To: Work, Family, and Public Policy Workshop Participants

From: Martha McCluskey, mcclusk@buffalo.edu

Re: April 4 workshop

I’m looking forward to the opportunity to talk with you about my paper, *Taxing Family Work: Aid for Affluent Family Care*. Since it is long, here are some suggestions for focusing your reading: pages 1-24; 30-45; 56-59; 63-72.

Thanks!
Taxing 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 low-income marriages and penalize 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.

---

*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 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.
# Table of Contents

I. Marital Income Splitting as Aid for Affluent Husband Care ........................................... 6
   A. Married Versus Single Primary Breadwinners ...... 6
      1. Breadwinner Bob’s Bonus ..................................... 6
      2. Comparing Single Sophia ................................. 8
      3. Favoring Married Primary Breadwinners .......... 8
   B. Not a “Marriage Bonus” ................................. 10
      1. Excludes Low-Income Marriage .......................... 10
      2. Targeted to One-Breadwinner Marriage .............. 11
      4. Skewed Toward White Husbands Error! Bookmark not defined.
      5. Skewed Toward Relatively Affluent Husbands 13
      6. Not Targeted to Dependent Care .................... 18
   C. Evidence of Husband Care ............................ 19
      1. Contemporary Wives’ Informal Service to Breadwinners.... Error! Bookmark not defined.
      3. Marriage Law’s Historical Focus on Unpaid Husband Care ......................................... 27

II. Rationales for Aid for Affluent Husband Care ...... 30
   A. Equity Between Married and Single Breadwinners? 31
      1. One Income For Two Consumers? ...................... 31
      2. One Income, Two Producers? ............................ 37
   B. Equity Between Married Couples? ...................... 40
      1. Income Distribution Matters ............................ 41
      2. Not a Problem of “Imputed Income” .................. 43
      3. Ignoring Exchange of Income for Services ........ 45
   C. Equity For Breadwinner-Dependent Households? .. 47
      1. Earning and Caring for Dependents ................. 47
      2. Privileging Husband Care over Dependent Care 49

III. Developing and Revising Aid for Affluent Husband Care ........................................... 52
   A. Joint Taxation as Support For Unpaid Affluent Husband Care........................................ 52
   B. The Marriage Penalty as Protection for Affluent Husband Care........................................ 54
   C. Enhanced Aid for Unpaid Husband Care in the 2001-04 Reforms .................................... 55
      1. Expanding Tax Aid for Unpaid Husband Care . 56
      2. Reinforcing Support for Affluent Husband Care 56
D. From Husband Care to Capital Care ...................... 58
   1. Leveraging Support for Upper-Class Wealth .... 58
   2. Burdening Family Breadwinning with the AMT 59

IV. Toward Fair Tax Aid for Breadwinner Care........ 63
   A. Individual Filing..................................................... 63
      1. Tax Equity, Not Just Social Equity .......... 64
      2. Not Only “Secondary Earner Bias”........... 64
   B. Increasing Progressivity........................................... 66
   C. Breadwinner-Caretaker Income Transfers......... 68
   D. Winners and Losers from More Progressive Individual
      Taxation.................................................................. 72
      1. Single Breadwinners................................. 72
      2. Dual Breadwinning Taxpaying Marriages ..... 72
      3. Married Primary Breadwinners............... 73
      4. Heads of Households................................. 74
      5. Breadwinners’ Diverse Care Choices......... 76
      6. Family Caretakers........................................... 77
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 taxpayers. These marriage tax reforms, set to expire in 2010 under a sunset provision, enjoy continuing approval across the political spectrum. The reforms reduced taxes for many dual-earning married couples by increasing what has been called the “marriage bonus.” That bonus, however, does not go to all married taxpayers, but instead directs tax benefits particularly 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. 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.

---


2EGTRRA § 901(a).

3See, 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, CENTER ON BUDGET AND 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).


Tax scholarship and popular commentary have extensively criticized the inequities resulting from past and present marriage-linked tax penalties and bonuses. 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. Why has such a seemingly outdated and inequitable marriage-based tax scheme not only endured but gained so much political ground while alternative policies remain off the table of serious examination or 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.” On the 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

---


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”); Dorothy 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.
competing goals. 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. 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 providers for others. This shift in focus 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.

To put this amount in context as compared to other government spending on family caretaking, the tax system’s “aid for affluent husband care” has exceeded government spending in the classic former family welfare program, Aid to Families with Dependent Children (AFDC). That welfare program, targeting low-income single parent families, was replaced in 1996 with a new system claiming to promote “personal responsibility” by targeting support for single parents to formal market work rather than family caretaking. Recent welfare policy narrowing

---

public support for unpaid family caretaking by low-income single mothers contrasts with the recent tax policy expanding public support for unpaid caretaking by middle and upper income primary-homemaker wives.

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-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 in part a problem of an ideological frame that (intentionally or not) limits imagination about alternatives 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 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.\textsuperscript{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.\textsuperscript{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 understood as tax aid for affluent husband care, rather than 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 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

\textsuperscript{16}Lawrence A. Zelenak, The Declining Progressivity of the Federal Income Tax, \textit{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).

\textsuperscript{17}See Martha T. McCluskey, Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform, \textit{in, Gender Equality: Dimensions of Women's Equal Citizenship} 267 (Linda McClain & Joanna Grossman, eds., Cambridge U. Press 2009) (discussing marriage tax policy in the context of ideas about gender, economic class, and citizenship).
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

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 to 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 for careful bargain-hunting helps Bob save money on food, household goods and

---

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.

19 Assuming an adjusted gross income of $100,000, personal exemptions of $7000, and standard deduction of $10,900, taxable income under 2008 rates for jointly filing married persons would be lower by $13,213. 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.
Taxing Family Work

professional clothes. Hannah’s homemaking also includes renovating, decorating, and landscaping the house the couple purchased; these improvements are likely to enhance their property’s 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 to raise children.\(^ {24}\) They also are concerned that if Hannah remains out of the workforce for long soon her earnings potential will erode significantly.\(^ {25}\) They realize they may need


\(^{21}\) 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 [news accounts of benefits to husbands of having a homemaking wife even in families without dependents].

\(^{22}\) See infra [example of wife improving husband’s medical care].

\(^{23}\) 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 (1998) (arguing for greater valuation for homemakers’ services in wrongful death cases).

\(^{24}\) 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, JESSICA MANVILLE & STEPHANIE BORNSTEIN, CENTER FOR WORKLIFE LAW, UNIVERSITY OF CALIFORNIA, 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).
her income in case of rising living expenses, setbacks in Bob’s career, or other crises.\footnote{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).}

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.\footnote{See supra note 18 (giving calculations for single filing taxpayer under 2008 rates).} 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.\footnote{For a further discussion of tax policy and single persons, see Lily Kahng [forthcoming Hastings L. Rev. 2010 – get permission to cite]. Is there a follow-up on this??}

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 busy work schedule, including housecleaning, professional laundering, frequent restaurant meals, and yard work. Nonetheless, Single Sophia finds that her time free from her law firm job often gets 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 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 and building savings 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 six thousand dollars 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, combining their income. 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.

Second, along with joint taxation, in 1948 the United States also adopted a separate tax rate for married couples that treats marital income as if it were divided between the spouses.

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 operates 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.

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 of a person’s earnings. 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 before

---

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 Untied States have been in the minority of nations that fail to tax married couples as individuals at least to some extent).
31 See Motro, supra note 7 at 1560–68 (illustrating the history and workings of income-splitting); Zelenak, Marriage and Income Tax, 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.
being required to share income with society in general.\textsuperscript{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."\textsuperscript{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 to 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,"\textsuperscript{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, earning $100,000, gets the benefit of a $50,000 earner’s more progressive tax rates.

This tax shelter is not available to all, or even to most, married breadwinners; 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 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.”

\textbf{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)

\textsuperscript{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, 4200, (Jan. 23, 2009). I think the highlighted portion needs to be in CFR format (Rule 14.2) I had this source in articles group and that thought never occurred to me from looking at it, so I’m honestly am unsure.

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

\textsuperscript{36} Id. at 32.
earn incomes below taxable levels, and the majority of those with less than $30,000 in annual income have no tax liability.\textsuperscript{37} Nearly two-thirds of taxpayers in 2006 paid more in payroll taxes than in income taxes.\textsuperscript{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.\textsuperscript{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-shifting between taxpayers has a tax impact.\textsuperscript{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 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 about sixty percent or more 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 $3346\textsuperscript{41} compared to the $6259 tax savings for marriage


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

\textsuperscript{39} See Carasso & Steuerle, supra note 6, at 159, 169 fig. 3 (Fall 2005). 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.

\textsuperscript{40} See MCCAFFERY, supra note 4 at 18, 16 (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).

\textsuperscript{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
if Breadwinner Bob earns one hundred percent of the couple’s $100,000
income. The marital income-splitting benefit is further reduced as spousal
incomes become more equal. If Bob earned $80,000 and Hannah earned
$20,000, their tax gain from 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 in part 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 tax gain from
marriage would be $356. 46 And two taxpayers earning $50,000 in
combined income but splitting earnings $30,000 and $20,000 would get a marriage bonus of one dollar (other things being equal).\footnote{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).}

One-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.\footnote{BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2007 (2009) http://www.bls.gov/news.release/famee.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).} In just over half of marriages, both spouses are employed.\footnote{Id.} In 2005, wives earned an average of thirty-five cents of every dollar of married couples’ income.\footnote{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.\footnote{See, e.g., ECONOMIC 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.}

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 income level 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.\footnote{U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2008 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, tbl. HINC-05, available at http://pubdb3.census.gov/macro/032008/hhinc/new05_000.htm.}

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). In contrast, relatively equal-earning marriages, which do not benefit as substantially from the income-splitting bonus, are concentrated at middle income levels.

Although the 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, 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).

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, although a portion of these dual-earning marriages consist of highly unequal spousal earnings benefitting from marital income-splitting. 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 earner was $47,846). 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). That bonus provides a substantial benefit for middle-

---

53 Dorothy A. Brown, Race, Class and Gender Essentialism in Tax Literature: The Joint Return, 54 WASH. & LEE L. REV. 1469, 1499–1501, 1500 tbl. 3.3. is it necessary to put “1500” in? isn’t it covered by 1499-1501?

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).


56 U.S. CENSUS BUREAU, supra note 52., tbl.FINC-06, available at http://www.census.gov/hhes/www/macro/032008/famine/new06_000.htm (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).


59 See tbl. 1 below.
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.
TABLE 1: Tax Benefit of One-Breadwinner Marriage by Income\(^{60}\)

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

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 2008, although husbands were the sole earner in 19.5% of all marriages in the United States, wives were the sole earner at the much lower rate of 6.9% of all marriages.\(^{61}\)

---

\(^{60}\) This table assumes 2008 rates and a simplified return with standard deductions and no dependents.

The highest rates of primary breadwinning by wives likely occur at income levels too low to benefit from the marital income tax break.\textsuperscript{62} Even when wives earn the majority of middle or upper class family income, they are less likely than primary-earning husbands to have a spouse whose contribution to marital income is relatively marginal. That is, it is likely that a much smaller percent of primary-breadwinner wives than husbands with taxable income earned the sufficiently unequal portion of marital income necessary to get a substantial benefit from the income-splitting bonus. 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).\textsuperscript{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.\textsuperscript{64}

Moreover, in one important respect, the tax system’s income-splitting bonus is not gender neutral. As many have criticized,\textsuperscript{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 only “a legal union between one man and one woman as husband and wife.”\textsuperscript{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 more close 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

\begin{itemize}
  \item\textsuperscript{62} See Lawrence Mishel et al., The State of Working America (2003) 110 & tbl. 1.33 (noting that wives of low-earning husbands contribute proportionately more to family income than do wives of high-earning husbands).
  \item\textsuperscript{63} Brown, supra note 53, at 1492 tbl. 3.1.
  \item\textsuperscript{64} Id. at 1496, tbl. 3.2.
  \item\textsuperscript{65} See e.g., Patricia A. Cain, Heterosexual Privilege and the Internal Revenue Code, 34 U.S.F. L. Rev. 465, 469–71 (2000).
  \item\textsuperscript{66} 1 U.S.C.A. § 7 (2000).
\end{itemize}
extensively. That is because one-earner marriages are much less common among relatively affluent African Americans than white Americans, and because, even within dual-earner marriages, African American husbands and wives are much more likely than white spouses to earn relatively equal incomes. 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.

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 intent) as support for the unpaid family care labor typically done by homemaking wives in one-breadwinner marriages. 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.

68 Brown, Bonus/Penalty, supra note 67 at 1475 n.23–25; Brown, supra note 5 at 287 tbl. 1.2, tbl. 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).
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.
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 receive little or no benefit from marital income-splitting because most spouses providing informal family dependent care are also income earners contributing 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.

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

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, Are Women Opting Out: Debunking the Myth,,CEPR BRIEFING PAPER (Nov. 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.
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 hours more 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 single women and their husbands may reflect a 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 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

\(^{75}\) 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).


\(^{77}\) 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.
lower educational levels and in occupations other than professional, technical, and managerial categories.\footnote{\textit{Id.} at 34–35 tbl. 1.2.}

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.\footnote{\textit{Id.} at 32.} 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.\footnote{\textit{Id.} at 35.} Fifteen percent of workers with fifty hours or more a week in formal employment report that they usually work seven days per week.\footnote{\textit{Id.} at 84.} 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.\footnote{\textit{Id.} at 72, 68 tbl.3.2.}

Although this study noted 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.\footnote{\textit{Id.} at 72.} 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.”\footnote{See \textit{STONE suprana} note 21 at 62.} 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.\footnote{\textit{Id.} at 4–7.}

Although women in upper income marriages have high rates of formal labor market participation,\footnote{\textit{WILLIAMS ET AL., suprana} 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).} rising income for very high-earning husbands can lead to decreased formal employment by wives.\footnote{\textit{Id.} at 4–7.} Examples of high-income one-breadwinner families show how breadwinning husbands can...
gain from increased informal services from wives who have withdraw from formal employment. In one marriage [example?] where the [a?] wife left her job as a lawyer to be a full time homemaker, both spouses noted the benefits both to the children as well as to the high-earning husband. For example, the wife had increased time to plan vacations and decorate their home.90 Discussing his wife’s change from an employed journalist to a full-time homemaker, one 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 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 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

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).
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).
Taxing Family Work

colleagues. Other stories show how even without children or other dependents and even at moderately well-off [high?] 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. 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 stress and tension. 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.

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. 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. 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. 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

98 Id.
99 Id.
102 Id. at 67–75.
Husbands who run a business may depend on their unpaid wives to help with tasks such as bookkeeping, decision-making, managing employees, marketing, or answering the phone. 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.

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, for example increases in healthy behaviors. 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. 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.

In sum, a defining characteristic of the specialized breadwinner-homemaker marriage, especially those that are relatively affluent, is facilitating informal marital caretaking work for primary breadwinners, especially 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, 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 intent, operates as tax support for caretaking services for breadwinners who are particularly

---

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”).
104 Id. at 78, 90–91.
105 Id. at 88–90.
108 Id.
likely to receive many of those services outside of the formal labor market from a non-breadwinning wife.


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 white men with wives earned about eleven percent more than never-married men with comparable labor market characteristics (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 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 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 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’


\(^{113}\) Id. at 2.

market work hours increase. Although most studies have focused on white men, some evidence has showed a wage bonus, though lesser, for married black men as well. In contrast, marriage is likely to bring a wage penalty for breadwinning white women and a much smaller wage bonus for black women. Because this wage effect is targeted to 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. Nonetheless, husbands’ gains from wives’ domestic service plausibly accounts for at least some husbands’ wage advantages. 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. 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 more in their careers early on than otherwise comparable single breadwinning men and married breadwinning women.

Returning to our hypothetical, Breadwinner Bob will not only get a reduced tax rate after marrying Homemaker Hannah, but can also expect a wage increase compared to a single earner with similar experience and

---

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).
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).
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, but rather that wives’ domestic services might 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).
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 between dependent child and parent. Similarly the tax code’s income-splitting provision similarly focuses family tax support centrally on the marital relationship, rather than on dependency relationships. 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. Examining the legal construction of the marital breadwinner-homemaker relationship demonstrates how the tax bonus as a device 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. The husband was entitled to his wife’s earnings and to other economic gain from her labor, and had the right to compel her service and obedience. Legal historian Hendrik Hartog posits that the traditional legal duties of a husband to 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.

---

122 See infra ____ NEED THIS CITE (comparing the marital income-splitting benefit to income-splitting and other tax supports for heads of households).
124 Id. at 156, 150 n. 36, CHECK TO SEE IF n.36 is on pg. 150!!!!
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).
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. Classical political theory linked status as a citizen with political and legal rights to status as a household master commanding the service of a wife and servants. 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. When slavery was abolished, American law continued and even strengthened the idea that marriage is not just a private individual contractual right but is also a relationship within which unequal gender status—a man’s right to “his wife”—was important to public policy and civic virtue. 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.”

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. Despite rejecting the common law rule that a husband 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. 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

---

126 Id. at 101.
130 Stanley, supra note 128, at 29.
131 Id. at 2209–10.
132 Id. at 2203–04 (discussing courts’ reasoning for refusing to enforce wives’ contracts with husbands for compensation for domestic labor).
unenforceable. 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. 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 any agreement the spouses actually entered into.

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 him.” 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.” 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. The modernized “loss of consortium” action in tort specifically recognized the value of wives personal services to husbands, particularly emotion and sexual support. 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.

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

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. L. REV. 1, 31–33 (1996).
134 Silbaugh, supra note133 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).
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.
meaning and rights of the breadwinner-homemaker marital form by protecting and promoting spouses’ unpaid “husband care” for economically successful married breadwinners. Whatever the overt or surface level motivations, or explanations for the income-splitting bonus (and its recent enhancement), its effective targeting of special benefits toward primary breadwinners who fit the traditional paradigm of husband raises the question whether it is best explained as part of this broader policy continuing (albeit in gender neutral form) protection of special support for “husband care.” To answer that question, this Article turns to a scrutiny of the reasons more overtly offered as justifications for this tax bonus.

II. 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 makes 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.

---


142 See INSTITUTE 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).

A. Equity Between Married and Single Breadwinners?

1. One Income For 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.” In their classic analysis of family taxation, for example, 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. 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, and therefore are excluded from marital income-splitting tax benefits. Furthermore, a breadwinner in a federally recognized marriage may not actually or fully share income with a non-earning or low-earning spouse and may even live in an entirely separate household as a number of tax scholars have discussed.

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

---

144 See Motro, supra note 7, at 1523 (explaining and critiquing shared consumption as one of several justifications for marital income splitting).
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).
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”).
“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 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 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, sacrificing some combination of leisure, sleep, and time devoted to her profession, or perhaps she could garner unpaid services from family or friends.

But 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 his or her money to obtain 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 to 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 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 even 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 has no 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.\(^{150}\)

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

\(^{148}\) 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 supra note STILL NEED THIS NOTE [Siegel]; Silbaugh, supra note 133, at 31–33 (discussing Borelli v. Brusseau).
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.\footnote{Joan Williams, Unbending Gender 120–21 (2000).} 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 moral worth rather than on a right to compensation for homemaking.\footnote{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).} 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 disinherita, which at any rate is not based on a theory of equal rights to the breadwinner’s gains.\footnote{See Colby T. Roe, 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).}

There are also practical considerations that make the degree of income-sharing within breadwinner-homemaker marriages particularly subject to the discretion of the income-earning affluent breadwinner. For example, in a lower-income household, a married primary breadwinner may have less ability to hoard consumption since most income will probably go to basic necessities such as housing, food and furniture in which a homemaking spouse can readily share.\footnote{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).} But at relatively affluent income levels a married breadwinner is likely to have more power to avoid sharing gains from earnings with the non-breadwinning spouse.\footnote{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).} 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 to pay down his credit card debt from his personal consumption prior to marriage (which might include, for example, his previous medical or educational expenses, personal goods and services, or gifts to prior girlfriends). In contrast, the transitory and non-commodified nature of spousal domestic services means 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 (especially given [evidenced by?] the economic disadvantages for specialized homemakers likely in

\footnote{Joan Williams, Unbending Gender 120–21 (2000).}
Although a dissatisfied homemaker married to a non-sharing breadwinner may be free to return to work (if the breadwinner does not enforce the homemaking with violence) to procure her own income, after substantial periods of withdrawal from the formal workforce a homemaker’s earning potential may be sharply constrained. 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.

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 relatively few 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.

---

156 See supra TAN _ (discussing the limited rights to property and alimony for homemakers in divorce) WE STILL DON’T KNOW WHAT TAN IS

157 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). Author needs to set up this footnote better in the parenthetical. I suggest just removing it.

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 have a much higher estimate 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. NOT EXACTLY SURE WHAT THE AUTHOR MEANS BY THIS. DOES SHE MEAN THAT COUPLES DIFFER ON WHAT THEY THINK THEIR FINANCIAL WELL-BEING IS? OR SOMETHING ELSE? I don’t think it’s unclear—when asked to estimate their family’s financial worth, wives low-ball and husbands high-ball. J.L. Zagorsky, Husbands’ and Wives’ View of the Family Finances, 32 J. of Socio-Economics 127, (2003).
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 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, or even “leisure,” likely provided by spouses of affluent primary breadwinners. Just as Single Sophia’s indirect or intangible gains 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, 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. 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 people;
her altruism, however, will not count as income-sharing that reduces her tax liability. Only gifts made to organizations formally organized 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. 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. 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 the breadwinners as well as 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 mutual contractual exchange. 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

---

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).

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).
legally attributed to the breadwinning spouse instead should be allocated in part to the homemaker’s labor. 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. In joint contribution theory, however, the primary homemaker is presumed to contribute 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.

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 income-splitting bonus presumes that married primary breadwinners uniquely deserve to have their personal expenses converted into deductible business expenses for tax purposes. 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. 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. 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 exempting initial earnings from taxation. Beyond this basic level, greater consumption on personal goods and services indicates 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.

---

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 Institute 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”).

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. of L. & Econ., 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
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 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 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.

¹⁷⁴ See I.R.C. § 162(a)(1) (West 2010) NOT SURE ABOUT THIS CITE. RULE 12. Don’t think that we should cite West here See Rule 12.8.1, pg 109. (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 (West 2010) (disallowing certain entertainment, amusement, and recreation expenses not directly related to business purposes).
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.\textsuperscript{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 a gendered, racialized, sexualized, and class-based breadwinning status for special public support.

\textbf{B. Equity Among 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 taxpayers.\textsuperscript{178} The current system taxes married couples with similar combined income 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.\textsuperscript{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.

\textsuperscript{177} See Zelenak, \textit{supra} note 4, at 356 (noting that husbands may gain from intangible services from a homemaking spouse, including enhanced status from a “trophy wife”).
\textsuperscript{178} Bittker, \textit{supra} note 11, at 1395; Zelenak, \textit{supra} note 4, at 399–40; McIntyre & Oldman, \textit{supra} note 145, at 1590–92.
\textsuperscript{179} See Motro, \textit{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”).
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).\textsuperscript{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, 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 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-

\textsuperscript{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.

\textit{I HAVE NO IDEA HOW THESE SHOULD BE PROPERLY CITED. Is it available online? Can we just cite it like a website?}
breadwinning couple with a lower standard of living considering income left over for discretionary spending or savings.  

Similarly, beyond modest income levels, higher individual income typically reflects higher pay rates per hour rather than simply 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 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. In the United States labor market, part-time jobs are heavily skewed toward low-security, low-benefit, and low-income work. 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 equal 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 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

---


183 See McCaffery, supra note 4, at 131 (explaining how fringe benefit rules “slant” the employment market to make part-time jobs particularly disadvantageous).
couple may skimp on domestic chores or sleep, sacrificing some quality of life or physical and mental well-being. 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 problem of the income tax system’s focus on money income. 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.

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. 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. 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. 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 plumbing and painting, as well as sewing, laundry and housecleaning.

184 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).

185 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).

186 Bittker, supra note 11, at 1426.

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

188 Id. at 1617.

189 Id. at 1614–16.
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 time inconsistent with general tax equity principles.\textsuperscript{190} 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.\textsuperscript{191}

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.\textsuperscript{192} 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. 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.

Furthermore, progressive taxation limited to commodified income can reveal that, beyond modest income levels, higher income typically means higher pay rates (and often more flexible work hours). It can also reveal 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 reveals that the same nominal

\textsuperscript{190} Id. at 1617.

\textsuperscript{191} 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).
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 as taxable gain the monetary advantage that comes from being an affluent, primary breadwinner married to a primary homemaker. 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.193

The standard analysis describes the non-monetary advantages of one-breadwinner affluent marriages as “imputed income,” typically defined as “self-performed” goods and services.194 That standard characterization obscures the breadwinner’s gains from the primary homemaker’s specialized labor. The non-breadwinning homemaker spouse typically provides informal services not just for herself or himself, but also for a spouse who does less informal household labor.195 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.196 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

---


194 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).

195 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)).
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 gains, 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 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.197

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 among 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 rates that

197 See Motro, supra note 7, at 1527 and accompanying text.
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.\(^{198}\) 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 money 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 $100,000,\(^{199}\) compared to her previous tax of $19,479 on the same income as a single person with no dependents.\(^{200}\)

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 tax than her non-married colleague.

\(^{198}\) See Zelenak, supra note 4, at 339 (describing the inequities of marriage taxation as a problem of progressivity and joint returns).

\(^{199}\) 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 2008 Tax Table. Taxable income of $85,000; tax of $16,319, minus credit of $600 for a total tax of $15,719.

\(^{200}\) A single individual with a $100,000 income, a standard deduction of $5,450 and a personal exemption of $3,500 would have taxable income of 91,050; for a 2008 tax rate of $19,479.
taxes ($15,719 compared to $13,312, assuming a simplified return under 2008 rates). 201

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. 202 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 breadwinners with one or more children. 203 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, 204 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. 205 Even if Heather pays others

201 See supra notes 199 & 200. ARE THE NUMBERS CORRECT? DO THEY WORK OUT?
202 I.R.C. § 21(d) (West 2010).
203 I.R.C. § 21(b)(2) (West 2010).
205 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. NACCRRRA, PARENTS AND THE HIGH COST OF CHILD CARE: 2009 UPDATE (surveying child care referral centers nationwide), at app. 1 22–23. 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.
to do some housework as well as child care, Heather is likely to have many domestic responsibilities to manage in the evenings and on weekends, or perhaps she will forgo many domestic tasks to accept lower standards of living and caretaking for herself and her child. Even with full-time child-care help, parenting is likely to cut into her work time, due to her child’s medical and educational appointments, illnesses, vacations, and scheduling conflicts, among other things.206

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). Like Bob, Heather probably has substantial new living expenses for her new family member, such as health care, clothes, food, and other consumer goods as well as greater housing costs over the long run. Heather’s relatively high income likely gives her enough to pay for adequate child care as well as a relatively safe and comfortable home. However, she may feel she needs to make difficult sacrifices in spending in order to save money in the event she or her child gets seriously ill or she loses her job. She can also expect that her family responsibilities will have some costs and risks for her future earning capacity, such as her ability to make partner or to get new high-paying or high-status jobs. She is likely to have less time than Bob for investments that might pay off in future income growth, such as major home improvements, professional and community networking and leadership, or a romantic life that might lead to household partnership with another high-earner.

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.207 For example, the “kiddie

206 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).

207 See Stephanie Hoffer, Adopting the Family Taxable Unit, 76 U. Cinn. 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).
tax” restricts the amount of income affluent parents can shelter from high tax rates through property transfers to minor children.\textsuperscript{208}

In contrast to the 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” homemaking wife.\textsuperscript{209} 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.\textsuperscript{210} 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.\textsuperscript{211} As one comment noted in hearings on the 1948 reform, marital income-splitting would leave out:

\begin{quote}
[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.
\end{quote}

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.\textsuperscript{213} With these changes, widows or widowers with dependents effectively continue to receive the 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.\textsuperscript{214} 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 homemaking spouse,

\begin{footnotes}
\item[209] McIntyre & Oldman, supra note 145, at 1602.
\item[210] 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).
\item[212] Id. at 196–97 (citing testimony of Paul Foley, Senate Tax Reduction Hearings, 1948, 278, 282).
\item[213] Bittker, supra note 11, at 1418.
\end{footnotes}
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 homemaking 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 homemaking spouse? By making the tax shelter for unmarried dependent caretaking less valuable generally 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.215

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 will pay so little tax that income-splitting would not provide a substantial benefit.216 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.217

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’

215 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).
217 Id.
unpaid care for affluent white husbands over unpaid care for children by mothers.

III. CURRENT POLICY UPDATES HISTORICAL INEQUITIES

The current marital income-splitting rates are a product of historical contingencies as well as theories of equitable taxation. 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. 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 property laws. 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.

The 1948 federal income-splitting reform extended the tax benefits of community property to affluent husbands in other states 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. In reality homemaking wives’ rights to earnings from breadwinning husbands tended to be more a matter of form than substance under community

---

218 Zelenak, supra note 4, at 347.
WHAT HAPPENED TO 219?
220 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).
221 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).
222 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).
property laws.\textsuperscript{224} 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.\textsuperscript{225} 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.”\textsuperscript{226}

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.\textsuperscript{227} 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.\textsuperscript{228} Jones argues that Congressional rejection of a substantive income-shifting requirement was motivated not only by concern over administrative difficulties, but also by a particular ideology of gender and marriage.\textsuperscript{229} For example, she notes that tax expert and legislative counsel Stanley Surrey explains that reform would have the presumably beneficial effect that 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.”\textsuperscript{230}

\textsuperscript{224} 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. \textit{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.

\textsuperscript{225} Jones, supra note 223, at 295.

\textsuperscript{226} \textit{Id.}

\textsuperscript{227} Some suggest that family harmony would be weakened if homemaking wives gained rights to share income from a breadwinning husband. \textit{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).

\textsuperscript{228} \textit{Id.} at 294 n. 252 (citing S. Rep. No. 1013, 80th Cong.,2d Sess. 26 (1948)).

\textsuperscript{229} \textit{Id.} at 294.

\textsuperscript{230} \textit{Id.} at 296 (quoting Stanley Surrey, \textit{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) [supra 211? Or no b/c of different year? Or is that a typo?].
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.\textsuperscript{231} 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.\textsuperscript{232} In 1951, for example, only those with marital income over $10,000 (the equivalent of over $84,000 a year in 2008 dollars\textsuperscript{233}) could benefit from the income-splitting tax shelter.\textsuperscript{234} 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.”\textsuperscript{235}

**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.\textsuperscript{236} 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.\textsuperscript{237}

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.\textsuperscript{238} Because the reduced income-splitting benefit of that system taxed relatively equal-earning spouses \textit{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 reform, for example, a husband

\textsuperscript{231}Kessler-Harris, \textit{supra} note 211, at 194.

\textsuperscript{232}McCaffery, \textit{supra} note 4, at 54.


\textsuperscript{234}See McCaffery \textit{supra} note 4, at 59 (citing Senator Eugene Millikin in a discussion of 1951 reforms proposed by Senator Hubert Humphrey).

\textsuperscript{235}Id. at 59 (citing Randolph E. Paul, Taxation in the United States 611–13 (1954)).

\textsuperscript{236}See Zelenak, \textit{supra} note 10, at 6 (explaining the history of the “marriage penalty”).

\textsuperscript{237}FN. See infra TAN [first sentence after Part III.C] STILL DON’T KNOW WHAT THIS SOURCE IS.

\textsuperscript{238}See \textit{supra} notes 57–60, Part I.B.5.
and wife who each earned $50,000 could be taxed as if one earned roughly $70,000 and the other $30,000. 239

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 taxing separately filing married persons higher than single filing persons. 240 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. 241 However, as Boris Bittker explains, Congress rejected such an option out of concern that it would restore the pre-1948 marital disparity favoring affluent breadwinners who transfer (or at least appear to transfer) substantive rights to monetary income to their homemaking wives. 242

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 rate 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 what those breadwinners would have received if single or separately filing. 243

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. 244 Unfortunately, these reforms solved the dual-breadwinning “marriage penalty” problem of 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 in 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

239 See supra notes 57–60, Part I.B.5.
240 Bittker, supra note 11, at 1429.
241 Id.
242 Id.
243 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.
244 See supra note 1.
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. This change means dual-breadwinning marriages no longer lose part of their tax-free earnings compared to what they would get as single 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. 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. However, these family tax reforms expire in 2010.

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 2001 through 2004 reforms 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 low-earner. Indeed, by returning to the 1948 system of full marital income-splitting for most taxpayers, the recent marriage reforms substantially increases 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 direct gains from

---


246 Kalinka, supra note 245, at 227.

247 Id. at 232–33.

248 See Gregg Esenwien, 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).
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.249 Expanding the fifteen percent marital tax bracket cost twice as much as the child credit and standard deduction changes combined.250 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.251 Married couples earning between $40,000 and $100,000 got the remaining twenty-seven percent.252

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 $100,000.253 Less than twenty percent of married taxpayers filing jointly had an adjusted gross income over $100,000 in 2003,254 so although many of these taxpayers are far from rich they are 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 average benefit of $1064, while the next highest-income fifth will receive an average benefit of $148.255

While the above family tax reforms primarily target support to the upper middle class, they exclude the very highest earners. Because the 2001 through 2004 reforms 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 high-earning dual-breadwinning married taxpayers face further penalties compared to what they would pay as two individuals filing singly or as

249 Carasso & Steuerle, supra note 6, at 162.
251 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).
252 Id.
253 Id. at tbl. 2.
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 law changes provided substantial tax reductions skewed to favor the rich. The 2001 reform package reduced tax rates for high earners. These reforms, like the family tax reforms, were phased in gradually and are subject to the 2010 sunset provision. 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. 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. 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. Furthermore, that reform package provided for gradual reduction of estate and gift taxes, and for eliminating the estate tax in 2010. 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

---


258 MAJOR ENACTED TAX LEGISLATION, supra note 256.

259 Id.
this favorable tax rate to dividends which were previously treated as ordinary taxable income.\(^{260}\)

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 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% ($5790) for top quintile taxpayers.\(^{261}\) 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).\(^ {262}\)

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.”\(^ {263}\) 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, even when out of reach, 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.\(^ {264}\) Federal tax law’s Alternative Minimum Tax (AMT) provision requires taxpayers with adjusted gross incomes above a certain level of exempt income to calculate taxes under a separate system in addition to the regular income tax, and then to pay whichever produces the higher tax bill.\(^ {265}\) The AMT was established in 1969 to ensure upper

\(^{260}\) Burman & Kobes, supra note 257.


\(^{262}\) Id.

\(^{263}\) See Zelenak, supra note 16, at 182–84 (discussing the politics of the tax cuts).

\(^{264}\) Id. at 172.

\(^{265}\) See I.R.C. § 55 (West 2010).
income taxpayers would not use tax credits, deductions and other “loopholes” to avoid substantial income tax liability.\(^{266}\) 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.\(^{267}\) While less than one percent of taxpayers paid under the AMT in 2000,\(^{268}\) if Congress does not change exemption levels by 2010 more than a third of taxpayers will be subject to the AMT,\(^{269}\) with two-thirds of these AMT taxpayers having incomes between $75,000 and $200,000.\(^{270}\)

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.\(^{271}\) For 2009, the exemption levels were temporarily changed to $46,700 for single filers and heads of households, and $70,950 for married persons filing jointly.\(^{272}\) Without these “patches,” the exemption amounts would fall to $33,750 and $45,000 respectively.\(^{273}\) 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.\(^{274}\) For example, the AMT “fix” for 2009 was tied to reductions in proposed funds for public education and Medicaid,\(^{275}\) while the 2008 AMT adjustment helped clinch Democratic support for highly unpopular legislation rescuing failing financial institutions.\(^{276}\) Despite the political unpopularity


\(^{269}\) Leiserson & Rohaly, supra note 267, at tbl. 1, Aggregate AMT Projects 2007-2018.

\(^{270}\) Id. at 7.


\(^{272}\) I.R.C. § 55(d)(1)(a) (West 2010).

\(^{273}\) Distribution of 2001-2006 Tax Cuts, supra note 261, at 4.

\(^{274}\) 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).

\(^{275}\) Alec MacGillis, Despite Stimulus Funds, States to Cut More Jobs, Wash. Post (suburban ed.) May 12, 2009, at A04.

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.277 In 2010 it is likely to cost more to repeal the AMT than to repeal the regular income tax while keeping the AMT.278

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.279 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.280 The AMT applies the same income brackets to married and single taxpayers,281 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.282 For example, two single breadwinning taxpayers like Dominic and Daniela would each get $46,700


278 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).

279 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).


282 Leiserson & Rohaly, supra note 267, at 6.
of adjusted gross income free from AMT (under 2009 rates), for a combined exemption of $93,400. If those 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 will replace the regular income tax system for 43.5% of tax filers with two children, and almost half of those with three or more children.283

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 over income from labor.284 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 backhanded way of charging the tax cuts for upper-class “wealth care” in the early 2000s to the more affluent middle-class.285 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

283 Leiseron & Rohaly, supra note 267, at 5–6.
284 See Burman, Gale & Rohaly, supra note 280, at 9; I.R.C. § 55(b)(3) (West 2010).
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.286

IV. 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 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 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.287 Yet as Edward McCaffery comments, “separate filing remains a distant dream for a small handful of feminist-oriented reformers.”288 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 pits “married couples’ equality” against “marriage neutrality.” 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). The 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. On the other hand, empirical evidence also casts doubt on the extent of marital income pooling, 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.

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.

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.

2. Not Only “Secondary Earner Bias”

---

289 See supra notes 9–10 and accompanying text.
290 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).
292 See Motro, supra note 7, at 1523.; Kornhauser, supra note 147, at 102; Zelenak, supra note 4, at 351–53.
293 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”).
294 Alstott, supra note 70, at 2014–15.
Tax scholar Edward McCaffery has extensively and insightfully discussed the social harm of the marital tax system as a problem of “secondary earner bias” discouraging market work by wives of affluent breadwinners.McCaffery, supra note 4, at 19–20. 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.Id. 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.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.).

McCaffery acknowledges that individual filing would not remedy this problem of secondary earning. Instead, he suggests directly targeting 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.Id. McCaffery’s analysis of the “secondary earner problem” leads him to frame the case for reform as a case for taxing married women less and taxing married men more.Id. at 278 (countering objections of “male-bashing”). 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.Id. at 2035–36; see also Laura Kessler, Transgressive Caregiving, 33 FLA. ST. 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).
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, while a non-earning wife (like Homemaker Hannah) considering earning $30,000 in addition to her husband’s $100,000 income would lose $7500 to taxes (based on 2008 rates with a simplified return). Increased tax support for married women would further disadvantage unmarried dependent caretakers and unequal-earning couples not in a federally-recognized marriage and 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 tax 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

---

302 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.

303 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.
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 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. 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.

Of course, recent anti-progressive tax reforms underscore the problem that policies supporting increased progressivity run counter to much recently prominent theory and recently powerful politics. But linking the broad issue of progressivity to the issue of marriage taxation could help to

---

question that politics. 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. 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 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. 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. But this problem could also be partly mitigated by linking individual taxation to substantially increased

---

305 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).


progressivity. The greater unfairness, arguably, is a tax system that allows
the many with high incomes and extensive wealth to avoid paying into and
maintaining government programs and social and physical infrastructures
that contributed 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 would
likely induce many of those spouses to give up some luxuries in the
interest of spreading resources to families with more modest income. That
result would 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.308 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
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.309 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 ends.310

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 1948.311 Preserving this general rule under

308 See supra TAN __[Part III.C.2.] STILL HAVE NO IDEA WHAT TAN IS
309 See supra Part II.B.3 (explaining that income-splitting ignores formal mark
310 See supra note ___ and accompany text [Part III.C.2] (discussing income-stacking
311 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).
individual taxation would be consistent with the tax treatment of unmarried breadwinners or married dual-breadwinners, who also cannot deduct the cost of domestic services from income save for limited dependent care expenses. Indeed, this Article’s goal of fair support for breadwinner care aims to provide more equitable tax recognition of the costs for workers, and 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 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. 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. 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. In addition, tax penalties could be designed to link allocation of income for tax purposes to long-term ownership rights. For example, by requiring a high-income spouse 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 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

312 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).
313 I.R.C. § 21 (West 2010).
314 See supra note 169 and accompanying text (discussing the Poe v. Seaborn ruling that federal tax law should treat marital income as equally divided among spouses for married couples in community property states).
315 See supra note ___ and accompanying text. STILL NEED THIS CITE
316 See Davis, supra note 287, at 246–48 (discussing possible tax rules for evaluating marital transfers under an individualized system).
shares that income with his non-earning homemaking wife. 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 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, 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” which exempts the richest taxpayers.\(^{318}\) 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 they could expect decreased tax burdens, when compared to the current system, in the event that a job loss or capital market crisis pushes them into lower income categories or in the event of marriage to another high earner.

2. **Dual Breadwinning Taxpaying Marriages**

\(^{318}\) See *supra* Part III.C.2.
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 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 for example, 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 who 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 period of dependent caretaking of preschool children, ill relatives, or for the spouse’s recovery from an 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.\(^{319}\) 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 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

\(^{319}\) See supra Part II.C.2.
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 inequitably and inadequately. Changing to a more equitable system of breadwinner caretaking could help to reiterate/underscore 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.320

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

320 FINEMAN, supra note 121, at 162. [should this be “NEUTERED MOTHER” as per the hereinafter? Do we need the hereinafter?]
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, including both human pleasure and human productivity, as a central goal of an income tax system based on ability to pay. By more fairly recognizing the economic and social value of human as well as capital development, 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 her financial support to family members in another country or her 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 or his 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 versus 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 or him 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, supra, 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.321 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.

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.322 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.323 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 that turns on spending of 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

321 Alstott, supra note 70, at 2029–30.
323 Id. at 20–22 (explaining and critiquing autonomy as a myth fundamental to American policy).
families as saving private resources through tax reductions.\textsuperscript{324} By reaffirming truly progressive taxation in place of the pseudo-progressivity of 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.

\textsuperscript{324} See Case, supra note 96 (noting advantages of support for family caretaking through enhanced public services rather than special parental privileges).