contribute toward building a vision that recognizes effective support for breadwinners and caretakers requires spending collective resources to enhance public resources. The long term savings from public investments in, for example, health care, public transit systems, cleaner air or better enforcement of laws protecting against crime, discrimination or consumer fraud, may be as important to supporting workers and families as saving private resources through tax reductions.³²¹ By reaffirming truly progressive taxation in place of the pseudo-progressivity of

³¹⁹ See MARTHA FINEMAN, *THE AUTONOMY MYTH* 37–40, 263–91 (2004) (discussing the importance of collective structures of support for family care).

³²⁰ *Id.* at 20–22 (explaining and critiquing autonomy as a myth fundamental to American policy).

³²¹ See Case, *supra* note 96 (noting advantages of support for family caretaking through enhanced public services rather than special parental privileges).

recent marriage tax reforms, tax reforms aimed at fair support for breadwinner caretaking could help point the way toward a society that truly values workers and families at home, in public policy and in the market.