

TAX POLICY AND FEMINISM: COMPETING GOALS AND INSTITUTIONAL CHOICES

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Introduction	2002
I. Five Feminist Tax Proposals: Competing Goals and Institutional Complexity	2006
A. Individual Filing and the Case for Equal Treatment in Taxation	2009
1. "Tax Neutrality" and Equal Treatment	2011
2. The Uncertain Consequences of Individual Filing	2016
a. Tax Rate Cuts and Wives' Labor Supply	2017
b. Individual Filing, Gender Role Change, and Women's Economic Well-Being	2022
3. Individual Filing and the Distribution of Income Within the Family	2026
a. Individual Filing and "Ability to Pay"	2026
b. Individual Filing and Intrafamily Redistribution	2029
4. Conclusions	2031
B. Encouraging Women's Market Work: Marginal Tax Rate Cuts for Working Wives	2033
1. Three Feminist Objections	2034
2. Institutional Limitations	2039
3. Conclusions	2041
C. Assisting Caregivers Through Family Allowances	2042
1. Family Allowances and Conflicting Feminist Goals	2045
2. Toward a Feminist Middle Ground	2047
a. Family Allowances, Gender Roles, and Work ..	2047

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b. Family Allowances and Women's Economic Well-Being	2049
c. Intrafamily Redistribution, Revisited	2050
3. Conclusions and a Word on the Costs of Compromise	2053
D. Revisiting the Issues: The Dependent Care Tax Credit and Feminist Proposals for Social Security Reform	2056
1. The Dependent Care Tax Credit	2056
a. The DCTC As a Compromise Among Competing Goals.....	2056
b. Conclusions	2059
2. Feminist Proposals for Social Security Reform	2059
a. Equal Treatment and the Spousal Benefit Rules	2061
b. Assisting Caregivers Through Homemakers' Credits.....	2063
c. Earnings Sharing: Another Compromise Solution	2064
d. Conclusions	2066
II. Beyond Taxation: A Comparison of Tax and Other Legal Institutions and the Potential of Legal Coordination	2066
A. Family Law	2067
1. Child Support Assurance	2070
2. Intrafamily Redistribution Through Family Law ...	2072
B. Labor-Market Regulation and Mandated Family Leave	2074
C. Welfare Policy	2077
Conclusion	2080

INTRODUCTION

Despite the dramatic increase in women's labor market participation in recent decades, women continue to perform a disproportionate share of "family labor," or the unpaid work of caring for children and other family members.¹ Feminists² have long been concerned that the gendered division of family labor reduces women's wages,³ contributes to

1. For data on labor-force participation, see U.S. Dep't of Commerce, Statistical Abstract of the United States 399-413 (1995) [hereinafter 1995 Statistical Abstract]. For data on women's family labor, see Victor R. Fuchs, *Women's Quest for Economic Equality* 60-61 (1988); Frances K. Goldscheider & Linda J. Waite, *New Families, No Families? The Transformation of the American Home* 110-11 (1991); David H. Demo & Alan C. Acock, *Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?*, 42 *Fam. Rel.* 323 (1993).

2. For my working definition of this contested term, see *infra* text accompanying note 10.

3. See Gillian K. Hadfield, *Households At Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 *Geo. L.J.* 89, 89 (1993).

the high and disproportionate rate of poverty among single mothers,⁴ limits married women's autonomy within the marital household,⁵ and circumscribes women's life choices and social and economic power.⁶

Although many feminists agree that legal reform should address the economic and social consequences of the gendered division of family labor,⁷ they differ significantly in their objectives and policy prescriptions.⁸ Feminists may seek to increase women's autonomy, economic well-being, power, or happiness. Feminist policy prescriptions also differ, although they tend to pursue one of three main goals. Some feminists advocate *equal treatment*, or the application of the same legal rules to men and women, in order to eliminate legal biases that discourage women's market work and reinforce traditional gender roles. Others favor policies that would not only eliminate legal biases but affirmatively *encourage women's market work* in order to change gender roles and enhance women's economic self-sufficiency. A third group argues that instead of trying to change women's behavior, public policy should provide additional income transfers and other *assistance to caregivers* in order to directly improve their economic security and social status.⁹

This Article considers what tax policy might contribute to a feminist legal agenda that seeks to advance one or more of these goals. This Article assumes that feminist objectives are worth pursuing in order to focus on institutional choices—i.e., how to design tax law changes in ways that are most likely to achieve feminist goals. Although “feminism” might be defined in many ways, I use the term here very broadly to encompass the objectives of improving women's autonomy, economic well-being, or power.¹⁰ This definition does not imply that feminists are not also con-

4. See Nancy Folbre, *Who Pays for the Kids?* 189–91, 204–206 (1994).

5. See *infra* text accompanying notes 116–122.

6. See Goldscheider & Waite, *supra* note 1, at 10; Arlie Hochschild, *The Second Shift* 9–10, 196, 257–66 (1989); Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *Geo. L.J.* 2227, 2242–47 (1994).

7. Scholars argue, for example, that the gendered division of labor creates barriers to equal economic and political opportunity, fosters systematic power differences within the family and in society, and allocates the social costs of caregiving to women. See Folbre, *supra* note 4, at 104–116; Susan M. Okin, *Justice, Gender, and the Family* 134–39, 174 (1989); Carole Pateman, *The Patriarchal Welfare State*, in *Democracy and the Welfare State* 231, 235–38 (Amy Gutmann ed., 1988).

8. See Robin West, *Jurisprudence and Gender*, 55 *U. Chi. L. Rev.* 1, 12–42, 58–72 (1988).

9. For a richer description of these goals, see *infra* text accompanying notes 17–25.

10. See Deborah L. Rhode, *Justice and Gender* 5 (1989) (noting different connotations of term and using term “in its most general sense” but distinguishing among strands of feminist thought where necessary). Given the multiple and contested meanings of “feminism,” the broad definition used here would encompass arguments about improving women's circumstances made by proponents who would not necessarily identify themselves as “feminists.” Another issue that arises in any feminist project is that legal analyses that focus on gender alone may obscure differences *among* women based on class, race, or sexual orientation. See Mary Becker et al., *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously* 118–54 (1994). Although this Article focuses

cerned about men, children, and society as a whole, or that other goals are not important. Instead, the definition simply helps isolate, for purposes of analysis, arguments about how tax policies might assist women.

This Article argues that tax policy can make an important contribution to a feminist legal agenda, but that some prior scholarship has overlooked the normative and institutional complexity of translating feminist goals into concrete policy prescriptions. Tax policy is a major form of economic regulation, with a significant financial impact on many women and families, and a number of scholars have recommended tax law changes intended, at least in part, to improve women's lives by changing the economic incentives and rewards for women's market work and family labor.¹¹ The major proposals include the adoption of individual (rather than joint) filing of income tax returns by married couples; a special, low tax rate schedule for married women; family allowances; an expanded dependent care tax credit ("DCTC"); and reforms in the Social Security payroll tax and benefits rules.¹²

This Article suggests that tax law changes, particularly in combination with other legal reforms, could improve the economic well-being of families with children or help ease women's labor-force participation. This Article also shows, however, that feminist arguments for these tax proposals have overlooked important conflicts among feminist goals and have overstated the capacity of incremental financial incentives and entitlements to change gender roles and improve women's economic well-being and power within the family. A closer analysis suggests four principal conclusions:

First, any feminist tax proposal incorporates normative judgments about the best way to help women, and none of these norms are uncontroversial, even among feminists. This Article considers three feminist goals that tax policy proposals might serve—achieving equal treatment, encouraging women's market work, and assisting caregivers¹³—and shows how each proposal faces difficult but inevitable tradeoffs among them. A better understanding of these competing goals highlights some striking—but often unacknowledged—tensions in conventional arguments for these tax proposals. For example, feminist arguments for "tax neutrality" or eliminating "biases" in taxation are really claims about the goal of equal treatment, which is enormously contested

primarily on gender, further work exploring the policy implications of differences among women would be extremely useful.

11. This Article uses the standard term "market work" to describe paid labor outside the home. "Family labor" is used to describe the unpaid work of caring for children and other family members.

12. For descriptions of these proposals and citations to the leading articles that discuss them, see *infra* notes 26–38, 128–134, 170–185, 231–245, 246–280 and accompanying text.

13. "Caregivers" are women or men who perform family labor. For a discussion of alternative feminist views on public policy toward caregivers, see *infra* text accompanying notes 22–25.

in feminist theory. Further, taking seriously the feminist goal of assisting caregivers poses a fundamental challenge to individual filing and other prominent feminist tax proposals that focus primarily on reducing tax rates on women's market earnings.

Second, proponents of tax law reforms have tended to overstate the impact of incremental tax incentives and income transfers on women's (and men's) attitudes and behavior. Tax law changes can supplement family incomes and modestly increase women's labor force participation, but these limited achievements—although they may be well worth having—do not necessarily advance more ambitious feminist goals. Despite proponents' claims, it is extremely difficult to use tax law rules to change the division of family labor within the household, to improve women's economic well-being, or to increase women's financial power within the family. This constraint is not unique to tax law, but instead reflects the limited capacity of legal rules governing financial entitlements to change deeply entrenched social norms about gender roles.

Third, a better understanding of these issues suggests that some tax law reforms are better able to achieve their underlying goals than are others. Although individual filing is a standard feminist prescription for tax law reform, a closer look suggests that some key feminist arguments for individual filing are weaker than proponents have recognized. Arguments for market work tax incentives for wives also rely on some particularly contingent empirical assumptions about the effects of incentives on behavior. In contrast, the feminist case for family allowances is somewhat stronger than typically portrayed, and an expanded dependent care tax credit¹⁴ could both facilitate women's market work and modestly assist some caregivers.

Finally, a crucial but often overlooked question is whether tax policy is likely to be more or less effective in achieving feminist goals than alternative changes in other legal regimes, including family law, welfare policy, and labor-market regulation. A comparison of institutional capabilities suggests that tax policy has comparative advantages over other legal measures but also notable weaknesses, and that other legal regimes face similar constraints in using financial incentives and entitlements to change attitudes and behavior. The analysis also suggests, however, that coordination between tax rules and other legal rules could draw on the diverse strengths of different legal regimes to expand the institutional options for feminist legal reform.¹⁵

Although portions of this Article highlight the limited power of tax policies to implement feminist goals, let me emphasize that the Article is not antifeminist. I strongly sympathize with the feminist project of improving women's circumstances through law, and the point of the Article is not to deny the possibility of advancing feminist goals, but to insist on a

14. For a discussion of the DCTC, see *infra* text accompanying notes 231–245.

15. See *infra* Part II.

more careful and complex analysis. Ultimately, a better understanding of the normative and institutional issues at stake can enhance the credibility of feminist tax proposals and can help focus attention and limited resources on legal reforms with the greatest potential for achieving their goals.

I. FIVE FEMINIST TAX PROPOSALS: COMPETING GOALS AND INSTITUTIONAL COMPLEXITY

This Part considers what several prominent tax proposals might do to implement three central feminist goals. These three goals represent the major objectives of feminist proposals for tax (and other legal) reforms intended to address the economic disadvantage for women that is created by the gendered division of market and family labor.¹⁶

The first goal is equal treatment, or the idea that men and women should face the same legal rules so that they can make equally undistorted decisions.¹⁷ "Equal treatment" is sometimes used to mean only formal equality, or the idea that legal rules should use gender-neutral language, but I use the term here in the still conventional but slightly broader sense of requiring equal treatment of "similarly-situated"¹⁸ men and women.¹⁹ Proponents of equal treatment posit that women's free

16. These three goals do not correspond precisely to common categories of feminist norms as delineated in feminist theory. See, e.g., Martha A. Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* 39–43 (1995) (distinguishing equality feminism, postegalitarian feminism, and dominance feminism); Mary Becker, *Strength in Diversity: Feminist Theoretical Approaches to Child Custody and Same-Sex Relationships*, 23 *Stetson L. Rev.* 701, 701–704 (1994) (offering four-part classification of feminist theory into formal equality, MacKinnon's dominance approach, West's hedonic approach, and Radin's pragmatic approach); Cass R. Sunstein, *Feminism and Legal Theory*, 101 *Harv. L. Rev.* 826, 827–29 (1988) (reviewing Catharine A. MacKinnon, *Feminism Unmodified* (1987)) (classifying feminist theory into "difference," "different voice," and "dominance" approaches); West, *supra* note 8, at 12, 68 (discussing various approaches, such as liberal, cultural, or radical). Although these are useful analytic categories for comparing feminist theoretical approaches, they do not always yield clear policy directions: for example, would market work incentives or assistance to caregivers be the best way to improve women's power, subjective happiness, or autonomy? This Article begins by defining three common feminist policy goals and then evaluates the potential for each kind of policy to advance underlying, substantive goals relating to autonomy, well-being, happiness, and power.

17. See Becker et al., *supra* note 10, at 51 (characterizing formal equality as "giv[ing] women and men the same choices"); cf. Martha A. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* 20–22 (1991) (contrasting rule equality, or "sameness of treatment," with equality of result).

18. This formulation reveals an inherent ambiguity in the equal treatment goal. Because it is not always obvious when men and women are similarly situated, it is not necessarily clear when equal treatment is appropriate, and feminists have debated the issue in a variety of contexts. See Fineman, *supra* note 17, at 21. The analysis below extends these debates to taxation in describing alternative interpretations of equal treatment. See *infra* text accompanying notes 135–136 and 188.

19. See Becker et al., *supra* note 10, at 51; Fineman, *supra* note 17, at 20–30. For a similar extension of formal equality, see Becker, *supra* note 16, at 701. This distinction

choices will maximize their autonomy and well-being, once legal barriers to those choices are removed.²⁰ Equal treatment claims in taxation often focus on eliminating tax biases against women's market work, and advocates argue that removing these distortions can help change traditional gender roles and help women become economically self-sufficient.

The second goal is to encourage women's labor force participation. Some feminists argue that equal treatment is insufficient to improve women's autonomy, power, and economic well-being, and that a stronger push toward the labor market is needed to overcome women's (and men's) preferences for traditional gender roles, which leave women economically disadvantaged. Some feminists contend that women's nominally free choices about market work and family labor are unduly influenced by social conditioning that leads women *and* men to favor women's family labor over market work, and that women's "true" preference would be to work more, so that a market work incentive is appropriate.²¹ Others take no position on whether women's preferences are "real" but simply argue that women would be economically better off and less dependent on men if they worked more. The goal of encouraging women's market work overlaps with the equal treatment goal, because eliminating legal biases against women's market work could lead them to work more. Advocates of equal treatment insist that the two goals are distinct, however, because the second goal would go beyond equal treatment to take special measures to change women's preferences and gender roles. Although the analysis of specific proposals below suggests that the line between equal treatment and other feminist goals is not as crisp as this account suggests, it is useful to begin with the conventional distinction.

The third goal is to assist caregivers directly through income support and other economic aid. Some feminists argue that caregivers, who are disproportionately women, perform socially important work and should be compensated for that work. On this view, the proper solution to the economic disadvantage of caregiving work is not to change women's behavior or preferences, but instead to help women as they are by improving the economic status of family labor.²² Some feminists see assistance

emerges clearly in the discussion of individual filing below. Proponents argue that nominally gender-neutral rules in fact have a disparate impact on men and women, given women's economic status as "secondary" earners.

20. See Fineman, *supra* note 17, at 20–30.

21. See Folbre, *supra* note 4, at 99; Rhode, *supra* note 10, at 165–67 (1989); Joan C. Williams, *Deconstructing Gender*, 87 Mich. L. Rev. 797, 829 (1989). See generally Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. Chi. L. Rev. 1129, 1158–39, 1147–57 (1986) (describing endogenous preferences produced by existing legal structures, including "adaptive preferences," which reflect psychic accommodation of limited opportunity sets).

22. See Fineman, *supra* note 16, at 161–64, 216–17, 230–33; Folbre, *supra* note 4, at 124, 258; Okin, *supra* note 7, at 175–80 (advocating measures to support parenting and encourage equal sharing by women and men). This argument is sometimes associated with "cultural" feminism. See, e.g., West, *supra* note 8, at 13–29 (defining cultural feminism). The term "cultural feminism" is troublesome, however, because it often

to caregivers as primarily a transition policy, needed to protect older homemakers but largely unnecessary for younger generations of women.²³ Other feminists argue that, even in the long run, women or men should be able to choose to engage in the socially important work of caregiving and should not suffer economic harm as a result of that choice.²⁴ They acknowledge that current policies, like welfare programs and private child support rules, provide a degree of income support for some caregivers but argue that current programs are inadequate or stigmatizing.²⁵

The analysis below shows how these three goals inevitably conflict with one another. The analysis also looks behind these policy goals to explore whether proposals that literally achieve equal treatment, encourage women's market work, or assist caregivers, can actually further the underlying, substantive goals of enhancing women's autonomy, well-being, and power.

This Part considers five specific tax proposals, which illustrate the most prominent approaches to feminist tax reform. The discussion begins by considering proposals for individual filing and reduced marginal tax rates for wives, because these proposals exemplify the first two goals, equal treatment and encouraging women's market work. The discussion then shows how family allowances and an expanded DCTC offer different compromises between the goals of encouraging market work and assisting caregivers. Finally, the analysis considers several feminist proposals for Social Security reform, which illustrate particularly clearly the trade-offs among competing goals.

denotes controversial beliefs about women's psychology and moral reasoning that feminists concerned about the economic plight of caregivers do not necessarily share. There is no consensus among feminists on whether women's continuing responsibility for family labor reflects biological, psychological, or culturally imposed differences between the sexes. Nor is there agreement on whether women's current emotional commitment to family labor should be celebrated or changed.

23. See generally Rhode, *supra* note 10, at 153–54 (describing needs of older displaced homemakers in divorce reform); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. Cin. L. Rev. 1, 79–80 (1987) (arguing that in short term, it is necessary to take measures to support women “who are trapped in circumstances neither they nor their husbands anticipated, and that they cannot now avoid”).

24. See Fineman, *supra* note 16, at 230–33.

25. The second and third goals also overlap to some degree: some feminists argue that the best way to assist caregivers is to facilitate the combination of market work and family labor. See, e.g., Barbara Bergmann, *The Economic Emergence of Women* 302, 310–313 (1986). Not all feminists agree, however, and again it is useful for purposes of analysis to treat the two goals separately in order to see the tensions and possible accommodations between them.

A. Individual Filing and the Case for Equal Treatment in Taxation

Under current law, married couples typically file joint tax returns, which calculate joint tax liability based on a couple's aggregate income.²⁶ Many scholars have argued that joint taxation inappropriately subjects wives' market earnings to a high marginal tax rate. Although the joint return applies a formally gender-neutral tax rate schedule to a couple's aggregate income, wives are often viewed as "secondary" workers, because they typically earn less than husbands and their jobs often are perceived as more dispensable.²⁷ The result under joint filing is that a married woman's initial *marginal* tax rate is determined by her husband's earnings. Single workers and married men face a marginal tax rate schedule that starts at zero and rises gradually as earnings rise, but wives, as secondary earners, face a marginal tax rate schedule that begins in the tax rate bracket determined by their husband's earnings.²⁸ A number of scholars have objected to this differential in taxation and have recommended the replacement of joint filing with a system of mandatory individual filing.²⁹ Under individual filing, husbands and wives would file separate tax returns, and all workers—married or single, male or female—would pay tax according to the same rate schedule. Thus, a wife would face a marginal tax rate no greater than the rate applied to a married man or a single worker with the same income.³⁰

26. See I.R.C. § 1(a) (1994). Married couples may file separate returns, but there is rarely an advantage to doing so, and most couples file jointly. See IRS, U.S. Dep't of Treasury, Pub. No. 1304, *Individual Income Tax Returns 1992*, at 35 (rev. 1995) (tbl.1.3) (showing, for 1992, approximately 48 million joint returns and 2.4 million returns of married individuals filing separately).

27. As wives earn a larger share of household income, however, their status as "secondary" workers may be changing. See Maria Cancian et al., *Working Wives and Family Income Inequality Among Married Couples*, in *Uneven Tides* 195, 205–07 (Sheldon Danziger & Peter Gottschalk eds., 1993).

28. See Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 *Buff. L. Rev.* 49, 52–54 (1971); Pamela B. Gann, *Abandoning Marital Status As a Factor in Allocating Income Tax Burdens*, 59 *Tex. L. Rev.* 1, 42 n.137 (1980); Harvey S. Rosen, *Tax Illusion and the Labor Supply of Married Women*, 58 *Rev. Econ. & Stat.* 167, 167 (1976).

29. See Alicia H. Munnell, *The Couple Versus the Individual Under the Federal Personal Income Tax*, in *The Economics of Taxation* 247, 263–65 (Henry J. Aaron & Michael J. Boskin eds., 1980); Blumberg, *supra* note 28, at 95; Gann, *supra* note 28, at 46; Lawrence Zelenak, *Marriage and the Income Tax*, 67 *S. Cal. L. Rev.* 339, 371 (1994). Although it would be possible to enact a system of optional separate filing, which would permit couples to elect to file jointly or separately, the text focuses on mandatory individual filing, which would be necessary to ensure the elimination of the secondary-earner marginal tax rate bias.

30. In contrast to the account in the text, some analysts view joint filing as subjecting husbands and wives to the *same* marginal tax rate, because a dollar of extra earnings by either one would be taxed at the couple's marginal tax rate. See John Piggott & John Whalley, *The Tax Unit and Household Production* 1–2 (National Bureau of Econ. Research Working Paper No. 4820, 1994) (suggesting that, in a system of individual filing with progressive marginal tax rates, lower-earning secondary workers will pay tax at a lower rate than primary earners). If the decision is whether a wife should begin to work, or go

Individual filing would have distributional as well as incentive effects. Individual filing would redistribute tax liability among couples at the same income level, tending to raise the average tax rates of single-earner couples and reduce the average tax rates of two-earner couples.³¹ This effect is the inevitable product of removing the secondary-earner bias in a system with progressive marginal tax rates. Under joint filing, a couple's tax bill is determined by its total income, so that a single-earner couple and a two-earner couple with equal *total* incomes pay the same tax liability. Individual filing, in contrast, tends to impose higher taxes on single-earner couples than on two-earner couples with the same total income, when marginal tax rates are progressive, because the single earner's higher wages are taxed at a higher marginal rate.³²

Because this Article is concerned with tax proposals that seek to change the tax treatment of women's market work or family labor, it focuses on the secondary-earner rationale for individual filing, but another important argument for individual filing is based on the distortion that joint filing creates in marital choices.³³ Joint filing creates a "marriage penalty" for many two-earner couples (i.e., two-earner married couples pay a higher total tax than two single individuals with the same earnings), and some scholars are concerned that the differential taxation of married and single workers may discourage marriage. Individual filing would

from part-time to full-time work, it seems likely that the change will be evaluated as if the wife's first dollar of earnings is taxed at the couple's marginal tax rate, as in the standard account. On the other hand, if the decision is whether a working wife *or* husband should work a few more hours, the consequences will also be evaluated at the couple's marginal tax rate. Thus, the standard account seems implicitly to rely on the proposition that husbands' hours and wages are fixed and that wives' work is relatively discretionary.

31. Although proposals for individual filing are not always explicit on this point, and a variety of distributional outcomes are possible depending on the new rate structure, to keep the analysis simple I assume that individual filing would be structured so that it would not shift tax burdens across income classes but only between two-earner and single-earner couples in the same income class. Individual filing could also change the tax liability of single individuals, if the individual rate schedule must be raised in order to make up revenue lost by the move to individual filing. For an analysis of individual filing under the 1976 rate schedule, see Munnell, *supra* note 29, at 267–71. Munnell's plan shows an increase in the taxes of single-earner couples, a decrease in the taxes of two-earner couples, and no change in the taxes of individuals other than heads of households, whose taxes would increase. (Munnell's plan loses revenue; a more realistic plan probably would increase the basic rate schedule on individuals.) See *id.*

32. See Boris I. Bittker, *Federal Income Taxation and the Family*, 27 *Stan. L. Rev.* 1389, 1395–97 (1975). Bittker's analysis focuses on marriage neutrality but can easily be extended to show that it is impossible to have (1) equal taxation of equal-earning couples, (2) equal marginal tax rate schedules for primary and secondary workers, and (3) progressive marginal tax rates. One might argue that a single-earner couple should pay higher taxes than a two-earner couple, because the latter must pay for childcare and other additional expenses of working. Although this observation is surely correct, it is not a particularly convincing rationale for individual filing. The appropriate response would be to allow a deduction for the additional expenses.

33. See Munnell, *supra* note 29, at 263, 278; Gann, *supra* note 28, at 8–9.

make tax liability invariant to marital status.³⁴ Although the secondary-earner bias and the marriage neutrality issue are often linked because most individual filing proposals would address both, the two issues are logically distinct,³⁵ and this Article does not consider in detail the potential feminist arguments for or against marriage neutrality. In passing, it may be useful to note that there are serious questions about both the empirical significance of the marriage penalty as a deterrent to marriage and the status of marriage neutrality as a feminist goal. Many advocates of individual filing place great weight on legal noninterference with marital decisions, but the limited empirical evidence suggests that the "marriage penalty" has a small impact, at most, on those decisions.³⁶ Further, although some feminists place a high value on removing impediments to marital autonomy,³⁷ others might place considerably less value on marriage.³⁸

1. *"Tax Neutrality" and Equal Treatment.* — Although not all arguments for individual filing are feminist,³⁹ a number of scholars have explicitly argued that individual filing would benefit women. They contend that joint filing is simply an anachronism: higher marginal tax rates for working wives may have been uncontroversial when the married-couple family with a nonworking wife was typical.⁴⁰ Today, however, market work has become the new norm for many married women, who work in

34. See Munnell, *supra* note 29, at 265–67; Gann, *supra* note 28, at 32–46.

35. The secondary-earner bias arises because marginal tax rates on husbands and wives (within couples) are perceived to be different; the marriage penalty (or bonus) arises because average tax rates on married couples and single couples with the same earnings pattern are different. In theory, we could eliminate the secondary-earner bias by having individual filing for husbands and wives *but* preserve a marriage bonus (or penalty) by having a lower (or higher) tax rate schedule for married individuals than for single ones.

36. See James Alm & Leslie A. Whittington, Does the Income Tax Affect Marital Decisions?, 48 Nat'l Tax J. 565, 571 (1995) (finding that "taxes affect at least some marital decisions of at least some individuals, but . . . for many individuals taxes are largely irrelevant"); David L. Sjoquist & Mary B. Walker, The Marriage Tax and the Rate and Timing of Marriage, 48 Nat'l Tax J. 547, 556 (1995) (finding that marriage tax does not influence marriage rates but may lead some individuals to postpone marriage for short periods).

37. See David L. Kirp et al., Gender Justice 186–90 (1986).

38. See generally Fineman, *supra* note 16, at 145–76 (criticizing traditional notions of family centered on a heterosexual relationship between husband and wife rather than on caretaking relationships).

39. For example, Lawrence Zelenak recognizes that questions of women's roles in market work and family labor are highly contested both among feminists and in society at large. He sees individual filing not as a policy to benefit women but instead as a way to ensure that the government takes no position on the controversy. See Lawrence Zelenak, Comments on Anne Alstott's "Tax Policy, Welfare Policy and Family Labor: Family Allowances for Caregivers" 10–12 (1995) (unpublished manuscript, on file with the Columbia Law Review).

40. Joint filing tends to award a "marriage bonus" to single-earner couples, i.e., a reduction in total tax liability compared to the tax liability of an unmarried couple with the same earnings.

order to maintain family incomes.⁴¹ These scholars argue that joint filing inappropriately penalizes working wives and tends to perpetuate traditional gender roles by discouraging married women's market work.⁴² They contend that individual filing would eliminate current law's bias, creating "tax neutrality" that would neither encourage nor discourage married women's market work.⁴³

An immediate problem is that the content of the tax neutrality norm is not entirely clear. Although "neutrality" has a vaguely economic sound, in fact the feminist tax neutrality argument for individual filing is best understood as an equal treatment claim, rather than an argument about neutrality or efficiency as used in the economic analysis of taxation.

In conventional (and more precise) economic terminology, tax rules are said to be "neutral" if they do not alter the relative (pre-tax) economic consequences of a set of choices faced by an individual. A tax "distortion" arises if tax rules change the relative economic payoffs of alternative choices. For example, the income tax distorts labor-supply choices, because wages are taxed while the "imputed income" from leisure or family labor is not.⁴⁴ (In the interest of precision, I will call this idea "decisional neutrality.")

Individual filing is not neutral in this sense. Individual filing would not create complete decisional neutrality for married women's labor-market choices because married women, like other workers, would continue to face the distortion created by the taxation of market earnings and the exclusion of imputed income. Individual filing would, however, mean that wives would face the same marginal tax rate schedule as other workers.

Some feminist advocates of individual filing also invoke the goal of efficiency. Although tax neutrality in this context may tend to promote efficiency, the two goals are not identical. As conventionally defined, efficiency in taxation requires minimizing total tax distortions on individuals' decisions, on the assumption that in the absence of taxation market allocations would be efficient.⁴⁵ Efficiency suggests that a change in tax rules should be made if a greater distortion can be reduced or eliminated by creating or exacerbating a smaller distortion, because the change will

41. See Cancian et al., *supra* note 27, at 196, 205–08.

42. See Munnell, *supra* note 29, at 247–53, 278; Blumberg, *supra* note 28, at 94–95; Gann, *supra* note 28, at 39–46.

43. See Aline Quester, *Women's Behavior and the Tax Code*, 59 Soc. Sci. Q. 665, 665 (1979); Laura Ann Davis, Note, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. Cal. L. Rev. 197, 236–38 (1988).

44. For a definition of imputed income, see Boris I. Bittker & Martin J. McMahon, Jr., *Federal Income Taxation of Individuals* ¶ 3.3 (2d ed. 1995). For a discussion of the impact of the imputed income exclusion on women's work, see *infra* notes 242–244 and accompanying text. The decisional neutrality norm implicitly presumes that choices made in the absence of taxation would maximize welfare.

45. See Harvey S. Rosen, *Public Finance* 303–23 (4th ed. 1995).

reduce the aggregate welfare loss in the system.⁴⁶ Because empirical studies suggest that married women's labor supply is particularly "elastic," or responsive to marginal tax rates,⁴⁷ the welfare loss from high marginal tax rates on married women may be high. The efficiency argument is that individual filing would increase aggregate welfare, because the larger gain in wives' welfare would outweigh the smaller loss in husbands' and single workers' welfare attributable to the general marginal tax rate increase needed to finance a revenue neutral change. Although the efficiency norm does not always coincide with feminist concerns, because it seeks to maximize total utility rather than women's utility, in this case the efficiency argument tends to dovetail with the feminist argument that the tax law has a disproportionate impact on women's choices regarding market work.

Individual filing may promote efficiency, but it arguably does not go far enough. Optimal commodity taxation theory suggests that, if a tax system is to raise a given amount of revenue, efficiency generally dictates higher taxes on inelastic decisions and lower taxes on elastic decisions in order to minimize total distortions.⁴⁸ Because married women's labor-supply decisions are elastic relative to those of other workers,⁴⁹ optimal commodity taxation may require going beyond equal taxation to create even *lower* marginal tax rate schedules for married women than for other groups. Edward McCaffery, for example, relies in part on optimal commodity taxation principles to advocate special low marginal tax rates for married women.⁵⁰ Although reasonable people may differ about just how low the technically optimal marginal tax rate on wives would be, there is no reason to think that individual filing, which *equalizes* marginal tax rates on wives and other workers, is necessarily the most efficient policy.⁵¹

Thus, although efficiency is related to tax neutrality, the two goals are not coextensive. For an efficiency advocate, equalizing initial marginal tax rate schedules for husbands and wives is not a goal in itself but

46. See *id.* This general statement may not hold where a new distortion helps correct a preexisting distortion; this is the problem of the second-best. See *id.* at 314–15, 325–27.

47. For a discussion of the empirical literature on wives' labor supply, see *infra* notes 68–83 and accompanying text.

48. See Rosen, *supra* note 45, at 328–34.

49. But see *infra* text accompanying notes 70–75 (describing empirical evidence suggesting that wives already at work have labor supply elasticities that are nearly as low as those of men, while nonworking wives' participation decisions may be quite elastic).

50. See Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 *Yale L.J.* 595, 654–64 (1993). For a discussion of McCaffery's proposal, see *infra* Part I.B.

51. I am using "optimal" here in the technical sense used in optimal commodity tax theory. Efficiency concerns may, of course, be trumped by distributional concerns. It might be that distributional concerns combined with efficiency goals would lead us to individual filing, but that is simply another way of stating the proposition in the text—that some separate norm of *equal taxation* seems to underlie the "neutrality" case for individual filing.

only one possible approach to the goal of maximizing total utility. Although the efficiency goal suggests that individual filing is a step in the right direction, it does not justify the strong focus on equal marginal tax rates for husbands and wives that is the hallmark of the feminist case for individual filing.⁵²

Ultimately, the feminist tax neutrality argument for individual filing is best understood as a distinct argument for *equal taxation* of men's and women's wages, rather than an argument for decisional neutrality or efficiency. The equal taxation claim, in turn, is a rather straightforward appeal to the equal treatment goal.⁵³ Here, the equals to be treated alike are male and female wage-earners, and individual filing would do so by ensuring that all workers face the same marginal tax rate schedule.

Framing the conventional argument for individual filing as an equal treatment claim also helps clarify that, of the three feminist tax policy goals, only equal treatment supports individual filing over alternative policies with any degree of finality. First, feminists who seek to encourage women's market work might support individual filing, but only as a partial step toward an ideal, rather than as a complete end in itself. On this view, individual filing is just the beginning of a move toward *unequal taxation* through special tax incentives for women's market work.⁵⁴ This perspective suggests that the desirability of individual filing turns on how effectively it encourages women's market work, changes gender roles, and improves women's economic well-being, and that individual filing may be inferior to other policies, e.g., a DCTC or mandated family leave.⁵⁵

Second, the feminist goal of assisting caregivers also provides no strong reason for preferring individual filing to alternative policies and even suggests a rationale that favors joint filing. Individual filing would cut average tax rates for some working women who are caregivers, but it would also cut taxes for working women who are *not* caregivers, would provide no benefits to homemakers or to single mothers and, as noted above, would raise average tax rates on single-earner couples. Thus, indi-

52. This distinction emerges quite clearly in a recent paper by John Piggott & John Whalley, which argues that individual filing would tend to remove one tax distortion—the secondary-earner bias—but would create another distortion in the allocation of family labor between husbands and wives. See Piggott & Whalley, *supra* note 30, at 1–2. Although Piggott and Whalley are quite right that the latter distortion is a matter of concern in traditional efficiency analysis, many feminists would applaud a tax “distortion” that led men to take on even an inefficiently large share of household labor.

53. For example, Grace Blumberg's early, classic article (which does not rely on neutrality language but which argues directly for equal taxation) contends that individual filing is analogous to the antidiscrimination and equal pay laws of Title VII. See Blumberg, *supra* note 28, at 95.

54. See *infra* Part I.B.

55. For discussions of these policies, see *infra* text accompanying notes 231–245 and 326–341.

vidual filing would help some caregivers but harm others,⁵⁶ in order to pursue a goal—equal marginal tax rates on husbands and wives—which, on this view, is not particularly important. From this perspective, individual filing is clearly less desirable than policies that are better targeted to caregivers, e.g., family allowances.

This point is worth emphasizing, because it suggests a potential feminist defense of the joint filing system. The traditional case for individual filing has characterized joint filing as clearly antifeminist because it raises marginal tax rates on secondary earners. Once we take seriously the goal of assisting caregivers, however, the other side of the feminist argument emerges. On this view, higher marginal tax rates for secondary workers are simply an inevitable by-product of an important feature of the tax system—equal taxation of equal-earning couples—which is necessary to avoid overtaxing single-earner couples.⁵⁷

Once the equal taxation argument for individual filing is understood as an equal treatment claim, its controversial nature becomes clear. Although the equal treatment goal has motivated many significant feminist legal achievements, feminists have increasingly challenged the importance, or more precisely, the sufficiency, of equal treatment.⁵⁸ The equal treatment goal basically accepts existing legal and social arrangements, including the gendered division of family labor, provided that tax and other legal rules treat men and women alike. Many feminists argue that equal treatment of men and women does not sufficiently take into account underlying social inequalities that leave women situated very differently from men, and that more fundamental structural changes are nec-

56. Individual filing might harm caregivers in two ways. First, a proposal for individual filing might raise taxes on single mothers if it is funded (in part) by repealing head of household filing status or by raising tax rates across the board. Second, an increase in taxes on single-earner couples could reduce the after-tax income available to the caregiver in the family as well as to other family members. See *infra* text accompanying notes 104–122 for a discussion of the allocation of joint tax liabilities within the marital household.

57. One could argue that the joint filing system actually undertaxes single-earner couples because they receive a marriage bonus (a lower average tax rate than that paid by an unmarried couple with the same earnings pattern), while two-earner couples incur a marriage penalty. The problem with this rejoinder, however, is that equal-earning *unmarried* couples pay unequal taxes, so that the marriage “bonus” and “penalty” are needed simply to equalize the joint tax burden across couples. This explanation does not provide a rationale for choosing between the two possible positions, but instead merely illustrates that both are logically consistent points of view.

58. See generally Fineman, *supra* note 17, at 20–22 (arguing that “a growing minority [of feminist legal scholars] has pointed out that achieving the objectives of equality requires measures that extend beyond mere sameness of treatment; the rules should be explicitly developed to achieve equality of result, with the historic and contemporary disadvantages associated with gender given important consideration”).

essary to significantly improve women's autonomy, well-being, or power.⁵⁹

This general feminist critique of equal treatment can be extended to the context of taxation. Although the equal taxation argument for individual filing acknowledges women's socially determined status as secondary workers, the critique would be that the equal taxation argument does not go far enough in recognizing and redressing social and economic inequalities. For example, feminists who seek to encourage women's market work might argue that the secondary-earner bias created by the joint filing system is only one of many legal, economic, and social obstacles to women's market work. On this view, equalizing husbands' and wives' marginal tax rates is—although a step in the right direction—an inadequate response to a much deeper problem. Other feminists would argue that women's responsibility for family labor leaves male and female market workers so unequally situated that unequal taxation (through special assistance for caregivers) is needed to achieve a more substantive vision of economic equality.

These normative conflicts pose a significant challenge for the conventional feminist case for individual filing. The equal taxation argument for individual filing is most coherent if understood as an equal treatment claim, because only the equal treatment goal makes an unambiguous case for individual filing over other policies. An advocate of individual filing must either defend equal treatment against its feminist critics or acknowledge that individual filing is at best only one option for taking a limited step toward the more ambitious (and also controversial) feminist goal of encouraging women's market work. The latter course then requires a more sophisticated analysis of why—assuming, realistically, that resources for feminist tax reform are limited—individual filing is preferable to other policies that could also encourage women's market work.⁶⁰

2. *The Uncertain Consequences of Individual Filing.* — A second strand of the feminist argument for individual filing also merits attention. Some advocates of individual filing rely not only on the inherent propriety of equal treatment, but also on two empirical predictions about the beneficial consequences of equal taxation for women.⁶¹ First, they argue that individual filing could help change gender roles by encouraging married

59. For critiques of equal treatment, see *id.* at 20–31; Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 32–45 (1987); Okin, *supra* note 7, at 16–17.

60. Part I.B considers tax policies that might be used to encourage women's market work.

61. These consequentialist arguments are not strictly necessary to make a feminist case for individual filing—or to make an efficiency case. For some feminists, equalizing marginal tax rate schedules for husbands and wives may be a sufficient goal in itself, regardless of consequences. Nevertheless, these arguments have commonly been made in order to strengthen the feminist case for individual filing, and they deserve a closer look.

women to work more (outside the home).⁶² Second, some proponents claim that increasing married women's market work could also enhance women's economic security and independence.⁶³ Increasing women's participation in the labor force could encourage women to invest more in education and other human capital, leaving them better situated to provide for themselves and less dependent on men or on state income support. Women's market employment may also confer political and psychological benefits in a society that often measures achievement by reference to market work.⁶⁴

Although these arguments are intuitively plausible, a closer look suggests that the projected effects of individual filing on women's and men's behavior are overly optimistic, and that individual filing has only a limited capacity to change gender roles or to increase married women's economic well-being through market work.

a. *Tax Rate Cuts and Wives' Labor Supply.* — These predictions about gender role change and women's economic well-being rest on the simple premise that individual filing would increase married women's market work by lowering their marginal tax rates. The real story is, however, considerably more complicated. Individual filing would reduce marginal tax rates for many, though not all, married women.⁶⁵ The most significant reductions in marginal rates are likely to be for wives who earn relatively little but who either have high-earning husbands or whose earnings are sufficient to push the couple out of a lower bracket into a higher one.⁶⁶

62. See Gann, *supra* note 28, at 39–47.

63. For general statements about the value of market work for women, see Bergmann, *supra* note 25, at 5; Kay, *supra* note 23, at 4; Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv. L. Rev. 1497, 1552 (1983).

64. See Bergmann, *supra* note 25, at 5; Rhode, *supra* note 10, at 174; Blumberg, *supra* note 28, at 94–95; Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 Hastings L.J. 63, 64, 110 (1993). See generally Jon Elster, *Is There (or Should There Be) a Right to Work?*, in *Democracy and the Welfare State* 53, 62–63 (Amy Gutmann ed., 1988) (describing effects of work on self-esteem).

65. It is not possible to tell, without a sophisticated model and good data, how many wives would be affected by individual filing or how significant the marginal tax rate reduction would be. In a recent study, Feenberg and Rosen estimate the marriage bonuses and penalties under current law (i.e., the difference between average tax rates on married couples and average tax rates on the same couples if single), but their study does not (and was not intended to) simulate marginal tax rates under a system of individual filing, which probably would not have the same rate structure as the current schedule for single individuals. See Daniel R. Feenberg & Harvey S. Rosen, *Recent Developments in the Marriage Tax*, 5–16 (National Bureau of Econ. Research Working Paper No. 4705, 1994).

66. The marginal tax rate reduction depends on the extent to which joint filing subjects married women's earnings to higher marginal tax rates determined by the husband's earnings. The determination is complicated because married and single people have different standard exemptions and because the new rate schedule for single individuals would differ from the current rate schedule for single individuals. See *supra* note 31. To take a simple example, a wife whose husband is in the lower tiers of the 15% bracket and who herself earns (or could earn) little (but enough to exceed the zero bracket created by the personal exemption and standard deduction) would probably

The conventional prediction is that married women's labor supply will increase significantly, and legal scholars routinely cite empirical studies finding that married women's labor supply is more elastic than that of married men or single workers (male or female).⁶⁷ A better understanding of the methodology of these studies, however, suggests that there is more uncertainty than the apparent consensus indicates. Although economists are quite candid in acknowledging these issues, legal users of econometric work are not always duly cautious in applying the end results to policy analysis.

According to the standard analysis, economic theory cannot predict whether marginal tax rate cuts will increase or decrease wives'⁶⁸ labor supply. The tax cut raises wives' after tax wage, and some may go to work or increase their work hours in response to the higher wage (the "substitution effect"). The increase in the after tax wage also creates a competing "income effect" that may discourage market work, because a woman can earn the same after tax amount with less work. Thus, a tax incentive does *not* necessarily affect actual behavior, and economic theory alone cannot predict even the direction, let alone the magnitude, of the behavioral change.⁶⁹

The prediction that married women's labor supply will increase in response to a tax cut is based on empirical studies. Although many empirical studies find that married women's labor supply is particularly elastic, or responsive to tax cuts or other changes in the net wage, the empirical evidence is uncertain in a number of ways. The basic difficulty is that it is impossible to observe directly married women's response to lower tax rates. Actual work behavior reflects a mix of causal factors, and what appears to be a response to tax changes could instead be attributable to a wide variety of demographic, social, or other economic factors. With rare exceptions, economists cannot conduct controlled experiments to isolate the effects of tax rates on work.⁷⁰ Instead, economists must use theory to develop plausible models of married women's work behavior, use regression analysis to test how well the model "fits" available data sets, and then

remain in the 15% marginal bracket under individual filing. Depending on how the new rate schedule is set and on the husband's earnings, a very high earning wife, whose marginal tax rate is already high, might not receive any marginal tax rate reduction from individual filing.

67. For a discussion of these empirical studies, see *infra* text accompanying notes 68–83.

68. This section focuses on married women because they are the group that would be affected by individual filing and by McCaffery's proposals, described at *infra* Part I.B below.

69. See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 Harv. L. Rev. 533, 547–51 (1995).

70. In the late 1960s and early 1970s, social scientists conducted a number of controlled experiments involving a negative income tax ("NIT") in order to test the response of welfare recipients to changes in the terms of assistance. The results of the NIT experiments are still used today but have been criticized on methodological grounds. See generally, *Lessons from the Income Maintenance Experiments* (Alicia H. Munnell ed., 1986) (describing NIT experiments and critiques of experiments' methodology).

use elasticity estimates to predict future behavior. The empirical results are only as good as the theoretical model, statistical techniques, and data sets used.⁷¹

Although these problems are endemic to much empirical work in the social sciences, they have been particularly evident in empirical studies of the effects of taxes on married women's labor supply. A host of methodological issues arises in determining women's labor-supply response to the wage rate,⁷² and additional issues confront studies that attempt to model the effects of taxes on the wage.⁷³ For many years, empirical studies concluded that married women's labor supply was significantly more responsive to wages and to tax changes than married men's labor supply.⁷⁴ Recently, however, several studies have argued that previous empirical work finding high elasticities was flawed. According to the new view, married women already at work have a labor supply elasticity that is much closer to married men's, but nonworking women's labor-supply elasticity is much higher than that of either of the former groups.⁷⁵ These results suggest that working wives are not likely to in-

71. See Thomas A. Mroz, *The Sensitivity of an Empirical Model of Married Women's Hours of Work to Economic and Statistical Assumptions*, 55 *Econometrica* 765, 795 (1987); William C. Randolph & Diane L. Rogers, *The Implications for Tax Policy of Uncertainty About Labor-Supply and Savings Responses*, 48 *Nat'l Tax J.* 429, 433, 437-38 (1995); see also Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 *Cal. L. Rev.* 1905, 1921-26 (1987) (reviewing labor supply studies and discussing methodological issues).

72. For a survey of many issues, see Mark R. Killingsworth & James J. Heckman, *Female Labor Supply: A Survey*, in 1 *Handbook of Labor Economics* 103 (Orley Ashenfelter & Richard Layard eds., 1986); James J. Heckman, *What Has Been Learned About Labor Supply in the Past Twenty Years?*, 83 *Am. Econ. Rev.*, May 1993, at 116, 116-20. Modeling issues include whether labor-supply decisions are made by individuals acting alone or whether they are influenced by other family members' decisions, the "heterogeneity" of jobs (i.e., the fact that most individuals cannot choose from an unlimited menu of work options but must choose among jobs with fixed characteristics including hours and wages), and differences between static and dynamic models. See Killingsworth & Heckman, *supra*, at 124-79. Using data to test theoretical models creates other challenges. See Killingsworth & Heckman, *supra*, at 179-84. See generally Heckman, *supra*, at 117-20 (discussing problems of estimation including estimation of wages for nonworkers and errors in data sets); Joel Slemrod, *Do Taxes Matter? Lessons from the 1980s*, 82 *Am. Econ. Rev.*, May 1993, at 250, 253 (noting that "empirical analysis of cross-sectional (and any other) data is subject to bias because unobservable explanatory variables may be correlated with included variables").

73. See Nada Eissa, *Taxation and Labor Supply of Married Women: The Tax Reform Act of 1986 As a Natural Experiment 1-3* (National Bureau of Econ. Research Working Paper No. 5023, 1995); Jerry A. Hausman, *Taxes and Labor Supply*, in 1 *Handbook of Public Economics* 213 (Alan J. Auerbach & Martin Feldstein eds., 1985). Modeling issues include the use of static, rather than dynamic or life cycle, models and the exclusion of nonpecuniary attributes of jobs. See *id.* at 223-25. For econometric issues, see *id.* at 248.

74. See Killingsworth & Heckman, *supra* note 72, at 179.

75. See *id.*, at 179; Mroz, *supra* note 71, at 795; Robert K. Triest, *The Effect of Income Taxation on Labor Supply in the United States*, 25 *J. Hum. Resources* 491, 513 (1990). But see Eissa, *supra* note 73, at 31 (finding that for high income wives, the participation decision is only slightly more elastic than the hours decision). Mroz's study found that

crease their work hours significantly in response to marginal tax rate cuts, but that nonworkers may respond more strongly by beginning to work.

Even the new consensus is not entirely solid, however. Because the determinants of married women's labor supply are so complex, economists acknowledge continuing questions about the validity of estimates of married women's labor-supply elasticity, compared to the relatively high degree of consensus about estimates of labor-supply elasticity for men.⁷⁶ Finally, an additional obstacle not typically accounted for in economic models is that tax incentives often are not well understood by their targets.⁷⁷ Thus, although economic models posit that women's labor supply is a function of tax rates, wage rates and other factors, in the real world married women may fail to respond to tax changes, particularly complex ones that are difficult to understand.⁷⁸

The policy stakes here are fairly high. If current empirical studies significantly overestimate married women's responsiveness to tax rate changes, then most predictions about the social consequences of marginal tax rate cuts for wives simply evaporate. The argument is not that empirical studies are useless, but only that the high degree of uncertainty in estimates of married women's labor supply compels caution and even skepticism about the effects of individual filing and other tax rate reductions.⁷⁹ Given this uncertainty, perhaps the most reasonable approach is to acknowledge these issues but to treat the available studies as the best current evidence until a new consensus develops. The remainder of this

many prior estimates of female labor-supply elasticity were biased upwards, in some cases because models ignored the correlation between work experience and women's "taste" for market work. The result was that the models overstated wage elasticity results, because part of the variation in work hours (mistakenly) attributed to the wage rate was in fact attributable to a greater taste for work. See Mroz, *supra* note 71, at 774. See generally Daniel L. Rubinfeld, Reference Guide on Multiple Regression, *in* Manual on Scientific Evidence 415, 419–22 (Federal Judicial Ctr. ed., 1994) (discussing methodological issues in regression analysis, including spurious correlation).

76. See Mroz, *supra* note 71, at 795–96; Triest, *supra* note 75, at 512–13; see also Killingsworth & Heckman, *supra* note 72, at 185 (emphasizing variability of estimates of uncompensated labor elasticities and characterizing range of estimates as "dauntingly large").

77. See, e.g., Alstott, *supra* note 69, at 548 (describing potential gap in transmitting the work incentives created by the earned income tax credit when recipients do not understand terms of the program).

78. Recent estimates of the responsiveness of savings to tax rate changes provide a cautionary tale. Through the early 1980s, many economists agreed that tax rates had a significant influence on savings. More recently, however, a new consensus has emerged, as many economists have concluded that income tax rates in fact have little effect on savings. See Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 52 *Tax L. Rev.* (forthcoming 1996) (manuscript at 22, on file with the Columbia Law Review); Slemrod, *supra* note 72, at 251–52.

79. Cf. Anthony B. Atkinson, *Public Economics in Action* 152–53 (1995) (arguing that although we can learn something from empirical studies, "we certainly have to be cautious about the idea that their findings can be incorporated routinely into the analysis of policy").

Article uses empirical studies of work effort and other behavior in this way.

Even if we accept existing studies as the best current knowledge, it is difficult to know exactly what they reveal. Recent studies offer a wide range of predictions about the magnitude of the effect of tax rate cuts on wives' work effort. For example, Jerry Hausman's survey of the literature presents a range of estimates, which suggest that a 1% reduction in marginal tax rates could translate into a *decrease* in wives' hours of market work of 0.12% or an *increase* of as much as 1.88%.⁸⁰ Hausman's own estimate is that a 10% tax cut would increase wives' labor supply by 4.1%, and a 30% tax cut would increase wives' labor supply by 9.4%.⁸¹ These rough estimates do not, of course, accurately convey the impact of individual filing, which cuts marginal tax rates by different amounts for different groups of women. Under individual filing, nonworking and low-earning women married to high earners receive the largest marginal rate reductions. Higher earning married women and those whose husbands earn little receive smaller (or zero) marginal rate reductions. One simulation predicted that optional individual filing would increase married women's work effort by about 11%—certainly not an inconsequential increase, but perhaps not a terribly substantial one.⁸²

These results raise more questions than they answer. For example, the 11% estimate does not mean that all women will work 11% more but instead that some women may go to work or work many more hours, while others continue their present behavior.⁸³ The data also cannot pre-

80. See Hausman, *supra* note 73, at 247 tbl.5.6 (uncompensated elasticities are calculated by adding wage and income elasticities). Killingsworth and Heckman present a range of estimates indicating that a 1% reduction in marginal tax rates could translate into a 0.03% decline in wives' work hours or an increase of as much as 14%. See Killingsworth & Heckman, *supra* note 72, at 185. All these estimates are for married women's total (or uncompensated) labor-supply elasticity. Economists interested in efficiency focus on compensated elasticities, which are relevant to measuring deadweight loss. See Rosen, *supra* note 45, at 308–10. This discussion, in contrast, seeks to evaluate claims about the *aggregate* change in wives' market work following individual filing, and so looks to uncompensated elasticities. (Implicitly, the use of uncompensated elasticities assumes that the revenue needed to finance the change is raised from other sources, e.g., single-earner couples.) Compensated elasticities would be relevant in assessing the importance of the efficiency arguments for individual filing or an expanded DCTC.

81. See Hausman, *supra* note 73, at 249; see also Mroz, *supra* note 71, at 766, 790–91 (presenting range of estimates and rejecting most based on methodological flaws); Triest, *supra* note 75, at 512 (estimating that income tax in aggregate reduces wives' hours of work by as much as 30% or as little as 10%, compared to a hypothetical world with no income tax).

82. See Daniel H. Feenberg & Harvey Rosen, *Alternative Tax Treatments of the Family: Simulation Methodology and Results*, in *Behavioral Simulation Methods in Tax Policy Analysis* 24–31 tbls.1.3 & 1.8 (Martin Feldman ed., 1983) (showing that under system of optional individual filing average annual hours of work by wives increase from 732 to 815, an 11.3% increase).

83. Feenberg and Rosen present data showing the composition of increased work effort by income class. See *id.* at 31 tbl.1.8.

dict what kinds of jobs the women will get or the wages they will earn. Thus, a better understanding of the empirical evidence on married women and market work certainly does not defeat the case for individual filing but does suggest caution in making broad social predictions based on simple and unquantified readings of the economic evidence.

Finally, it is important to distinguish two quite separate points about the impact of tax incentives on behavior. The first question is whether behavioral reactions to a given incentive are likely to be responsive or unresponsive to a tax cut of a particular size. This is the elasticity issue considered above—how responsive is wives' labor supply to a 1% (or 10% or 20%) marginal tax rate cut?—and that question is the focus of the empirical uncertainty just discussed. The second and distinct point is that, whether elasticities are large or small, modest incentives or income transfers generally will have smaller effects than larger incentives or transfers. Individual filing and the other tax proposals discussed here, including reduced marginal tax rates for married women, family allowances, and the DCTC, would make relatively modest changes in women's and families' incomes, typically on the order of, at most, several thousand dollars per year.⁸⁴ Much larger incentives or transfers could, of course, have greater effects on behavior and well-being,⁸⁵ but this Article focuses on relatively incremental tax proposals because they have been most often discussed and because they are at least in the ball park of politically feasible changes.

b. *Individual Filing, Gender Role Change, and Women's Economic Well-Being.* — The next problem is that even if marginal tax rate cuts do lead married women to increase their market work, individual filing is likely to have only a limited impact on gender roles or married women's economic well-being. Although it is not particularly surprising that an incremental policy has modest effects, a closer analysis shows that there are significant obstacles to using marginal tax rate cuts to implement these substantive goals.

Market Work and Gender Role Change. Individual filing may "change gender roles" simply by encouraging married women to work more. If, as some studies suggest, some wives want to work more, but their husbands are opposed,⁸⁶ the tax change could benefit these women by giving recalcitrant husbands an economic reason to cooperate.

84. Cf. Feenberg & Rosen, *supra* note 65, at 21 tbl.3 (finding average marriage "tax" of \$9980 under current law for couples earning more than \$200,000). These large marriage penalties give some idea of the kind of *average* tax rate reduction individual filing might create for two-earner couples, but the incentive effect should be measured in terms of marginal, not average rates, and these data do not indicate marginal tax rate reductions. See *supra* note 65.

85. A payment of, say, \$40,000 per year to every working woman might indeed induce larger numbers of women to go to work, although such a policy could also create a large income effect that could lead women already at work to reduce their hours of work while still collecting the subsidy.

86. See Philip Blumstein & Pepper Schwartz, *American Couples* 118–25 (1983).

Whether individual filing accomplishes gender role change in the more fundamental sense of changing the division of family labor is much less clear. In theory, lower marginal tax rates on married women and higher tax rates on married men could induce husbands to share family labor, as wives increase their market work and husbands decrease theirs, but any prediction about the effect of incentives on gender roles is fundamentally speculative. Individual and household decisions about market work and family labor are complex, and the effects on gender roles of incremental changes in wives' work effort are even more complex and less well understood.⁸⁷ In addition, because married men's labor supply is rather unresponsive to tax changes,⁸⁸ husbands may not work much less in response to the tax increase.

Although in some households women's increased market work may encourage changes in the gendered division of labor, in others wives will take on (or continue) the "double shift" of market work and family labor. Recent experience suggests that even dramatic increases in women's labor market participation do not necessarily lead men to increase their share of family labor.⁸⁹ The optimistic story is that gender role change will accelerate as new generations of men and women grow up expecting to share family labor. The pessimistic story, supported by some survey evidence of younger generations, is that cultural expectations and the inflexible conditions of full-time market work will make gender role change a painfully slow process.⁹⁰ The argument is not that women's market work has not changed gender roles and expectations—it clearly has—but only that there is little reason to expect that incremental increases in married women's market work in response to tax incentives would materially affect the long-term outcome.

87. For one example, see the discussion below of the uncertain impact of wives' work on intrafamily income allocations *infra text* accompanying notes 116–122.

88. See *supra* text accompanying notes 65–85. In general, estimates suggest that the uncompensated elasticity of working-age men's labor supply is very close to zero. See Rosen, *supra* note 45, at 404.

89. Although there has been some movement toward more equal sharing, the increase in men's family labor has lagged far behind the increase in women's market work. See Francine D. Blau & Marianne A. Ferber, *The Economics of Women, Men, and Work* 128–29 (1986). Some studies find that men have begun to take on a greater share of responsibility for family labor but that women continue to bear a disproportionate burden. See Goldscheider & Waite, *supra* note 1, at 11, 109; Juliet B. Schor, *The Overworked American* 103–04 (1991).

90. See Fuchs, *supra* note 1, at 72 (noting that surveys of Stanford undergraduates reveal that both male and female students expect that wives will take on twice as much family labor as husbands); see also Miriam Lewin & Lilli M. Tragos, *Has the Feminist Movement Influenced Adolescent Sex Role Attitudes? A Reassessment After a Quarter Century*, 16 *Sex Roles: A Journal of Research* 125, 128–30 (1987) (describing survey finding that adolescents' stereotyping of sex roles did not decline between 1956 and 1982, although girls reported less dissatisfaction with being female). These sorts of surveys provide only weak evidence—it may be, for example, that adolescents have excessively stereotyped views that do not correspond to their adult behavior—but they do suggest the inherent difficulty of changing entrenched attitudes.

Market Work and Well-Being. A second problem is that the relationship between market work and women's economic well-being is also extremely complex and may vary by class, by race, and by occupation. The basic difficulty is that generic marginal tax rate cuts cannot address the diverse needs of different groups of women. Although individual filing obviously cannot solve all women's economic problems, it may not even be a good first approach to addressing the most significant barriers to improving women's economic well-being through market work.

First, it seems probable that individual filing is most likely to increase market work among married women without children or those who have or can get reliable childcare or jobs with flexible hours. A number of scholars have noted the obstacles to women's market work created by a lack of reliable and affordable childcare and by jobs that demand essentially a full-time commitment.⁹¹ Marginal tax rate cuts alone cannot change the terms of work that are incompatible with family labor responsibilities,⁹² and so individual filing is likely to give the most effective help to women who need it least. This "cream-skimming" effect is only to be expected, because the most entrenched social and institutional barriers are hardest to remove. Nevertheless, we should explicitly ask whether resources are best devoted to this group or whether instead they might have a greater impact if devoted to needier groups or to other policies that might facilitate market work, e.g., childcare or maternity leave.⁹³ Thus, it is not only the modest size of the tax incentive that limits its effectiveness, but also the presence of other social and economic constraints and the limited power of tax incentives to change those conditions.

Second, the benefits of additional market work for women may vary significantly by occupation and by earnings. Some studies suggest that continuing participation in market work may increase women's earnings so that they approach parity with men's.⁹⁴ These aggregate results, however, may conceal significant differences in the distribution of higher earnings. The benefits of uninterrupted work are likely to be significantly greater for skilled careers (doctors, lawyers, nurses) than for unskilled jobs (waitresses, shop clerks, some secretaries). More generally, studies of low-income workers suggest that persistence at low-wage work may not materially improve earnings or enhance women's ability to

91. See Mary L. Heen, *Welfare Reform, Child Care Costs, and Taxes: Delivering Increased Work-Related Child Care Benefits to Low-Income Families*, 13 *Yale L. & Pol'y Rev.* 173, 194-96 (1995); McCaffery, *supra* note 50, at 619-21; Williams, *supra* note 21, at 822-36.

92. But see *infra* Part I.B (discussing McCaffery's proposal to combine marginal tax rate cuts for married women with Title VII reform, in order to address these structural barriers).

93. See Jane Waldfogel, *London Sch. Econ., Women Working for Less: A Longitudinal Analysis of the Family Gap* 44, 51 (Discussion Paper #WSP/93, 1993) (concluding that maternity leave can significantly reduce wage gap between women with children and other workers).

94. See *id.*

achieve economic self-sufficiency.⁹⁵ Thus, the market work incentive created by individual filing could create long-term gains in professional status and wages for higher-wage and skilled jobs but may have far less upside potential for married women qualified only for low-wage work.⁹⁶ This problem is not limited to low-income women; even middle class married women may be eligible only for low-wage jobs if they have foregone education or work experience that would qualify them for better jobs.⁹⁷ (This problem is also related to the first one: even better educated or more experienced women may be constrained to take lower paying or "dead end" jobs if their childcare responsibilities preclude long or unpredictable hours or travel, for example.)

Third, the benefits of individual filing may vary significantly by class and by race. The empirical studies described above suggest that marginal tax rate cuts may be most effective in increasing the labor-force participation of nonworkers, and less effective in increasing the hours worked by married women already at work. Individual filing tends to award the largest marginal tax rate cuts to nonworkers married to high earners, and thus may be effective in targeting marginal tax rate reductions to one of the most responsive groups.⁹⁸ The gain in *aggregate* labor force participation, however, may be less attractive when we look at its distribution. Data show that housewives tend to be white and upper or middle income.⁹⁹ Better data are needed to determine the exact distribution of tax cuts from individual filing and their impact on the work effort of different classes of women, but advocates of individual filing ought to consider the possibility that the largest tax incentives would accrue primarily to white, middle and upper income housewives.¹⁰⁰ Although these

95. See Kathryn J. Edin, *The Myths of Dependence and Self-Sufficiency: Women, Welfare, and Low-Wage Work*, Focus, Fall/Winter 1995, at 4–6. Although studies that focus on low-income single mothers cannot be directly applied to married women, the basic finding calls into question the benefits of persistence at low-wage work.

96. For an argument that women are more likely than men to be employed in low-wage, dead end jobs, where returns to education and experience are "close to zero," see Ronald G. Ehrenberg & Robert S. Smith, *Modern Labor Economics* 425–26 (5th ed. 1994); see also Rhode, *supra* note 10, at 174 (noting that "[a]lthough at higher socioeconomic levels a prolonged leave of absence presents fewer financial hardships, it also imposes greater professional costs").

97. See Fuchs, *supra* note 1, at 43.

98. See *supra* notes 65–66 and accompanying text.

99. See Cancian et al., *supra* note 27, at 199 (reporting that overall percentage of white wives who work is somewhat smaller than percentage of black wives who work, that white wives' market work declines faster as husbands' income rises, and that black wives' labor-force participation rate varies less with husbands' income); Nancy C. Staudt, *Taxing Housework*, 84 Geo. L.J. 1571, 1610 n.163 (1996) (noting that white women are more likely to be married than are black women).

100. The argument in the text considers the distribution of *marginal* tax rate cuts, not average tax rate cuts. Although individual filing would concentrate marginal tax rate cuts on upper income housewives, two-earner couples would see the largest average tax rate reductions. In a recent article, Dorothy Brown argues that because black women have higher labor-force participation rates than white women, and because black women tend

women may be quite deserving of assistance, and many are at risk for impoverishment upon divorce,¹⁰¹ the distribution of incentives may be controversial among feminists.¹⁰² There is no consensus among feminists on the priority to be given to issues of gender and class. Some feminists may favor even expensive policies that help primarily higher income women,¹⁰³ but others might prefer policies that concentrate work incentives and income support on other groups.

Although this discussion raises more questions than it answers, these are exactly the kinds of issues that should be addressed by advocates of individual filing who believe that removing tax distortions can materially promote women's economic well-being. Individual filing may lead some women to increase market work, but more work is not necessarily better, at least if work is not an end in itself. We need to think about what kinds of work women would take on and under what conditions, and which groups of women are most likely to benefit.

3. *Individual Filing and the Distribution of Income Within the Family.* — A final set of arguments for individual filing also relies on predictions about the benefits of equal treatment for women. Advocates argue that equal taxation of men's and women's earnings would better recognize the reality of unequal income distribution within the family and could even improve the situation by increasing wives' bargaining power. Once again, however, a closer look shows that both arguments are overstated.

a. *Individual Filing and "Ability to Pay."* — As noted above, individual filing would tend to impose lower *average* tax rates on two-earner couples than on single-earner couples with the same total income.¹⁰⁴ The first argument for individual filing is that the heavier taxation of single-earner couples is entirely appropriate, because many husbands and wives control

to contribute a higher share of household income than white women, black taxpayers are more likely to pay a "marriage penalty." See Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in *Taxing America* (forthcoming 1996) (manuscript at 6, on file with the Columbia Law Review).

101. For discussions of the economic impact of divorce, see, e.g., Fineman, *supra* note 17, at 17-75; Rhode, *supra* note 10, at 147-52. Lenore Weitzman's earlier study documents the drop in women's and children's living standards that often follows divorce. Although Weitzman's work has been criticized for attributing the situation to divorce law reform, critics typically agree that women and children often are worse off economically after divorce. See Lenore Weitzman, *The Divorce Revolution: The Unexpected Social Consequences for Women and Children in America* 337-54 (1985); see also Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *Divorce Reform at the Crossroads* 75 (Herma H. Kay & Stephen D. Sugarman eds., 1991).

102. Although this issue may not concern those who view individual filing as a means of correcting current biases in taxation, the distribution of incentives is quite relevant to the case for individual filing as a work subsidy program.

103. See, e.g., Quester, *supra* note 43, at 674 (acknowledging that tax distortions in work behavior have been largest for middle and upper class women but arguing that these women are important role models).

104. See *supra* text accompanying notes 31-32.

only what they earn.¹⁰⁵ On this view, a husband (or wife) who is the sole wage earner controls a higher income and so should pay more tax than the total tax paid by a two-earner couple with the same total income. In other words, each individual's "ability to pay" taxes is best measured by his or her own income, and not by joint marital income. In contrast, joint filing incorrectly assumes that income is "pooled" or shared equally within the marital household.¹⁰⁶

The problem with this argument is that its factual and normative premises are too simple. An initial difficulty is that the meaning of "equal sharing" or "pooling" is not always clear. Equal sharing presumably does not require literal joint decisionmaking on every issue but instead implies some consensual arrangement for making decisions about spending and saving. Whether any particular pattern of control reflects real consent or coercive power may be difficult for husbands and wives or third party observers to ascertain. It has proved devilishly difficult to determine, through empirical studies, the extent of actual sharing among married couples.¹⁰⁷ As Marjorie Kornhauser points out, survey data are quite tricky to interpret, because people (including members of the same couple) may define sharing differently, and husbands and wives may have different perceptions about the extent to which decisions are consensual.¹⁰⁸

Available evidence suggests that couples vary significantly in their behavior. Some husbands and wives retain control over their own, separate earnings, while others share their income, and still others vest control of all funds, including the wife's earnings, in the husband.¹⁰⁹ Kornhauser's survey finds that roughly seventy percent of married couples share in-

105. See Kornhauser, *supra* note 64, at 84-91 (finding that couples do not universally pool finances and that earning power influences financial control).

106. See *id.* at 96-98; Zelenak, *supra* note 29, at 354-58. But cf. Louis Kaplow, *Optimal Distribution and the Family*, 98 *Scandinavian J. Econ.* 75, 76 (1996) (concluding that under utilitarian welfare function, presence of unequal sharing of income may dictate either greater or smaller allocation of resources to families).

107. There may be significant differences, for example, between wives' roles in managing family income and their effective roles in decisionmaking. See Carolyn Vogler & Jan Pahl, *Money, Power, and Inequality Within Marriage*, 1994 *Soc. Rev.* 263, 273, 277 (distinguishing financial management from strategic control and finding that male management is associated with male control but that female or joint management is associated with joint control).

108. See Jan Pahl, *Money and Marriage* 169 (1989) (noting that husbands generally perceived more sharing than wives did); Kornhauser, *supra* note 64, at 80-86, 106 (arguing that survey data overestimate pooling, because couples think that they should pool income, even if they in fact do not). Other kinds of data are also difficult to interpret. Blumstein and Schwartz report couples' responses to questions asked in personal interviews and also attempt third party observation of marital negotiations. Jan Pahl reports couples' responses to questions asked in personal interviews. For explanations of the difficulties in interpreting such data, see Blumstein & Schwartz, *supra* note 86, at 131 & n.13; Pahl, *supra*, at 60-62, 83-87.

109. For a review of the literature, see Viviana A. Zelizer, *The Social Meaning of Money* 36-70 (1993); Marjorie Kornhauser, *Theory Versus Reality: The Partnership*

come to some extent. Whether that is a high or low percentage of sharing depends on one's perspective.¹¹⁰ Kornhauser argues that husbands, as primary earners, tend to have greater effective control over income even in couples who believe that they share.¹¹¹ On the other hand, Lawrence Zelenak's discussion of the available studies concludes that while husbands often have greater control over spending and savings decisions than wives, substantial pooling does occur.¹¹²

A second ambiguity is that couples may "pool" in one sense, but not in another. Zelenak notes that even when spouses do not share control over income, they typically share in consumption, if only because many major consumption goods, like housing, are indivisible.¹¹³ Zelenak's distinction is important because it suggests that *both* individual and joint incomes are imperfect measures of economic well-being. Joint filing would tend to accurately measure material well-being but would overstate the psychic well-being of a wife who has little control over consumption decisions. In contrast, individual filing would permit two-earner couples who do pool or at least share consumption to understate their material well-being. In addition, individual filing would allow pooling couples with unearned income to deliberately understate their economic well-being by shifting unearned income to the spouse in the lower tax bracket.¹¹⁴ From a feminist perspective, there is no single right answer to this controversy. The abstract question of whether "control" or "consumption" is more important in defining "ability to pay" is highly formalistic—and not one to which feminist goals give any clear answer.

Finally, the argument based on ability to pay contains implicit, and inconsistent, assumptions about the distribution of tax burdens and after-tax income within the family. The argument for individual filing is that husbands and wives control their own earnings, so that if each one is taxed on that amount, he or she then has the appropriate amount left after tax. The implication seems to be that in a system of joint filing, each member of the couple would literally "pay" half of the joint tax, so that the (lower earning) wife ends up with an unduly heavy tax burden. But the basis for this assumption is not clear. If the couple believes that tax

Model of Marriage in Family and Tax Law Versus Intra-Household Allocations, 69 Temple L. Rev. (forthcoming 1996) (manuscript at 15–19, on file with the Columbia Law Review).

110. See Kornhauser, *supra* note 64, at 106; Zelenak, *supra* note 29, at 350–51.

111. See Kornhauser, *supra* note 64, at 86–91.

112. Zelenak ultimately supports individual filing but notes that it is a close call. See Zelenak, *supra* note 29, at 358.

113. See *id.* at 351–58.

114. For discussions of these issues, see Munnell, *supra* note 29, at 271–77. Administrative concerns should not be overstated, however: Canada and a number of Western European countries have managed to implement individual filing, and although virtually any regime permits some opportunistic income shifting, those countries have apparently found the costs to be manageable. See generally *Comparative Tax Systems: Europe, Canada, and Japan* (Joseph A. Pechman ed., 1987) (describing different approaches in several countries).

liability should be apportioned between husband and wife according to ability to pay, then why wouldn't they apply that norm even in a system of joint filing, apportioning the joint tax burden between spouses according to their incomes? If, however, the intrafamily norm is *not* ability to pay but some other norm—for example, that husband and wife should each pay fifty percent of any tax liability imposed on the couple—then why wouldn't they follow the same procedure under individual filing as well?¹¹⁵

Thus, for this argument to work, there must be something about individual filing that *changes* intrafamily norms about the distribution of income between husbands and wives. The following subsection considers that argument.

b. *Individual Filing and Intrafamily Redistribution.* — Some scholars argue that individual filing could help redistribute income and power within the family by increasing wives' after tax earnings.¹¹⁶ Individual filing could raise wives' after tax income in two ways. Wives who respond to marginal tax rate cuts by working more would earn more before taxes. Even working wives who do not work more would see increased after tax wages due to the marginal tax rate reduction.

The obvious practical problem is that wives' increased earnings may not translate into greater control over family resources. A married woman may reap little direct financial benefit from individual filing if the dynamics of the family divest her of effective control over the additional income. Although *men's* market earning power has been associated with

115. One could argue, instead, that under joint filing the wife will "pay" the tax burden determined by her higher marginal tax rate as secondary earner, but that argument raises essentially the same questions. This version of the argument assumes that (perceived) *average* tax rates within the couple will mirror perceived *marginal* tax rates under the Code. The couple may instead split the joint (average) tax burden according to an intrafamily norm of ability to pay. If they do not do so, it is not clear why they will necessarily begin to respect ability to pay under individual filing, instead of continuing to allocate a heavier tax burden to the wife. The basic point is that the legal structure of the tax code does not necessarily determine allocations of resources within the family.

116. See, e.g., Kornhauser, *supra* note 109, at 14–19 (arguing that available empirical evidence on intrafamily allocations suggests that wage earners tend to retain control over their own earnings). Kornhauser clearly argues that individual filing would recognize *existing* patterns of intrafamily control, see *id.* at 30, and also seems to anticipate that individual filing could improve the situation by increasing after tax earnings over which the wife will retain control. She seems to expect that women would control the disposition of additional disposable income attributable to tax credits awarded on an individual return. See Kornhauser, *supra* note 64, at 110. Kornhauser also argues that individual filing could "reinforc[e] a sense of independence and self-worth in both partners." *Id.* Although some feminist predictions about the impact of individual filing on intrafamily sharing may anticipate only symbolic gains, others clearly contemplate an actual redistribution of resources within the family, explicitly making an argument that is implicit in other scholarship. See Davis, *supra* note 43, at 237 (arguing that individual filing will remove work disincentives and "put more money at [women's] disposal, and give women control over how to spend the money they earn").

men's greater power within the family, it is not clear that women can take advantage of a similar dynamic by earning more.¹¹⁷

Although some studies suggest that women who go to work can improve their bargaining power within the family, the same studies also find that a wife's earnings do not necessarily strengthen her bargaining power.¹¹⁸ Traditional notions of male control over finances may trump wives' increased financial contribution.¹¹⁹ In addition, the direction of the causal relationship between wives' earnings and their power within the family is not entirely clear. Although it is quite plausible that a wife's market earnings could give her new confidence to insist on participating in financial decisions, it may also be that wives who are especially assertive to begin with, or who have husbands with more egalitarian views, are more likely to work in the first place.¹²⁰

A variant of the bargaining power argument is the claim that married women's earnings can enhance wives' ability to make a credible threat to leave the marriage. Economic historians suggest that women's increased market work and self-sufficiency may have contributed (along with other complex causes) to the rising divorce rate over time,¹²¹ and individual filing might similarly enhance women's ability to make a credible "exit threat." This strategic argument appeals both to historical trends and to our taste for game theory, but must nevertheless confront several obstacles. If individual filing creates only an incremental improvement in a wife's earnings, the exit threat is only modestly enhanced. In addition, for the enhanced exit threat to work, it must actually be used by wives and

117. Kornhauser provides a vivid example of a wife whose perceived "control" over her own (substantial) earnings actually reflects significant deference to her husband's wishes. Although the wife "controls" her own earnings, she must pay not only her share of household expenses but also all child-related expenses. When those expenses exceed her income, she must receive her husband's approval for extra expenditures. See Kornhauser, *supra* note 109, at 18–19.

118. See Blumstein & Schwartz, *supra* note 86, at 53–56; Zelizer, *supra* note 109, at 67; see also Pahl, *supra* note 108, at 109, 174, 176 (finding that wives' earnings *relative* to husbands' earnings are correlated with greater control over finances and that wives who were dominant in household decisionmaking usually were employed).

119. See Blumstein & Schwartz, *supra* note 86, at 56; Pahl, *supra* note 108, at 174; Zelizer, *supra* note 109, at 69. Pahl also suggests that even when women's earnings lead to greater sharing of control over finances, the *relative* earnings of the spouses—and not the simple fact of a wife's employment—may still determine "overall control." See Pahl, *supra* note 108, at 168.

120. See generally Pahl, *supra* note 108, at 121–23 (describing the complex variables, including culture, psychology, and social factors like earnings and social class, which combine to determine patterns of management and control of a couple's finances). Another issue is how a tax cut is likely to be perceived by the couple. Would a tax reduction due to individual filing be viewed as the wife's money or as family money? Does it matter whether the tax benefit is received throughout the year, in the form of bigger paychecks, or at the end of the year through a tax refund? Does the fact that the refund check is made out to the wife enhance her control, or will dominant ideas about pooling turn "her" money into "their" money?

121. See Bergmann, *supra* note 25, at 235–38; Folbre, *supra* note 4, at 205.

must not be overcome by other bargaining power impediments. For example, even if individual filing could increase wives' earnings substantially, women's market earnings may remain low in absolute terms or relative to their husbands' earnings. In those cases, the exit threat remains weak, because the wife could suffer economic hardship or a severe drop in living standard. In addition, traditional attitudes about appropriate gender roles may lead wives to hesitate to put a relationship at risk by making economic threats.

Finally, advocates might argue that despite these practical difficulties, individual filing would send a symbolic message about women's economic independence. The effects of legal symbolism are particularly uncertain, however, not just because symbolism is intangible, but also because it is extraordinarily difficult to predict the impact of government-sponsored metaphor on deeply entrenched notions about women's roles in families.¹²² Individual filing could even convey a negative message if it is viewed, with hostility, as a special benefit for married women that is financed by tax rate increases on married men and single individuals.

Part II.A.2 revisits the question of intrafamily redistribution to consider what tax law changes might accomplish in connection with changes in community property rules.¹²³ That analysis suggests that although individual filing might play a role in strengthening family law rules that seek to enhance women's control over marital property, ironically, the most effective approach would require measures that are at odds with the goal of eliminating the secondary-worker bias.

4. *Conclusions.* — Feminist proposals for individual filing have a long and distinguished academic lineage. Some of the earliest, groundbreaking feminist scholarship in tax focused on the system of joint filing, demonstrating that gender-neutral language does not guarantee gender-neutral treatment, and more recent scholarship has elaborated that theme.¹²⁴ Nevertheless, despite the historic and analytic importance of these feminist proposals, some key feminist arguments for individual filing are significantly weaker—and more contested—than they have been portrayed.

Individual filing is often offered as the answer to two separate, though related, questions. The first question—and the one explicitly considered in many articles advocating individual filing—focuses on the binary choice between individual and joint filing and asks whether femi-

122. See generally Fineman, *supra* note 17, at 27–28 (discussing efforts to use symbolism of equal treatment in family law); Michael Livingston, *Risky Business: Economics, Culture, and the Taxation of High-Risk Activities*, 48 *Tax L. Rev.* 163, 166, 182–87 (1993) (exploring use of tax law as means of communicating cultural norms).

123. See *infra* notes 317–324 and accompanying text.

124. For earlier works discussing individual filing, see Blumberg, *supra* note 28; Gann, *supra* note 28. For more recent proposals for individual filing, see Kornhauser, *supra* note 64, and Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 *UCLA L. Rev.* 983 (1993).

nist arguments favor one regime over the other. The preceding analysis clarifies some hidden normative conflicts, showing that the traditional feminist case for individual filing implicitly reflects a preference for the goals of equal treatment and encouraging women's market work over the goal of assisting caregivers. Individual filing would implement equal taxation of men's and women's earnings, but at the cost of lowering the tax burden on two-earner couples compared to equal-earning single-earner couples. Although feminist advocates of individual filing have recognized this tradeoff, they have not clearly seen that the goal of assisting caregivers suggests a *feminist* reason to support joint filing and equal taxation of equal-earning couples. In other words, taking seriously the goal of assisting caregivers shows that there is no single "feminist" answer to the filing unit issue, even in principle. Further, the analysis demonstrates that conventional arguments have overstated the practical consequences of individual filing for the division of family labor, women's economic well-being, and intrafamily distributions—and, thus, have also overstated the detrimental impact of joint filing today.¹²⁵

The second, and broader, question is what priority, if any, individual filing should be given in a feminist legal agenda. An advocate of equal treatment would give individual filing top priority, but the preceding analysis suggests that the equal treatment argument is rather weak for two reasons. First, as just noted, empirical predictions about the effects of individual filing have been overstated. In retrospect, optimistic feminist predictions about the effects of individual filing on gender roles, women's economic well-being, and intrafamily distributions may have been most appealing during the ascendancy of equal treatment feminism in the 1970s and early 1980s. Continuing experience with women's increasing labor force participation has begun to call into question the benefits of market work for women, as women have taken on new duties and expectations without shedding the old ones—and it is no accident that feminist theory in the intervening decades has increasingly looked beyond equal treatment.¹²⁶ It is important not to overstate the case: women's greater labor force participation has, over time, fundamentally changed some important expectations about gender roles. The basic point here, however, is that by this time, incremental increases in response to individual filing probably have only very uncertain effects.

Second, although the case for individual filing might rest on symbolic rather than practical effects, the purely symbolic impact of individual filing is likely to be rather minimal. The equal treatment goal has been enormously important in accomplishing important change in other

125. I add "today" as an important caveat because I am considering only the case for keeping or repealing the joint return now. The analysis has not addressed the historical claim that the system of joint filing played a role over time in women's economic subordination.

126. See Fineman, *supra* note 17, at 22.

areas of law,¹²⁷ but it is difficult to equate individual filing with fundamental civil rights protections for voting and education. The symbolism of individual filing is likely to be far less visible and less well understood than other legal reforms. Although scholarly proposals for individual filing use the rhetoric of equal treatment to good effect, average taxpayers may not understand or attach any importance to the change. Individual returns might be promoted as an official recognition of married women's economic independence, but some couples will experience the change only as an obligation to fill out two tax returns instead of one. In addition, the fact that one- and two-earner couples with equal earnings pay different taxes under individual filing may make it particularly difficult to defend the policy, in the public arena, as a symbolic step toward "equality." The point is not that equal treatment is inherently unimportant, but only that there are significant questions about the current importance of extending the equal treatment model to *taxation* through individual filing.

Finally, although individual filing might be viewed as a first step in a feminist legal agenda that seeks to encourage women's market work, the traditional case for individual filing provides only a contingent endorsement. If we assume, realistically, that resources for feminist policies are limited and that individual filing is not the only available policy option, then the case for individual filing as a market work incentive requires further analysis to compare individual filing with other policy options—e.g., other kinds of marginal tax rate cuts, an expanded DCTC, or family leave. The next section considers the issues involved in designing a tax policy to implement the goal of encouraging women's market work.

B. *Encouraging Women's Market Work: Marginal Tax Rate Cuts for Working Wives*

This section uses a recent proposal by Edward McCaffery to illustrate the normative and institutional complexity of creating tax rules to encourage women's market work.

In two recent articles, McCaffery makes an explicitly feminist argument for reducing marginal tax rates on wives.¹²⁸ In the first article, McCaffery proposes a special low or even negative tax rate schedule for married women, financed by higher taxes on married men.¹²⁹ In the second article, McCaffery elaborates the case for the tax cut and adds a second feature: repeal of the provisions of Title VII that require equal

127. See *id.* at 20–28.

128. McCaffery's proposal is one part of a long and complex analysis that is primarily concerned with challenging the use of the "wage gap" between men's and women's earnings to measure feminist progress, and with showing that government intervention might improve the functioning of the labor market. See McCaffery, *supra* note 50, at 599. This Article does not address these claims.

129. See McCaffery, *supra* note 124, at 1035–53.

pay for women and men.¹³⁰ McCaffery is deliberately noncommittal about how the tax cut should be accomplished and suggests a number of institutional options, including individual filing, perhaps with a special low tax rate schedule for secondary earners.¹³¹

McCaffery argues that taxing wives at lower rates than husbands would be efficient, and that in this case efficiency promotes the feminist goal of increasing women's welfare. The efficiency argument is based on the optimal commodity tax principles described above: the intuition is that we can raise a given amount of revenue with the smallest net utility loss if we impose lower taxes on more elastic commodities.¹³² Thus, because married women's labor supply is so elastic, the tax law can maximize welfare by taxing wives at *lower* rates than other workers.¹³³ McCaffery also argues that the combination of tax rate reductions and repeal of the equal pay requirement in current antidiscrimination law would expand women's employment choices by encouraging employers to offer more high-quality part-time jobs.¹³⁴ He maintains that tax incentives for market work are appropriate in order to overcome cumulative economic and social biases, and that women would choose to work more in the absence of legal and economic impediments.

1. *Three Feminist Objections.* — Like other feminist tax policy proposals, marginal tax rate cuts for wives are open to feminist objections, which illustrate tensions among—and ambiguities within—the three feminist goals.

First, the proposal seems to conflict with the goal of equal treatment. Individual filing alone would be acceptable under the equal treatment standard, but additional reductions in marginal tax rates for women presumably would not, because they would create "special treatment" for women's earnings.¹³⁵ The proposal for repeal of Title VII's equal pay requirement also seems to be in tension with the goal of equal treatment. Here, however, the ambiguity of the equal treatment goal becomes troublesome. If the logic of equal treatment is flexible enough to recognize that statutes drafted in gender-neutral language (i.e., the joint filing rules) can disproportionately affect women, perhaps it is also elastic enough to acknowledge that women may need "special" benefits in order to overcome the legal, social, and economic conditions that tend to dis-

130. See McCaffery, *supra* note 50, at 663–64.

131. He also suggests a second-earner deduction, a reduction in the Social Security payroll tax, or an expansion in the DCTC. See *id.* at 663. Part I.D.1, below, considers the case for an expanded DCTC as a work incentive for women.

132. See *supra* text accompanying notes 48–50.

133. See McCaffery, *supra* note 50, at 657–59.

134. See *id.* at 665.

135. Although McCaffery's plan would be phrased in gender-neutral terms to provide tax cuts for "secondary earners," see *id.* at 662–63, the logic of the equal treatment case for individual filing suggests that an equal treatment analysis would take into account the fact that wives are most likely to be secondary workers.

courage their market work.¹³⁶ Under that more expansive reading, however, the equal treatment goal would simply collapse into the goal of encouraging women's market work.

Second, there is an inevitable conflict between the feminist goals of encouraging women's market work and providing income support for caregivers, and it emerges clearly in McCaffery's proposal. The basic conflict centers on whether women's current preferences about family labor ought to be changed. As noted above, the case for market work incentives typically includes a claim that women's current preference for family labor either is the product of years of social indoctrination into traditional gender roles, or is simply dysfunctional.¹³⁷ Feminists who favor aid to caregivers, however, typically argue that women's current preferences are valuable, and that commitment to caregiving work is a socially important trait.¹³⁸

These views clearly are incompatible, and McCaffery's proposal takes the first approach. Although McCaffery argues that his proposal would expand women's choices and not enshrine any particular view about how women ought to behave, he does assert that public policy should seek to overcome the many legal and social biases that discourage married women's market work.¹³⁹ He also flatly rejects the alternative of making unconditional income transfers to women, arguing that simply redistributing income to women "could make things worse" by "plac[ing] an added penalty on working" and perpetuating current discontinuities in the market for women's labor.¹⁴⁰

From the opposite side, feminists who see the devaluation of women's family labor as the central obstacle to women's autonomy, power, or happiness could oppose market work tax incentives.¹⁴¹ Although tax incentives would not force any woman to go to work if she prefers not to, they would increase the rewards of market work relative to those of family labor. To the extent that married women's market work decisions are made jointly with other family members who will benefit from the extra family income, wives may face pressure to take advantage

136. McCaffery notes that the imputed-income exclusion and the joint tax return are not the only legal rules that discourage women's market work; others include the Social Security rules and the fringe benefit system. See McCaffery, *supra* note 124, at 996–1001, 1010–14.

137. See *supra* text accompanying note 21.

138. Feminists who seek only transitional support for caregivers in older generations may have less difficulty with the norm of changing preferences for *future* generations. See Kay, *supra* note 23, at 21–24.

139. See McCaffery, *supra* note 50, at 653–54; McCaffery, *supra* note 124, at 983–88.

140. McCaffery, *supra* note 50, at 652.

141. See, e.g., Staudt, *supra* note 99, at 614–18 (arguing that "tax incentives developed to encourage women's market participation . . . will have only a marginal effect on women's labor decisions . . . and because many women do not view household labor as oppressive . . . , encouraging market participation will not always operate to empower women").

of the incentive regime. Thus, although McCaffery's ultimate goal of expanding women's employment options could benefit caregivers who work, the objection would be that the mechanism for doing so relies too much on changing women's behavior and preferences. Distributionally, the proposal would reduce the average tax rates of some caregivers' families (i.e., two-earner couples) but raise taxes on others (i.e., single-earner couples). Although McCaffery frames his proposal as a tax cut for "women" paid for by higher taxes on "men," that overstates the case. A system of individual filing can nominally set high tax rates for husbands and low tax rates for wives, but the discussion of intrafamily distribution above suggests that the aggregate tax burden on the couple is likely to affect both the husband's and the wife's income and consumption. Thus, McCaffery's proposal is more accurately described as a tax cut for two-earner couples and a tax increase on single-earner couples.

Third, even feminists who want to encourage women's market work might object to the pattern of incentives created by McCaffery's plan. Although McCaffery suggests that any of several ways of cutting wives' taxes would do for purposes of his proposal,¹⁴² the institutional details matter. Different types of tax incentives target marginal and average tax rate cuts to different groups of women, and virtually any market work tax incentive will encourage some women to work while discouraging others. Choosing among the alternatives requires explicitly normative decisions that are not provided by the generic feminist goal of encouraging women's market work.

To understand this point, it is useful to recall that any tax rate cut has *competing* income and substitution effects. Although we typically speak of marginal tax rate cuts as a "work incentive," in fact—as noted above¹⁴³—any tax cut has an income effect that discourages work and a substitution effect that encourages it. Although empirical studies typically conclude that wives as a group will work more in response to tax cuts, the aggregate figure obscures the effect on individuals: some women will work more and others will work less. The important point here is that different "work incentive" policies target income and substitution effects to different groups of women, and that once again there is no automatic "feminist" answer that reveals the one correct pattern.

For example, one of McCaffery's institutional options is individual filing, combined with a special, low marginal tax rate schedule for secondary earners. Individual filing would reduce marginal tax rates for wives, but not single women, and only for some wives. It would create the largest marginal tax rate reduction for nonworking or very low-earning wives of high-earning men but would provide little or no marginal tax rate reduction for others, including many wives whose earnings are relatively

142. See *supra* note 131 and accompanying text.

143. See *supra* text accompanying notes 68–69.

similar to their husbands' earnings.¹⁴⁴ This pattern arises because individual filing eliminates the secondary-earner distortion, and so provides the largest marginal tax rate cuts to women who face the greatest secondary-earner bias. McCaffery offers an efficiency rationale for this pattern: recent studies suggest that the decision by nonworkers to go to work is more elastic than the decision by current workers to increase their hours of work, and optimal tax principles suggest concentrating tax rate reductions on the most elastic choices. Although this is a coherent position, it contains an implicit, and controversial, normative assumption that increasing participation options for nonworkers, including high-income women, is more important than providing work incentives to other groups, including, say, single mothers or wives already at work.

There are also distributional questions involving the *average* tax rate cuts awarded to different groups. For example, individual filing also tends to create the largest average tax rate cuts for high-earning wives married to high-earning husbands.¹⁴⁵ Although McCaffery's proposal quite clearly focuses on incentives and discounts distributional concerns, some feminists might object to the distribution of benefits from the tax cut. In an earlier article, McCaffery defends policies that encourage market work by high-income women,¹⁴⁶ but he later suggests that the margi-

144. See *supra* text accompanying notes 65–66.

145. This effect arises even in a system of individual filing that is revenue neutral and that does not cut taxes for high-income households in the aggregate. The reason is that, as noted above, individual filing in a tax system with progressive marginal tax rates tends to increase taxes on single-earner couples but reduce them on two-earner couples. With a progressive tax rate schedule, the disparity between the two kinds of couples is greater at high income levels than at low income levels. A simple example illustrates the point. Suppose that there are four couples, (A), (B), (C), and (D). High-income couples (A) and (B) both have total incomes of \$100,000, but couple (A) is a single-earner household, and couple (B) is a two-earner household in which both husband and wife earn \$50,000. Low-income couples (C) and (D) both have a total income of \$20,000, but couple (C) is a single-earner household and couple (D) is a two-earner household in which both husband and wife earn \$10,000. Suppose that the initial system of joint filing imposes a marginal tax rate of 0% on joint income up to \$10,000, 25% on income between \$10,000 and \$20,000, and 50% for income over \$20,000. The joint filing system raises total revenue of \$90,000; couples (A) and (B) each pay tax of \$42,500, and couples (C) and (D) each pay \$2500. Now suppose that individual filing is adopted, and the new system must raise the same total revenue and must not increase or reduce taxes on high- or low-income couples in the aggregate. There are many possible permutations, but consider just one: a new tax rate schedule for each individual of 0% on the first \$5000 of income, 20% on incomes between \$10,000 and \$30,000, and 66.4% on incomes over \$30,000. The new system will still raise \$90,000 in the aggregate, and high-income couples (A) and (B) will still pay \$45,000 in the aggregate, while low-income couples (C) and (D) will still pay \$5000 in the aggregate. But now couple (A) pays \$50,450 while couple (B) pays \$34,550—a difference of \$15,900. And couple (C) pays \$3000 while couple (D) pays \$2000—a difference of \$1000.

146. See McCaffery, *supra* note 124, at 1028–29 (arguing that “encouraging upper-income women to stay home deprives women of powerful, and symbolically important, role models”). A feminist might take either position; there is no consensus among feminists on

nal tax rate cut might be restructured to concentrate benefits on the lowest earners.

Another market work tax incentive, the earned income tax credit ("EITC"), illustrates a different institutional structure, which targets marginal and average tax rate cuts in a quite different pattern. The EITC is a "refundable" tax credit for low-income workers, who use the credit to offset their income tax liability, and receive any unused credit as a cash "refund."¹⁴⁷ The EITC for a worker with two children is equal to 40% of earnings up to \$8890. To limit the credit to low-income workers, the credit is phased out as earnings rise; the phaseout rate is in effect an additional marginal tax rate of 21.06% on earnings between \$11,610 and \$28,495, when the credit is fully phased out.¹⁴⁸ (For married couples who claim the EITC, the earnings amounts are determined on a joint basis.¹⁴⁹)

As I discuss at more length in a previous article, the structure of the EITC creates potential work incentives for some workers and potential disincentives for others.¹⁵⁰ The EITC is an unambiguous work incentive for nonworkers, but has mixed income and substitution effects even for recipients who receive the 40% earnings subsidy. For slightly higher income workers, the phaseout of the EITC creates a potential work disincentive.¹⁵¹ Empirical studies suggest that the EITC encourages nonworkers to enter the labor force but probably has no net effect on work effort by EITC recipients already in the work force.¹⁵² In addition, the taxes raised to fund the EITC also may discourage work by other, higher income taxpayers.

Is the EITC a good way of encouraging *women's* market work? Here the tradeoffs become even more nuanced. Empirical studies suggest that

the priority to be given to issues of gender and class. See *supra* text accompanying note 103.

147. See I.R.C. §§ 6401(b)(1), 6402(a) (1994).

148. See *id.* § 32(b); Rev. Proc. 95-53, 1995-2 C.B. 446-47. The income amounts are indexed for inflation; amounts in the text are for 1996.

149. See I.R.C. § 32(d).

150. See Alstott, *supra* note 69, at 548-53.

151. For nonworkers, the earnings subsidy creates a positive substitution effect—work appears more attractive because the after tax wage is higher—and has no income effect, because the person cannot receive the income without going to work. Workers who receive the earnings subsidy, which is just a tax rate cut in the form of a negative tax, encounter a negative income effect, because the transfer makes them feel richer, and a positive substitution effect, because their after tax wage is higher. For workers in the phaseout range, the EITC operates just like a traditional welfare program. The introduction of a phaseout creates a negative income effect because higher earnings result in the loss of a portion of the EITC, and a negative substitution effect because the after tax wage is lower than before the introduction of the phaseout. See *id.* at 548-49.

152. For an excellent summary and analysis of recent studies, see Jane G. Gravelle, Congressional Research Serv., *The Earned Income Tax Credit: Effects on Work Effort* (1995), reprinted in *Tax Notes Today*, Sept. 15, 1995, available in LEXIS, Fedtax library, TNT file, 95 TNT 181-39.

the EITC tends to encourage nonworking single mothers to enter the labor force but probably discourages work effort by wives in married couples that receive the EITC.¹⁵³ (The latter effect arises because in a system of joint filing, the EITC phaseout rate exacerbates the secondary-earner bias.¹⁵⁴) The taxes raised to finance the EITC may also raise marginal tax rates for higher earning single women and married women (and men). Determining whether the EITC pattern is a good *feminist* tax policy requires normative judgments about the relative importance of work for different groups of women. If we want to encourage labor-force participation by the lowest income single mothers,¹⁵⁵ the EITC is a good idea, but if we are primarily concerned about wives and the secondary-worker bias, it is less attractive, at least without a simultaneous move to individual filing.

The point is not that we must choose between, say, the EITC and individual filing, but instead that virtually any market work tax incentive requires normative judgments about how to target potential incentives and potential disincentives. We could adopt an array of tax incentives for women's market work—say, individual filing with a reduced tax rate schedule for married women, as well as a larger EITC—and still we would discourage work by some women.¹⁵⁶ Ultimately, the simple goal of encouraging women's market work provides no unique feminist answer, and the details of institutional design determine which women gain and which women lose.

2. *Institutional Limitations.* — Even if one embraces the objective of encouraging married women's market work and decides on a particular institutional structure to accomplish that goal, the discussion of individual filing above suggests serious questions about the capacity of marginal tax rate cuts to achieve the underlying goals of changing gender roles, women's economic well-being, or improving the flexibility of the labor market.¹⁵⁷ These are not necessarily McCaffery's goals: his proposal is intended primarily to create a greater variety of part-time and flexible work options,¹⁵⁸ and he seems less concerned with increasing women's economic security or with encouraging men to share family labor, although he does predict that men will work less while women work

153. See *id.*

154. For a discussion of the secondary-earner bias in the EITC, see McCaffery, *supra* note 124, at 995. The EITC can also have a negative income effect on nonworking secondary earners, because the wife may work less or choose not to work because the EITC increases her husband's earning power. See Gravelle, *supra* note 152.

155. See Gravelle, *supra* note 152.

156. Such a system would create higher marginal tax rates on two groups: (1) groups whose marginal tax rate increases under individual filing—potentially including single women or some wives in two-earner couples—and (2) women in the EITC phaseout range (who were not in the phaseout range under the old system based on joint income).

157. See *supra* Parts I.A.2 & 3.

158. See McCaffery, *supra* note 50, at 665.

more.¹⁵⁹ For other reformers inclined to see market work tax incentives as a route to greater economic independence and security for women, however, the problem remains that marginal tax rate cuts may do little to change gender roles, to reduce the most significant barriers to women's entry into the labor force, or to enhance their prospects for self-sufficiency through market work.

Although larger tax rate cuts might do more than individual filing to encourage market work by some women, the analysis above in Part I.A.2.b suggests that it is not just the size of the tax cut that matters. A slightly larger tax cut might encourage more women to work but still would confront the difficulty of altering attitudes about gender roles and structural barriers to combining market work and family labor. These conditions may change over time, and tax cuts for working women could help, but any prediction is necessarily uncertain, and, realistically, proposals for incremental change will have limited effects.

One key strength of McCaffery's plan is that it explicitly takes account of and attempts to remove structural barriers to women's market work. McCaffery recognizes that current labor market arrangements restrict women's ability to work flexible hours or to obtain high quality part-time work and argues that the solution is to repeal the equal pay requirement of Title VII.¹⁶⁰ In combination with tax changes, he argues, the new rules would encourage employers to create new institutional alternatives, as men and women pressure employers for new flexible and part-time options and employers seek to accommodate the needs of the new pool of cheaper female labor. McCaffery predicts that women's wages would drop after amendment of Title VII,¹⁶¹ but argues that allowing employers to pay women less would make "markets work better" by rewarding employers who hire women and removing the incentive to segregate women into separate job classifications to avoid the equal pay rule.¹⁶² Lower marginal tax rates for married women, he argues, would help make up the reduction in women's pay.¹⁶³

Although McCaffery's proposal is an innovative attempt to use legal reforms to restructure the labor market,¹⁶⁴ it illustrates the difficulty of predicting and controlling the effects of such radical change. Repealing the equal pay guarantee of Title VII would certainly deal a significant blow to the civil rights of women—an important loss which, once surrendered, might not easily be recovered if the experiment fails. Moreover, the potential gain in labor market flexibility rests on a highly contingent

159. See *id.* at 662, 665.

160. McCaffery's proposal would retain the prohibition against categorical or irrational discrimination against women but would permit firms to make a rational case for lower pay for women. See *id.* at 656.

161. See *id.* at 664–65.

162. *Id.* at 655.

163. See *id.* at 664–65.

164. See *infra* Part II for a discussion of other "combination" policies.

series of incentives, and it is extremely difficult to predict whether the plan would effect a net improvement in women's choices and well-being. For example, for McCaffery's proposal to expand part-time and other flexible work options, employers would have to value the new, cheaper source of female labor sufficiently to make potentially costly alterations in the structure of employment in order to attract more female workers into the labor market. McCaffery's account suggests employers have so far paid little attention to women's current demand for such arrangements,¹⁶⁵ and it is not clear that the new incentive structure would alter the situation.

A darker scenario is that employers would reap windfall gains by cutting women's wages while retaining current job arrangements, with full-time work the norm and part-time work offered only for certain kinds of work and typically with low pay and benefits. Although McCaffery anticipates that (married) male workers will also begin to demand part-time work as they reduce their hours in response to higher marginal tax rates, empirical evidence suggests that men may not significantly reduce their market work in response to tax rate increases,¹⁶⁶ so that the additional pressure on employers from men that McCaffery anticipates may not materialize. Finally, the proposal could have disastrous consequences for single women—including single mothers—if their wages fall after Title VII repeal, because they would not share in the tax cut available to married women.¹⁶⁷ McCaffery argues that in the long run all women may benefit from expanded choices and possibly even higher wages, if women as a group become more committed to the labor force and pursue more education.¹⁶⁸ Nevertheless, McCaffery emphasizes "a certain tentativeness" to the proposal, and acknowledges that further behavioral studies are needed.¹⁶⁹

3. *Conclusions.* — Although McCaffery's proposal is a thoughtful attempt to use tax incentives to improve women's lives, it illustrates the strong normative positions and empirical assumptions that underlie proposals for marginal tax rate cuts for wives. Market work tax incentives are controversial even in feminist terms, because they are in tension with the competing goals of equal treatment and assisting caregivers. The choice of marginal tax rate cuts for wives also implies a controversial normative

165. See McCaffery, *supra* note 50, at 620.

166. See *supra* note 88. McCaffery argues that the proposal would, over time, increase men's labor supply elasticity. See McCaffery, *supra* note 50, at 662.

167. See McCaffery, *supra* note 50, at 662–63 (describing marginal tax rate cuts available to wives). McCaffery's main focus is on married women, and he does not offer a clear prediction about the consequences of the proposal for single women. The article's positive analysis notes that many single women are affected by the same labor market dynamics as married women. See *id.* at 609, 623, 629, 631 n.127. The discussion of the final proposal seems to anticipate that all women's wages will drop, see *id.* at 664–65, but there is no description of the net effects for single women.

168. See *id.* at 665.

169. See *id.* at 656.

judgment that encouraging work by nonworking wives is more important than, e.g., targeting market work incentives and average tax rate cuts more broadly to single mothers and lower income women as well. And even if one is willing to make those normative tradeoffs, the same institutional questions raised in connection with individual filing create doubt about the capacity of marginal tax rate cuts to achieve underlying goals of changing gender roles or improving women's economic well-being and power within the family.

McCaffery's combination proposal also illustrates the difficulty of using tax reform and deregulation to make big changes in the structure of market employment. The proposal requires taking a gamble on institutions that do not seem well suited to achieving their goals. If the proposal worked as intended, it would indeed mark a major expansion of women's (and men's) choices about market work and family labor, but if the proposal failed, it could significantly worsen the economic prospects of women workers. Ultimately, the appeal of McCaffery's proposal depends on one's taste for risk in policymaking, and I think that the stakes here are simply too high.

There are other institutional options worth considering, however. Part I.D suggests that an expanded DCTC could encourage some women's market work while also accommodating, to some extent, the goals of equal treatment and assisting caregivers. Part II.B. explores what a modified program of family leave might do to expand flexible workplace options for women.

C. *Assisting Caregivers Through Family Allowances*

This section considers family allowances, which illustrate one attempt to use tax policy to implement the goal of assisting caregivers. Family allowances, which are common in Western Europe and some other countries,¹⁷⁰ would provide a fixed dollar payment per child to every eligible family, including single parents, two-earner couples, and single-earner couples. When a child's parents live apart, the family allowance is typically paid to the custodial parent. When a child's parents live together, many countries pay the family allowance directly to the mother or (adopting gender-neutral language) to the "primary caregiver."¹⁷¹ Family allowance proposals typically anticipate a payment of at most a few

170. For a general description of family allowance programs in other countries, see Sheila B. Kamerman & Alfred J. Kahn, *Social Policy and Children in the United States and Europe*, in *The Vulnerable* 351, 363-65 (John L. Palmer et al. eds., 1988).

171. See, e.g., Social Security Contributions and Benefits Act, 1992, ch. 4, § 144(3), sched. 10 (Eng.) (payment to the wife); Income Tax Act, R.S.C., ch. 1, § 122.6, (5th Supp. 1985) amended by ch. 7, sch. VII, s. 12, 1994 S.C. 380 (Can.) (definition of "eligible individual"). For a recent U.S. proposal, see National Comm'n on Children, *Beyond Rhetoric: A New American Agenda for Children and Families* 94-95 (1991) (payment to the "primary caretaker"). Constitutional precedent suggests that the gender-neutral formulation would be necessary in the United States. See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977) (striking down gender-based classifications in Social Security); Weinberger

thousand dollars per year per child, which is not intended to provide subsistence-level income but instead to supplement market earnings and private child support payments.¹⁷²

Family allowances nominally provide a per child payment that is the same for every household, regardless of income, but the net distributional effect of the program depends on how it is financed—i.e., on how the tax rate structure changes to ensure that net revenue stays constant. Depending on the structure of the taxes raised to fund the program, family allowances might, for example, create a net transfer to all families with children from all childless families and individuals or might create, instead, a net transfer to poorer families with children from all other families and individuals.¹⁷³ Although family allowance proposals do not always clearly specify how they are to be financed, they typically seem to intend to redistribute income from higher to lower income classes as well as between families with and without children.¹⁷⁴

Although family allowances are an income transfer rather than strictly a “tax” policy, the distinction between taxes and transfers is theoretically and practically tenuous, and a number of scholars have proposed integrating family allowances into the tax system through a program of “refundable” tax credits.¹⁷⁵ Current tax law provides some benefits for families with children, but these tax provisions are not a substitute for a program of family allowances and are not intended as such. For example, the personal exemption for dependents provides larger benefits to higher income households than to lower income households, and no

v. Wiesenfeld, 420 U.S. 636 (1975) (striking down Social Security Act's gender-based classifications for survivor's benefits).

172. Advocates of family allowances who pursue this line of argument sometimes point with approval to the Swedish model of family policy, which provides a combination of income support for caregivers (e.g., family allowances) with policies that make it easier for women who are caregivers to work in the market (e.g., paid parental leave, subsidized day care and health insurance). See *infra* text accompanying note 221.

173. A simple example illustrates the possibilities. Assume that there are only four families: (A) richer with children, (B) richer and childless, (C) poorer with children, and (D) poorer and childless. Assume that initially there are no taxes and no transfers. Assume next that a family allowance is enacted to provide a transfer of \$1000 each to family (A) and family (C). Raising the taxes of family (B) and family (D) by \$1000 each creates a transfer from childless families to those with children, with no effect on the distribution of income *within* the two income classes (richer and poorer). Alternatively, funding the \$2000 total cost by raising the taxes of family (B) by \$1500 and the taxes of family (D) by \$500 creates a net transfer to families with children from childless families and also a redistribution of income from richer to poorer. Other permutations are possible.

174. See *infra* text accompanying notes 178–179.

175. See, e.g., Gene Steuerle, *Why I Favor Child Tax Credits or Allowances: Part 1: Restoring the Value of the Dependent Exemption*, 65 *Tax Notes* 629 (1994); Jonathan B. Forman, *A Strategy for Middle Class Tax Relief to Help Families*, *Wash. Times*, Sept. 20, 1994, at A19 (advocating refundable, per child tax credits).

benefit at all to the lowest income or highest income families.¹⁷⁶ Recently, President Clinton and Senator Dole have proposed different versions of a \$500 per child tax credit.¹⁷⁷ Although the proposed child tax credit could lay the foundation for a tax-based family allowance, in each case the credit is small and not available to the poorest or richest families.

Family allowances are commonly advocated as a means of improving the well-being of children,¹⁷⁸ alleviating poverty among single mother households and other families with children,¹⁷⁹ and reforming welfare.¹⁸⁰ Although Aid to Families with Dependent Children ("AFDC") provided, and the new program of federal block grants to states¹⁸¹ will provide, some modest, income-tested assistance for families with children, many advocates argue that family allowances would be superior. Some proponents of family allowances seem to anticipate that a family allowance would increase the generosity of total transfer payments made to caregivers; others argue that even if family allowances substituted dollar-for-dollar for current welfare benefits (instead of increasing them), recipients could benefit in several ways from the substitution of a universal benefit for an income-tested one. First, the family allowance would help alleviate the high marginal tax rates welfare recipients face; the family allowance would provide a secure, though modest, income floor that would not be reduced even as recipients earned more. Second, universal family allowances might be able to assist the poor without the stigma asso-

176. See I.R.C. § 151(d) (1994); see also Zelenak, *supra* note 29, at 400–01 (arguing that combining personal exemptions and family allowances is defensible in principle, because the two perform different functions).

177. For descriptions, see Ways and Means Releases: JCT Description of Dole Tax Plan, Tax Notes Today, Aug. 12, 1996, available in LEXIS, Fedtax Library, TNT File, 96 TNT 157-45; Clinton, Doms to Stay Course on Economy, Eschew Sweeping Tax Cuts, Tax Notes Today, July 22, 1996, available in LEXIS, Fedtax Library, TNT File, 96 TNT 142-5.

178. See Sheila B. Kamerman & Alfred J. Kahn, *Starting Right* 43–51, 67 (1995).

179. Analysts argue that Western European family allowances have successfully reduced poverty among single mother households and other families with children. See, e.g., Stephanie G. Gould & John L. Palmer, *Outcomes, Interpretations, and Policy Implications*, in *The Vulnerable*, *supra* note 170, at 413, 420; Kamerman & Kahn, *supra* note 170, at 351–65; Yin-Ling I. Wong et al., *Single-Mother Families in Eight Countries: Economic Status and Social Policy*, 67 Soc. Serv. Rev. 177 (1993); see also Daniel R. Meyer et al., *The Effects of Replacing Income Tax Deductions for Children with Children's Allowances: A Microsimulation*, 12 J. Fam. Issues 467, 477 tbl.2 (1991) (finding that family allowance of \$1000 per child would have reduced poverty rates in 1989 by 14.6%).

180. The welfare reform argument centers on the elimination of the income test, which—critics argue—discourages work and stigmatizes recipients. See Irwin Garfinkel & Sara S. McLanahan, *Single Mothers and Their Children: A New American Dilemma* 169–72, 177–78, 178–80, 181–89 (1986); Gene Steuerle, *Why I Favor Child Tax Credits or Allowances: Part 3: Reducing Welfare's Penalties on Work and Marriage*, 65 Tax Notes 919, 919–20 (1994); see also Meyer et al., *supra* note 179, at 479 tbl.3 (finding that adoption of family allowance could modestly increase work effort by AFDC recipients, but that total hours of work among AFDC recipients would remain quite small even after change).

181. For a description of the new program, enacted in 1996, see *infra* text accompanying notes 345–347.

ciated with income-tested welfare benefits. Finally, removing the income test would eliminate a considerable part of the complexity of income-tested welfare programs, which burdens both administrators and recipients.¹⁸² Advocates also argue that universal family allowances are likely to attract greater political and popular support than traditional, income-tested welfare programs.¹⁸³

Although these familiar arguments for family allowances are not exclusively made by self-identified feminists, they clearly have a feminist component, in the broad sense in which I am using the term here, because they seek to improve the economic well-being of single parents and of welfare recipients (who are disproportionately women). Some scholars have also made more explicitly "woman-centered" claims for family allowances, arguing that they could improve the economic well-being of both single and married mothers.¹⁸⁴ Advocates point out that family allowances, which would be equally available to women who work in the market and those who do not, would allow women to choose how to use the additional income. Some women might use the additional income to buy consumption goods, while others might use the extra money to reduce their market work hours, in effect "buying" more time at home for leisure or childcare.¹⁸⁵ (Note that this claim implicitly assumes that women—rather than other members of the household—will control the disposition of the family allowance, an assumption that is questioned in Part I.C.2.c, below.)

1. *Family Allowances and Conflicting Feminist Goals.* — Like other feminist tax proposals, family allowances are controversial even among feminists. Family allowances seem relatively well designed to implement the

182. See, e.g., Garfinkel & McLanahan, *supra* note 180, at 188; Steuerle, *supra* note 180, at 919–20. For a description of AFDC's complex eligibility rules and market work requirements, see House Comm. on Ways and Means, 103d Cong., Overview of Entitlement Programs: 1994 Green Book 324–31 (Comm. Print 1995) [hereinafter 1994 Green Book]. Family allowances might supplement welfare benefits, providing additional income support, or might simply replace welfare benefits dollar-for-dollar. In the latter case, family allowances would provide no additional cash for welfare recipients but would provide a secure income floor, which (assuming that the family allowance itself is not income-tested) would not be reduced by additional earnings, as welfare benefits typically are.

183. See Garfinkel & McLanahan, *supra* note 180, at 178. See generally Theda Skocpol, Social Policy in the United States 267–69 (1995) (advocating a number of universal programs for families including refundable tax credits).

184. See, e.g., Folbre, *supra* note 4, at 258; Fuchs, *supra* note 1, at 133–35; Annamay T. Sheppard, Paying for Women's Work, in *Family Law and Gender Bias: Comparative Perspectives* 1, 8–10 (Barbara Stark volume ed., 1992).

185. See Fuchs, *supra* note 1, at 135. This effect is not unique to family allowances, of course. Any reduction in average tax rates would increase disposable income, which could be used for childcare or other purchases. Implicitly, then, the feminist case for family allowances turns on the distribution of equal benefits to all mothers, married or single, working or at home. Individual filing, lower tax rate schedules, a DCTC, or an altered EITC would distribute benefits only to working women, including some childless women, and would provide unequal benefits to different income classes.

goal of assisting caregivers because they are paid to all caregivers without regard to their marital or market work status.¹⁸⁶ Family allowances provide only a modest income supplement, rather than a subsistence-level income. Feminists who equate family labor with full-time public employment might prefer even more generous income support for caregivers;¹⁸⁷ for that group, a family allowance is probably a step in the right direction but not a sufficient policy in itself. Other advocates of family allowances who seek to aid caregivers clearly anticipate combining relatively modest public support for caregivers with private child support and earnings from market work.¹⁸⁸

Family allowances probably conflict with the goal of equal treatment, although once again the boundaries of equal treatment are nebulous. If the equal treatment goal can be satisfied simply by gender-neutral phrasing that requires family allowances to be equally available to men and to women, then family allowances paid to "primary caregivers" should pass muster. If, however, we continue with the broader notion of equal treatment that underlies the case for individual filing, there seems to be a conflict. Once we recognize that women are more likely than men to be primary caregivers, then family allowances are in effect a "special" payment to women, which could reinforce traditional gender roles by rewarding women who act as primary caregivers. This logic parallels precisely the rationale of the equal treatment case for individual filing. The argument in that context is that because women are usually secondary workers, the tax disincentive for secondary workers discourages women's market work. Here, the parallel argument would be that because women are usually primary caregivers, the income transfer (or negative tax) tends to encourage women to continue to be primary caregivers. This logic suggests that family allowances are objectionable because they would reinforce the traditional norm that women should be mothers and devote their lives to childrearing. The equal treatment analysis also raises a serious question about the payment of family allowances to only one parent: although payment to women (as primary caregivers) may best reflect the reality of caregiving work in many families, that rule could deny benefits to men who take on significant, if not primary, responsibility for caregiving.

Family allowances also conflict with the goal of encouraging women's market work. Family allowances are available to all caregivers, whether they work in the market or not, and they are not income-tested; thus, they have no substitution effect that either encourages family labor

186. Family allowances for children may be less attractive to feminists who see the goal of assisting caregivers as primarily a transition policy for older generations, whose children are now grown, and not as a continuing benefit for younger mothers.

187. See, e.g., Christine A. Littleton, *Reconstructing Sexual Equality*, 75 Cal. L. Rev. 1279, 1301, 1330 (1987) (arguing that caregiving work should be compensated as full-time employment).

188. See Garfinkel & McLanahan, *supra* note 180, at 183.

or discourages work. The income taxes raised to finance the family allowance program may, however, discourage work by single and married women, and the family allowances themselves have an income effect that could discourage market work to some degree, as some women choose to use the extra income to "buy" time for leisure or childcare.¹⁸⁹ Although standard economic analysis suggests that the extra income improves women's welfare because they can follow their own preferences and use the extra income as they choose,¹⁹⁰ once again the goal of encouraging market work presupposes that women's nominal preference for family labor either is suspect and ought to be changed, or is simply dysfunctional.¹⁹¹ On that view, family allowances are objectionable because they could permit women to withdraw from the labor force or remain only marginally committed.¹⁹² In the long run, after children are grown and family allowances are gone, women would remain economically vulnerable.¹⁹³

2. *Toward a Feminist Middle Ground.* — Thus, family allowances initially appear to advance one feminist goal—assisting caregivers—at the expense of achieving equal treatment and encouraging women's market work. A closer look suggests, however, that this conflict is more apparent than real in the case of family allowances. These strong conflicts between competing goals do exist, but family allowances simply do not present them. In fact, family allowances fall somewhere in the middle, doing both less feminist good and less feminist harm than either advocates or opponents predict.

a. *Family Allowances, Gender Roles, and Work.* — Despite the fears of feminist opponents, family allowances are unlikely to significantly discourage women's labor-force participation or to reinforce traditional gender roles. Strong empirical predictions about the effects of family allowances on market work are almost certainly overstated. Family allowances would provide only a small income supplement and so would require recipients to augment their income through market earnings or other sources of income.¹⁹⁴ Empirical studies (using conventional elasticity estimates) suggest that family allowances are likely to create only a

189. The analysis in the text applies only to women or families who receive a net income transfer, i.e., a family allowance that exceeds the taxes raised to finance the program. As noted above, some families may pay a net tax. See *supra* note 173 and accompanying text.

190. See Alstott, *supra* note 69, at 54–55.

191. See *supra* text accompanying note 21.

192. See, e.g., Sheppard, *supra* note 184, at 9.

193. Cf. Kay, *supra* note 23, at 80 (arguing that the law should not encourage "economically disabling" choices by women). But see also Herma H. Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in *Divorce Reform at the Crossroads*, *supra* note 101, at 6, 31 [hereinafter Kay, *Beyond No Fault*] (arguing that divorce rules should "safeguard those who do not maximize their separate interests, but instead engage in unselfish, sharing behavior").

194. See Kamerman & Kahn, *supra* note 178, at 188.

modest net reduction in women's labor supply (taking into account both the "income effect" of the family allowance itself and the work-disincentive effects of the taxes raised to finance the program). Family allowances might even increase work effort among welfare recipients by reducing the high marginal tax rates that they typically face.¹⁹⁵

The harder question is whether reductions in women's market work, of whatever magnitude, would actually reinforce traditional gender roles. For the reasons suggested above, any prediction about the effects of legal change on social attitudes is necessarily guesswork. Although some socially conservative groups advocate family allowances in order to make it easier for mothers to stay at home or to work less,¹⁹⁶ there is no reason to predict that family allowances will fulfill either social conservative hopes or feminist fears. This, then, is the positive side of the limited impact of tax incentives. The resistance of social behavior and attitudes to legal change hinders the operation of affirmative legal incentives but also buffers the potential negative consequences of new entitlements.

Of course, to some extent this limited impact is a function of the small size of the family allowance, and more generous transfers could have larger effects. For example, the combination of family allowances with other forms of assistance to caregivers, such as welfare and child support, might cumulatively have a greater impact on women's work effort. We should be careful, however, to distinguish between the effects

195. See Meyer et al., *supra* note 179, at 480 (finding that family allowance tax credit of \$1000 per year per child would result in only "small" labor supply changes for all groups and that men and women not receiving AFDC would decrease work slightly, while women on AFDC would increase work by a more significant percentage); see also Robert K. Triest, *The Efficiency Cost of Increased Progressivity*, in *Tax Progressivity and Income Inequality* 137, 167-68 (Joel Slemrod ed., 1994) (calculating efficiency costs of changes in the EITC, the personal exemption, and a per person tax credit). Larger transfers might have larger effects, of course, and concerns about the impact of income transfers on work are also relevant to welfare policy and family law. The aggregate size and structure of transfers provided by tax, welfare, and family law will determine whether women must work to supplement their family allowance, or whether instead they can rely on public or private transfers. Even in this context, however, concerns about the effects of welfare on work effort are often exaggerated. Although marginal "tax" rates in AFDC were high and work effort among AFDC recipients was much lower than that of single mothers generally, studies suggest that benefit reduction rates played a relatively small role in reducing AFDC recipients' work effort, and that childcare, job availability, and inadequate job skills were more serious barriers to work. See Hilary Williamson Hoynes, *Work, Welfare, and Family Structure: What Have We Learned?* 21 (National Bureau of Econ. Research Working Paper No. 5644, 1996); Christopher Jencks & Kathryn Edin, *Welfare*, in Christopher Jencks, *Rethinking Social Policy: Race, Poverty, and the Underclass* 204, 223-25 (1993); Robert Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 *J. Econ. Literature* 1, 17 (1992).

196. See, e.g., *Reclaiming the Tax Code for American Families: Hearings Before the House Select Comm. on Children, Youth, and Families*, 102d Cong. 51-60 (1991) (statement of Gary L. Bauer, President, Family Research Council) (advocating an \$1800 per child credit to encourage mothers of preschoolers to stay at home).

on gender roles of incremental policies like family allowances and the effects of larger income transfers for caregivers.

Some feminist advocates of family allowances argue that they could actually create more egalitarian gender roles by encouraging men to share family labor.¹⁹⁷ This claim is also extremely contingent, however. Recent experience suggests, for example, that men rarely take paternity leave even when available, and studies suggest that men's labor supply is relatively inelastic to tax changes.¹⁹⁸ Critics of the egalitarian argument for family allowances might also point to the case of Sweden. Despite Sweden's relatively generous, gender-neutral family policies, women continue to perform a disproportionate share of family labor.¹⁹⁹

b. *Family Allowances and Women's Economic Well-Being.* — Family allowances may also do less to directly improve women's economic well-being than some feminist advocates predict. To the extent that middle and upper income families must pay higher taxes to help finance the family allowance, the net cash transfer will be even smaller than its nominal amount.²⁰⁰ Even if the family allowance is structured to ensure a net benefit to families with children at all income levels, an income transfer of, say, \$2000 per child is likely to have at best a modest impact on the finances of a middle income family. Lower income families may see a greater relative and absolute gain in income—\$2000 to a family earning \$10,000 per year is a significant improvement. Welfare recipients, however, may initially see no net increase in benefits if, as in many proposals, the family allowance reduces welfare benefits dollar-for-dollar.²⁰¹ Thus, the family allowance is likely to have the largest absolute benefits for lower income families that do not receive welfare (or that increase their earnings in response to the substitution of a non-income-tested family allowance for income-tested welfare benefits). These distributional characteristics do not, of course, defeat the case for family allowances, which

197. See Kirp et al., *supra* note 37, at 194.

198. See *supra* note 88 and accompanying text.

199. See Patricia Spakes, A Feminist Approach to National Family Policy, in *The Reconstruction of Family Policy* 23, 26–28 (Elaine A. Anderson & Richard C. Hula eds., 1991) (arguing that Swedish women still earn less than men, are segregated into “caring” professions, and “lack access to money, power, and the decision-making system”); Ann S. Orloff, Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States, 58 *Am. Soc. Rev.* 303, 313 (1993).

200. See *supra* text accompanying notes 173–174 (noting that, depending on how family allowances are structured, they could either create net transfer from richer families and childless taxpayers to poorer families or net transfer from all childless taxpayers to families at all income levels).

201. If a family allowance reduces welfare benefits dollar-for-dollar, the family allowance would not initially increase the total income of a welfare family receiving, say, a welfare benefit of \$6000 per year as that family would instead receive a family allowance of say \$2000 and a welfare benefit of \$4000 per year. See, e.g., Meyer et al., *supra* note 179, at 471 (describing simulated family allowance program). For welfare recipients, the net benefit of the family allowance turns on the reduction of marginal “tax” rates on earnings, because the family allowance is not reduced as earnings rise.

could still be promoted as a policy aimed at the working poor. The limited distributional impact does, however, suggest caution in evaluating claims that family allowances would benefit all recipients. How the net benefit is distributed depends crucially on the financing structure.

A cash allowance may also do little to help women combine market work and family labor if extra cash does not translate easily into time. If market work hours are largely fixed and not amenable to incremental adjustments, the impact of the cash transfer on women's time allocation is necessarily limited. The problem may be most severe in the short run, when hours are least flexible, or in occupations with rigid work schedules.²⁰² The basic point is that labor market inflexibility may constrain the effectiveness of cash transfers, just as it limits the benefits of market work tax incentives.

Another problem relates to a question raised but not addressed above—whether a family allowance paid to a *household* with children really will benefit the *woman* (i.e., the caregiver) in the household. The feminist case for family allowances implicitly assumes that women will control family allowances, but that assumption merits a closer look.

c. *Intrafamily Redistribution, Revisited.* — As noted above, family allowances in other countries are typically paid to mothers or to “primary caregivers.”²⁰³ Feminist proposals for family allowances in this country typically recommend payment to women (or primary caregivers);²⁰⁴ even proposals that do not focus on the issue seem to anticipate that family allowances would benefit women rather than “families” in general.²⁰⁵

The previous discussion of intrafamily redistribution²⁰⁶ suggests, however, that payment to wives does not guarantee their control over funds. A family allowance might be seen as the wife's family labor “wage” which is hers to spend,²⁰⁷ but the money could just as plausibly be perceived by the couple as an unearned windfall from the government.²⁰⁸ Once again, the empirical evidence is highly uncertain,²⁰⁹ but the best

202. See Alstott, *supra* note 69, at 547 n.54.

203. See *supra* text accompanying notes 170–171.

204. See Pahl, *supra* note 108, at 154–55 (arguing that financial support to mothers in form of family allowance “is likely to strengthen the position of women within the family and to improve the standard of living of women and children, especially in households where male earners do not share their income with non-earners”); Sheppard, *supra* note 184, at 10 (advocating caregivers’ benefits to be paid directly to caregivers).

205. See Folbre, *supra* note 4, at 258.

206. See *supra* Part I.A.3.

207. Interviews with couples in the United Kingdom suggest that some wives view the family allowance (child benefit) as “their money” or “their contribution” to the household. See Pahl, *supra* note 108, at 70, 157–58, 161.

208. A parallel criticism of family allowance proposals intended to benefit children is that payments to parents may not be spent for the benefit of their children. See Lawrence Zelenak, *Children and the Income Tax*, 49 *Tax L. Rev.* 349, 389–90 (1994).

209. Jan Pahl's interviews suggest that husbands and wives have different perceptions about the significance of the family allowance in family finances. That finding might suggest, for example, that women feel subjectively better off if they control the family

educated guess is that family allowances would have at most a quite modest effect on intrafamily distributions. As described above, family dynamics may divest the wife of control over spending the family allowance. Even if the wife can spend the family allowance as she chooses, the transfer would be only a small percentage of total income for many families.²¹⁰

Thus, the uncertainty of intrafamily distributions suggests that the initial analysis of family allowances' impact on women's economic well-being is too simple: it implicitly assumes that the money will be women's to spend. That analysis is apt in the case of single mothers, but married mothers or single mothers living with other adults may reap little direct benefit if intrafamily distributions give others effective control over spending decisions. This uncertainty also raises an interesting point about the predicted impact of family allowances on women's labor supply: if women do not benefit directly from the income, they may also be less influenced by the "income effect" that should permit them to reduce their market work. On the other hand, the income effect on women's labor supply may continue to operate at the household level. To take an extreme example, even if only the husband feels better off, he may still urge his wife, as secondary worker, to spend less time on market work and more time on household production.

Even if family allowances do not redistribute funds within the family, they might increase married women's bargaining power, because the transfer provides additional family income that would go with the wife (as the custodial parent) should she leave the marriage.²¹¹ This is essentially the "exit threat" argument considered above.²¹² As described there in greater detail, the magnitude of the increase in the wife's bargaining power is quite uncertain, in light of the modest size of family allowances and the other social institutions that reinforce unequal bargaining power. The exit threat argument also does not depend on the payment of family allowances to married women. Most of the predicted bargaining power

allowance but that it may not significantly improve their financial position from their husbands' perspective. See Pahl, *supra* note 108, at 157-58, 161. A recent study found that paying family allowances to wives can effect some change in family spending patterns, suggesting indirectly that wives may control the use of the funds. See Shelly J. Lundberg et al., *Do Husbands and Wives Pool Their Resources? Evidence from the U.K. Child Benefit 3*, 10-18 (Aug. 1995) (unpublished manuscript, on file with the Columbia Law Review) (finding that changes in U.K. family allowance system that shifted income from husbands to wives and increased transfers to wives resulted in increases in proportion of family income spent on women's and children's clothing).

210. Pahl's interview data are interesting here; she suggests that wives whose spending money is limited (either because they are poor or because they receive a fixed allowance from their husbands) value the family allowance relatively highly, even though it is quite small in amount. See Pahl, *supra* note 108, at 157-58, 161.

211. See Fuchs, *supra* note 1, at 133-35.

212. See *supra* text accompanying note 121.

enhancement could be accomplished by a system of family allowances paid *only* to single mothers.²¹³

Historically, the payment of family allowances to wives has been hotly contested. In the 1940s, U.K. proponents of payment to mothers advocated family allowances as an independent source of income for caregivers, while opponents saw the payment to mothers as inconsistent with traditional male financial responsibility.²¹⁴ More recently, reforms in the U.K. family allowance system have led some politicians to worry about men's resentment of a transfer "from the wallet to the purse."²¹⁵ It is not entirely clear whether this controversy is primarily about symbolism or about real control over funds. Family allowances paid to women might be a symbolic step toward recognizing the value of caregiving,²¹⁶ but the impact of symbolism on attitudes is so difficult to evaluate that it provides only a weak justification for large scale redistribution. And once again, symbolism can backfire if family allowances *appear* to reinforce traditional gender stereotypes (even if they have only a limited impact on actual behavior).

Finally, although one might argue that paying benefits to primary caregivers might do some good and very little harm, there is an associated administrative cost. Although other countries have successfully implemented the primary caregiver standard,²¹⁷ implementing the new system in the United States would require taxpayers and the government to make difficult intrafamily determinations not presently made.²¹⁸ Identifying whether a husband or wife (or one of two unmarried parents living together) is the primary caregiver may be difficult in cases where both

213. By increasing the income available to a wife upon divorce, a single mother's allowance would bolster the credibility of her exit threat. The only additional impact on the exit threat of paying the family allowance to married couples as well is that the husband benefits from the family allowance during marriage and would lose the additional income (which would go with the wife/caregiver) in the event of divorce.

214. See Susan Pedersen, *Family, Dependence, and the Origins of the Welfare State: Britain and France, 1914-1945*, at 345-51 (1993).

215. Pahl, *supra* note 108, at 162; see Lundberg et al., *supra* note 209, at 8.

216. See Bettina Cass, *Redistribution to Children and to Mothers: A History of Child Endowment and Family Allowances*, in *Women, Social Welfare and the State in Australia* 54, 83 (Cora V. Baldock & Bettina Cass eds., 1983); Pedersen, *supra* note 214, at 345-51.

217. See *supra* note 171 and accompanying text.

218. Either the federal income tax or the Social Security system, or some combination of the two, might be adapted to pay a universal, non-income-tested, family allowance. The federal income tax system has relatively good data now on dependents and EITC "qualifying children," and a "refundable" family allowance tax credit could use the refund mechanism to make cash payments, just as in the EITC. Alternatively, the Social Security system could handle the mechanics of payment, based perhaps on tax data or on birth records and applications for taxpayer identification numbers. Paying family allowances to the mother or primary caregiver raises administrative issues in either system, because neither currently distinguishes between primary and secondary caregivers. Although the Social Security rules provide payments to certain individuals with children in their care, these rules do not require distinguishing between primary and secondary caregivers. See 42 U.S.C. § 402(b)(1)(B) (1994).

parents provide some care. Although presumptions could address the issue, they are inevitably rough, and presumptions based on gender might be constitutionally prohibited.²¹⁹ State experience with the administration of the "primary caregiver" standard in child custody cases suggests that the determination is fact intensive and difficult even in a system intended to make individualized determinations, which the tax system is ill-equipped to do.²²⁰

3. *Conclusions and a Word on the Costs of Compromise.* — This analysis suggests that family allowances could make a modest contribution to the economic well-being of families with children, but that both feminist hopes and feminist fears may be exaggerated. Ultimately, family allowances represent a middle ground. They would provide a modest income supplement—but not a generous income—for caregivers, but they also would be unlikely to significantly discourage women's market work. Although family allowances may not encourage men to take on greater responsibility for family labor or directly improve the economic well-being of married women, they also seem unlikely to significantly reinforce traditional gender roles.

Thus, the strength of the feminist case for family allowances turns on the desirability of finding a compromise among competing goals. Family allowances suggest an approach that acknowledges feminist concerns about the well-being of caregivers and promises incremental gains for low income single mothers and families. Feminists who see equal treatment or increasing women's market work as the only important goals are unlikely to be impressed with the compromise and may oppose any income transfer that might discourage market work. However, those who take seriously the goal of assisting caregivers may be able to agree upon a modest income supplement which could enhance women's limited earning power without permitting complete withdrawal from the labor force.

There are, however, serious questions about the costs of compromise. First, this sort of compromise has been attempted in other countries with mixed results. Sweden, the most prominent example, has an array of programs (including family allowances, generous paid maternity leave, and part-time work for parents) that assist parents in combining market work and family labor. Some feminists note the advantages of the Swedish example, arguing that it provides a variety of income support programs for parents and promotes a high rate of female labor force participation while making humane and realistic allowances for the competing demands of family labor.²²¹ Other feminists disagree, however, noting that a high percentage of Swedish women work only part-time, that women's wages remain lower than men's, that there is a high degree of

219. See *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

220. See *infra* note 290 and accompanying text.

221. See Nancy E. Dowd, *Envisioning Work and Family: A Critical Perspective on International Models*, 26 Harv. J. On Legis. 311, 316–28 (1989).

sex segregation in the workplace, and that women continue to be primarily responsible for childrearing.²²² International comparisons are tricky, of course, because conditions are different, but the Swedish experience offers one hypothetical prediction about the sort of results that family allowances and similar compromise policies could produce. The difficult feminist question—ultimately a normative, not an empirical, one—is whether American women would, on balance, be better or worse off in such a situation, with greater economic well-being for many poorer women, expanded options for combining market work and family labor, but continued gender role segregation and perhaps reduced opportunities to enter male-dominated jobs.

Second, family allowances and similar policies are potentially an economically costly compromise. One familiar objection is that family allowances would create large scale income redistribution that would burden the economy and encourage childbearing. Although it is impossible to dismiss these concerns, a brief review of the empirical literature shows that these economic objections are less forbidding than they may first appear. As noted above, empirical studies conclude that family allowances are likely to have only a small net effect on aggregate work effort.²²³ Further, although one often hears the more general claim that Western Europe's generous social programs are the cause of economic stagnation,²²⁴ there is no academic consensus to support that popular perception. Existing studies reach mixed results in estimating the actual macroeconomic burden created by social welfare programs,²²⁵ and Anthony Atkinson concludes that such studies are "unlikely to yield conclusive evidence" because aggregate empirical evidence is inherently subject to question on several grounds.²²⁶ It may be that these studies are simply too flawed to detect the effect, but once again, the pragmatic approach of accepting the studies as the best current evidence raises questions about popular perceptions of the costs of redistribution.

Critics also argue that family allowances could encourage population growth. Although increasing fertility was once a popular goal of Western

222. See *id.* at 313 (noting that "policies have been ameliorative but not transformative"); Jane Lewis & Gertrude Astrom, Equality, Difference, and State Welfare: Labor Market and Family Policies in Sweden, 18 *Feminist Stud.* 59, 61, 72-74 (1992) (arguing that Swedish employment policies for women have not altered unequal division of family labor and may have reinforced sex segregation in workplace).

223. See *supra* text accompanying note 195.

224. See, e.g., Anthony B. Atkinson, *The Welfare State and Economic Performance*, 48 *Nat'l Tax J.* 171, 171-73 (1995); Richard W. Stevenson, *A Deficit Reins in Sweden's Welfare State*, *N.Y. Times*, Feb. 2, 1995, at A1.

225. See Nicholas Barr, *The Economics of the Welfare State* 436-37 (1987); Rebecca M. Blank & Richard B. Freeman, *Evaluating the Connection Between Social Protection and Economic Flexibility*, in *Social Protection Versus Economic Flexibility* 35-36 (Rebecca M. Blank ed., 1994); Gould & Palmer, *supra* note 179, at 429-31; Atkinson, *supra* note 224, at 173-78, 196.

226. Atkinson, *supra* note 224, at 179-82.

European family allowances,²²⁷ recent experience suggests that American politicians today would strongly oppose pronatalist policies, particularly if they would affect the poor; many recent proposals for welfare "reform" would deny benefits for additional children born to welfare mothers.²²⁸ Although one suspects that concern about childbearing among the poor is tinged with more than a little racism, there is also a legitimate concern, which feminists and nonfeminists might share, about whether society should be required to pay to support other people's (unlimited numbers of) children. Although answering this often debated question is not possible in the space of this Article, it may be helpful to note that empirical evidence, although imperfect as always, suggests that family allowances are unlikely to have a large effect on fertility.²²⁹

It has proven virtually impossible to settle the big questions of how redistributive taxes and transfers affect economic activity and private decisionmaking about fertility and marriage. There are a number of possible pragmatic responses to these concerns—and to political perceptions, which are realistically more important than econometric predictions. Family allowances might, for example, be phased in to meet revenue goals and to allow an evaluation of incentive concerns, though at the cost, of course, of postponing benefits.²³⁰ Part II.A.1 also discusses proposals for family allowances for single mothers.

227. See Kamerman & Kahn, *supra* note 178, at 370, 374. The pronatalist vision of some European advocates of family allowances was never realized: family allowances and other policies did not in fact raise birthrates. See Folbre, *supra* note 4, at 115; C. Alison McIntosh, Recent Pronatalist Policies in Western Europe, in *Below-Replacement Fertility in Industrial Societies: Causes, Consequences, Policies* 318, 323 (Kingsley Davis et al. eds., 1987). But see Thomas Büttner & Wolfgang Lutz, Estimating Fertility Responses to Policy Measures in the German Democratic Republic, 16 *Population Dev. Rev.* 539, 539 (1990) (finding positive relationship between fertility and explicit pronatalist policy introduced in 1976 in former East Germany).

228. See Christopher Jencks & Kathryn Edin, Do Poor Women Have a Right to Bear Children?, *Am. Prospect*, Winter 1995, at 43, 47; cf. Ben J. Wattenberg, The Birth Dearth 145–65 (1987) (advocating pronatalist tax policies in the United States).

229. Cf. Hoynes, *supra* note 195, at 24–25 (finding that the effect of welfare on out-of-wedlock births and marital decisions is small); Douglas E. Hyatt & William J. Milne, Can Public Policy Affect Fertility?, 17 *Can. Pub. Pol'y* 77, 78 (1991) (finding that government programs altering childbearing costs have "small but positive" impact on fertility); Leslie A. Whittington, Taxes and the Family: The Impact of the Tax Exemption for Dependents on Marital Fertility, 29 *Demography* 215, 223 (1992) (concluding that increase in personal exemption may result in small increases in fertility but that effect may be one of timing only).

230. Other revenue saving options include limiting family allowances to children under age 13, repealing the personal exemption, and making the family allowance taxable. A 1989 study suggested that repealing the personal exemption would fund a yearly \$292 per child refundable tax credit; a more generous \$1000 credit would cost \$76 billion per year, or a net cost of \$49 billion more than the personal exemption cost in 1989. See Meyer et al., *supra* note 179, at 473, 475; see also Kamerman & Kahn, *supra* note 178, at 189 (recommending \$1000 per child tax credit, estimated to cost \$40 billion in 1992, assuming repeal of personal exemption for children). Updating these numbers for inflation using the CPI-U (a very rough way of approximating a current revenue estimate,

D. *Revisiting the Issues: The Dependent Care Tax Credit and Feminist Proposals for Social Security Reform*

The preceding analysis examined feminist tax policy proposals that seek to advance the three feminist goals of equal treatment, encouraging women's market work, and assisting caregivers. The normative and institutional issues explored in that analysis set the stage for a briefer consideration of two other important feminist tax proposals—an expanded DCTC and Social Security reform.

1. *The Dependent Care Tax Credit.* — The DCTC is a tax credit equal to 20% to 30% of the dependent care expenses incurred by a working single parent or a two-earner couple.²³¹ Eligible dependent care expenses are capped, and the maximum annual DCTC is \$720 for one child and \$1440 for two or more.²³² The current DCTC can only offset income tax due and so provides no benefits to workers whose incomes are too low to have any income tax liability. A number of scholars have argued that the DCTC should be made "refundable" so that even the lowest income workers can benefit from the program.²³³

a. *The DCTC As a Compromise Among Competing Goals.* — There are two familiar arguments for the DCTC, one based on equal treatment and one based on the desirability of increasing women's market work. First, many scholars have noted that the exclusion of "imputed income" from the income tax base may distort women's labor supply decisions by making market work less attractive than family labor.²³⁴ Although men too can exclude imputed income, analysts worry that women, whose labor supply is relatively elastic and who bear the primary responsibility for family labor, are more likely to react strongly to the tax distortion. Taxing imputed income from women's family labor would remove the distortion, but most scholars have concluded that valuing imputed income is imprac-

but useful in ball park terms), a \$1000 refundable tax credit would cost \$90.8 billion annually. See 1995 Statistical Abstract, *supra* note 1, at 492 tbl.761. Making the family allowance taxable could reduce the cost by another \$18 billion or so, assuming that the benefits would be taxed at the current average tax rate for all income taxpayers of 13.5%. See 14 IRS Stat. Income Bull. 10, fig.B (Spring 1995) (finding that in 1993 taxpayers paid 13.5% of their adjusted gross income in taxes). This cost reduction figure is probably too high, however, because the average tax rate calculation excludes nontaxpayers.

231. See I.R.C. § 21(a) (1994) (providing that 30% credit is reduced gradually to 20% between \$10,000 and \$28,000 of adjusted gross income ("AGI")). The Code also provides an exclusion for employer-provided dependent care assistance, which is available only to workers whose employers offer a plan. See *id.* § 129. Between 1954 and 1976, the Code provided a deduction rather than a credit. See Heen, *supra* note 91, at 212–14.

232. See I.R.C. § 21(a), (c).

233. See, e.g., Heen, *supra* note 91, at 176 n.21 (citing variety of proposals for refundability).

234. See Gann, *supra* note 28, at 40–41; McCaffery, *supra* note 124, at 987, 1001; Zelenak, *supra* note 29, at 372.

tical.²³⁵ Instead, scholars have advocated a deduction for the costs of purchased childcare, which they argue would restore decisional neutrality in the choice between market work and family labor.²³⁶

This argument incorporates a kind of equal treatment claim, as well as an argument for decisional neutrality.²³⁷ Creating complete decisional neutrality between work and other activities for all workers would require either taxing all imputed income, for men as well as for women and from leisure as well as family labor, or else excluding all earnings from taxation. The typical argument for tax relief for dependent care expenses does not seek such sweeping change but instead is concerned primarily with the impact of the imputed-income rule on women's market work choices. The argument is that women are more likely than men to incur childcare expenses when they enter the labor force, so that a deduction for childcare costs in effect restores parity between men's and women's market work choices. A childcare deduction would tend to reduce the imputed-income distortion but would not restore complete decisional neutrality: women, like men, would continue to face a labor-*leisure* distortion, and both would remain unable to deduct a variety of ordinary costs of working.²³⁸

The DCTC is not a completely accurate response to the decisional neutrality concern, which dictates a tax deduction rather than a tax credit. A tax deduction (or, equivalently, an exclusion) in an appropriate amount would allow women either to perform untaxed family labor themselves or to earn an equivalent amount of untaxed earnings and to pay someone else to perform the same tasks. A deduction, however, provides larger benefits to higher income taxpayers, who are in higher marginal tax brackets, while a credit provides equal amounts at all income levels.²³⁹ The equal treatment and decisional neutrality rationales also do not support refundability of the credit, because the imputed-income distortion operates only when market earnings are also subject to income tax.²⁴⁰ Thus, the DCTC roughly serves the equal treatment objective while meeting competing distributional goals.

235. See Munnell, *supra* note 29, at 263–65; Gann, *supra* note 28, at 36. But cf. Staudt, *supra* note 99, at 1573–74, 1624–27 (proposing to tax imputed income from family labor).

236. See Munnell, *supra* note 29, at 252; Heen, *supra* note 91, at 209.

237. As noted in Part I.B.1, above, the scope of the equal treatment goal is not clear and might be interpreted in different ways. One could oppose a childcare deduction on equal treatment grounds, arguing that because women are more likely than men to incur childcare expenses, a nominally gender-neutral deduction would really be a “special” benefit for women.

238. See Marvin A. Chirelstein, *Federal Income Taxation* 93–100 (7th ed. 1994).

239. Before 1976, the dependent care allowance in the income tax was a deduction. See Heen, *supra* note 91, at 212–14.

240. Low-income workers exempt from the income tax are generally subject to the Social Security payroll tax, however, and so the equal treatment argument would support refundability to the extent of payroll taxes paid.

The second common argument for the DCTC is that childcare expenses are a major obstacle to women's market work, and that the DCTC is essentially a voucher through which the government can subsidize the purchase of childcare.²⁴¹ In implementing this goal, a credit or a deduction might be used, depending on the desired pattern of marginal and average tax rate cuts, and a refundable credit would extend the assistance to the lowest income workers. Like other "tax incentives" for women's market work, the DCTC would encourage work for some women and discourage work for others. Very generally, a refundable DCTC would provide an incentive for nonworkers to enter the labor force but would create a complex pattern of competing income and substitution effects for workers already employed outside the home.²⁴² For example, workers who already buy enough childcare to claim the maximum credit receive essentially an unconditional income transfer—much like a family allowance. Recent research suggests that the aggregate, net effect of the DCTC is probably to modestly increase mothers' labor force participation.²⁴³

These two arguments may suggest, somewhat misleadingly as I will argue in a moment, that the case for the DCTC basically replicates the case for individual filing. Like individual filing, the DCTC would both promote equal treatment and mildly encourage market work, especially by nonworkers. Just as in the case of individual filing, these modest gains in women's labor market participation may not translate easily into gender role change, improvements in women's economic well-being, or redistribution of power within the family.²⁴⁴

Although the analogy is accurate in part, the DCTC differs in two important respects from individual filing. First, the DCTC is somewhat more compatible with the feminist goal of assisting caregivers. Like individual filing, an expanded DCTC would assist working caregivers at the

241. See Heen, *supra* note 91, at 204–06.

242. For a nonworker who must purchase childcare, the DCTC has only a (positive) substitution effect: it reduces the cost of entering the workforce. There is no income effect because a nonworker cannot claim the credit. For a worker who already purchases some childcare in order to work, however, there are competing income and substitution effects. She will receive the DCTC for the childcare she already buys; the income effect (or feeling of being better off) tends to discourage work. At the same time, however, the DCTC permits her to buy more childcare at 70% or 80% of its pre-tax cost (up to the maximum amount of child care eligible for the DCTC). That subsidy reduces the marginal cost of increasing hours of work, and so creates a positive substitution effect. Finally, the phase-down of the DCTC between \$10,000 and \$28,000 of adjusted gross income creates a negative income and substitution effect for earnings in that range.

243. See Rachel Connelly, *The Effect of Child Care Costs on Married Women's Labor Force Participation*, 74 *Rev. Econ. & Stat.* 83, 90 (1992) (finding childcare subsidies have positive impact on labor force participation, particularly of young mothers); cf. Mark C. Berger & Dan A. Black, *Child Care Subsidies, Quality of Care, and the Labor Supply of Low-Income Single Mothers*, 74 *Rev. Econ. & Stat.* 635, 638 (1992) (finding that childcare subsidies affect employment but not hours worked).

244. See *supra* text accompanying notes 86–121.

expense of others: although advocates of expanding the DCTC often do not specify how the new benefit would be financed, preserving benefits for working single mothers and two-earner couples could require a tax increase on single-earner couples (as well as on childless taxpayers). On the other hand, unlike individual filing, the DCTC is targeted specifically to working caregivers, or more precisely, to single parents and two-earner couples, and is available to single mothers as well as to wives. A refundable DCTC would also distribute average tax rate cuts to working caregivers in all income classes.

Second, because the DCTC is linked to the purchase of market childcare, it may be marginally more successful than a simple tax cut or income transfer in transferring cash in a way that directly benefits women. Any tax rate cut would provide additional cash that might be used for childcare, but, as described above, the extra funds may not benefit women directly if intrafamily dynamics divest them of control over the funds. By linking the tax benefit directly to childcare expenses, the credit could encourage the purchase of additional childcare in some cases. When this incentive operates, and assuming that the wife wants to buy more childcare, the DCTC provides something like an "in-kind" transfer to women. On the other hand, for families that already purchase some childcare but do not increase their purchases, the DCTC is in effect another unconditional tax cut, basically a kind of family allowance for working mothers. Like a tax cut, the extra cash might or might not be spent for the benefit of the wife.²⁴⁵ It is impossible to know, a priori, how many families fall into each of these groups.

b. *Conclusions.* — This analysis suggests that one reason for the DCTC's popularity among feminists is that it attempts to accommodate all three feminist goals. A refundable DCTC would advance the goal of equal treatment and create a modest work incentive for some women, but also would transfer funds in a pattern targeted to working caregivers, whether married or single, at all income levels. Although individual filing also has elements of both equal treatment and a market work incentive, it is more strongly in tension with the goal of assisting caregivers and may be marginally less effective in targeting benefits to women.

2. *Feminist Proposals for Social Security Reform.* — Feminist proposals for Social Security²⁴⁶ reform also raise many of the same questions described in preceding sections. Although these reforms have been dis-

245. The same would be true of an in-kind childcare benefit. Women in families that would not otherwise purchase childcare (or that would purchase lower quality care) might gain by the availability of publicly provided childcare. If, however, the free public care simply replaces purchased care, the family now has available a new sum of cash equal to the cost of the purchased care. How that cash would be distributed within the family is not certain.

246. For simplicity, I focus on Old Age Insurance, largely ignoring Survivors' and Disability Insurance and Medicare.

cussed at length elsewhere,²⁴⁷ a brief discussion highlights the parallels between income taxation and Social Security. Because Social Security is an integrated system of taxation and income transfers, it illustrates the relevant tradeoffs in a particularly crisp way, showing how reforms that help some women can harm others.

Social Security provides cash benefits upon retirement to covered workers and their dependents.²⁴⁸ Workers become eligible for Social Security coverage by working in covered employment for a minimum period and by paying Social Security payroll (FICA) taxes on wages. Social Security benefits are calculated based on lifetime earnings, but the formula for determining Social Security benefits is progressive, so that Social Security benefits replace a higher proportion of total wages for low earners than for high earners.²⁴⁹ Social Security also provides an additional "spousal benefit" equal to 50% of the benefit the covered worker would receive if single. A spouse who is covered independently under the system through her own FICA contributions does not receive both the 50% spousal benefit and her own independent benefit, but instead receives the larger of the two amounts.²⁵⁰ One consequence of the spousal benefit rules is that a single-earner couple can receive larger total Social Security benefits than a two-earner couple with the same total earnings and payroll tax contributions.²⁵¹

247. For two excellent articles on the treatment of women under the Social Security system, see Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 Colum. L. Rev. 264, 276-85 (1989); Grace G. Blumberg, *Adult Derivative Benefits in Social Security*, 32 Stan. L. Rev. 233 (1980).

248. For a description of Social Security, see 1994 Green Book, *supra* note 182, at 3-47.

249. See William H. Simon, *Rights and Redistribution in the Welfare System*, 38 Stan. L. Rev. 1431, 1460 (1986) (noting that although "payout rates . . . replace relatively large percentages of average earnings for relatively low earners," the benefit structure "tends to give larger benefits to people with larger preretirement incomes, who tend to be relatively wealthy retirees").

250. See 1994 Green Book, *supra* note 182, at 15, tbl.1-6 (spousal benefit 50% of primary insurance amount). Thus, a married couple receives a total retirement benefit equal to the greater of (1) 150% of the higher earning spouse's independent benefit (i.e., the benefit the spouse would receive if single) or (2) the sum of the two spouses' independent benefits. Although men and women are equally eligible for spousal benefits, wives tend to earn less than husbands and so account for the vast majority of spousal benefit recipients. See Social Security Administration Annual Statistical Supplement to the Social Security Bulletin 187-88, tbl.5A1 (1994) [hereinafter 1994 Annual Statistical Supplement].

251. In other words, 150% of the benefit for a single earner may exceed the greater of (1) two independent benefits for two earners or (2) 150% of the primary insurance amount for the higher earner in the two-earner couple. See Congressional Budget Office, Congress of the United States, *Earnings Sharing Options for the Social Security System* xiii (1986) [hereinafter CBO]. Consider a simple example. There are two couples, (A) and (B). In couple (A), the husband's average monthly earnings were \$1000 and the wife earned \$0; in couple (B), the husband's average earnings were \$700 and the wife's were \$300. Suppose that a simple Social Security system replaces 75% of the first \$300 of

As a group, women receive larger Social Security benefits relative to their payroll tax contributions than do men.²⁵² Women are the principal recipients of spousal benefits and thus by definition receive benefits that exceed those to which wives would be entitled based on their own contributions. Women also typically live longer than men and so collect benefits longer. In addition, because women tend to earn less than men, they gain more from the progressivity of the benefit formula.²⁵³ At the same time, however, elderly women's average Social Security benefits are smaller than elderly men's,²⁵⁴ and elderly women remain significantly poorer than elderly men, due to their dependence on husbands' incomes, their longer lives, and their lower lifetime earnings.²⁵⁵

a. *Equal Treatment and the Spousal Benefit Rules.* — One feminist critique of Social Security is that the system discourages married women's market work.²⁵⁶ Married women must pay Social Security payroll taxes on their full earnings, but the spousal benefit rules mean that many working wives receive no additional benefit for the payroll taxes they pay. If a wife's earnings are low enough relative to her husband's, she will in the end collect only the spousal benefit, which she could claim even if she had never worked outside the home.²⁵⁷

This argument is reminiscent of the equal treatment argument for individual filing. If we recognize that women are more likely than men to

earnings and 25% thereafter and also has a 50% spousal benefit rule. Under that system, couple (A) receives a total benefit of \$600 (\$400 for the husband and \$200 for the wife), while couple (B) receives a total benefit of \$550 (\$325 for the husband and \$225 for the wife). There are two competing effects here: the single-earner couple tends to receive a lower proportionate benefit because of the progressive replacement-rate schedule but also receives a spousal benefit.

252. See Becker, *supra* note 247, at 278.

253. See W. Andrew Achenbaum, *Social Security: Visions and Revisions* 133 (1986); Simon, *supra* note 249, at 1482.

254. See 1994 Annual Statistical Supplement, *supra* note 250, at 200 tbl.5.A10 (showing that by end of 1993 women comprised 59% of Social Security beneficiaries (20,987 of 35,307) but received only 52% of total benefits); Becker, *supra* note 247, at 277-78 (noting that women receive about 52% of Social Security benefits paid to elderly but represent 60% of elderly Social Security beneficiaries).

255. See CBO, *supra* note 251, at xiii; see also Kirp et al., *supra* note 37, at 197 (pointing out that averaging zero-earnings years into lifetime average also hurts women, whose family labor responsibilities may reduce number of years worked); Marianne A. Ferber, *Women's Employment and the Social Security System*, Soc. Security Bull., Fall 1993, at 33, 43.

256. See Richard V. Burkhauser, *Earnings Sharing: Incremental and Fundamental Reform*, in *A Challenge to Social Security* 76-77 (Richard V. Burkhauser & Karen C. Holden eds., 1982); Robert J. Lampman & Maurice MacDonald, *Concepts Underlying the Current Controversy About Women's Social Security Benefits*, in *A Challenge to Social Security*, *supra*, at 21, 30.

257. See Becker, *supra* note 247, at 280. The number of wives with "dual entitlement" to benefits as retired workers and as spouses of retired workers has grown dramatically over time. See 1994 Annual Statistical Supplement, *supra* note 250, at 201 tbl.5.A14 (showing that in 1960, only 4.6% of women beneficiaries age 62 or older were dually entitled, while in 1993, 25.1% were dually entitled).

be secondary workers, then the current system is biased against wives' market work. For primary workers, the Social Security payroll tax is offset, at least in part, by an expectation of future benefits, which are positively correlated with earnings. For secondary workers who are likely to receive the spousal benefit, however, the situation is quite different: for them, the payroll tax is a true tax, because it confers no incremental future benefits.

The goal of equal treatment suggests repealing the spousal benefit entirely, so that primary and secondary workers would receive an equal benefit from their payroll tax contributions.²⁵⁸ The revenue saved through repeal of the spousal benefit could be used to reduce payroll taxes or increase benefits across the board. The dilemma, of course, is that equal treatment would help some women but hurt others. By definition, repealing the spousal benefit would reduce Social Security benefits for many wives, particularly full-time caregivers and those with low earnings.²⁵⁹ Without spousal benefits, a married woman would receive as much as (but no more than) a single woman with the same earnings history.²⁶⁰ The resulting redistribution of Social Security benefits could reduce benefits for many wives, particularly those with low market earnings or an intermittent or nonexistent work history.

Thus, there is a tension between achieving equal treatment in Social Security and assisting caregivers (if we assume, realistically, that many homemakers are also caregivers and that caregiving work tends to reduce many women's lifetime earnings). This tension may recede a bit with time because younger generations of women tend to have consistently higher rates of labor force participation than older generations had.²⁶¹ Even younger generations of women, however, do not duplicate men's patterns of market work: women continue to encounter significant disruptions in their work patterns during childbearing years, and women's lifetime earnings still are lower than men's.²⁶²

Repealing the spousal benefit might encourage women's market work, which could in turn increase women's Social Security benefits. Although repeal of the spousal benefit creates a potential work incentive

258. Repeal of the spousal benefit is analogous to the adoption of individual filing in the income tax context: each worker would pay payroll taxes only on her own earnings (as under current law) and would also receive benefits based solely on her own contributions. More precisely, the current Social Security rules use individual filing for purposes of calculating payroll taxes but determine benefits on a joint basis. Repeal of the spousal benefit would calculate both taxes and benefits using individual filing.

259. For a description and critique of a 1975 proposal to repeal spousal benefits, see Blumberg, *supra* note 247, at 264-66.

260. Although the repeal of spousal benefits would initially reduce or leave unchanged *every* married woman's benefits (because under current law they receive the higher of their own coverage or the spousal benefit), the revenue saved by repealing the additional benefits could be used to lower payroll taxes or increase benefits for workers.

261. See Ferber, *supra* note 255, at 34, 36-37.

262. See *id.* at 41-43.

because it restores the connection between women's payroll tax contributions and their ultimate benefits, the practical significance of that work incentive is hard to gauge. Social Security provides only a deferred reward for women's market work. Women may fail to respond to market work incentives in Social Security if they misunderstand the terms of the program, discount the availability of Social Security benefits due to widely publicized financial stresses on the system, or "myopically" discount their future well-being.²⁶³

b. *Assisting Caregivers Through Homemakers' Credits.* — A second feminist critique of Social Security is that it does too little to assist caregivers. Although the spousal benefit rules are intended to ensure coverage for women in "traditional" families, critics point out that spousal benefits are derived from husbands' coverage and thus provide limited benefits for divorced or never married women and women married to low earners.²⁶⁴ Some scholars propose replacing the spousal benefit with a system of "homemakers' credits," which would provide independent Social Security earnings credits for women (or men) primarily engaged in family labor.²⁶⁵ Homemakers' credits would essentially impute to the caregiver a deemed earnings amount, which would be added to her lifetime Social Security earnings record. Repealing the spousal benefit would ensure that each worker received benefits based on her own earnings record, while the additional homemakers' credits would ensure that caregivers would be protected. Unlike the spousal benefit, homemakers' credits would be fully independent of marital status, and thus equally available to married, divorced, and never married women.²⁶⁶

Proposals for homemakers' credits raise a host of serious difficulties, however. First, the proposal only reshapes rather than removes the con-

263. See also Edith U. Fierst, Discussion, *in* *A Challenge to Social Security*, supra note 256, at 66, 66–67 (discussing how women's market work decisions often are not affected by possible changes in Social Security benefits).

264. A never married mother cannot receive a spousal benefit even if the father of her children is covered. See 42 U.S.C. §§ 402(b)(1), 416(b) (1994); see also Becker, supra note 247, at 283 (arguing that the system links "old-age security for women (but not for men) to continuation of the marriage bond until death"). A divorced woman receives a spousal benefit only if she was married to a covered worker for ten years or more. See *id.* §§ 402(b), 416(d). The spousal benefit system pays greater (absolute) benefits to women married to high earners than to women married to low earners, even if they perform the same caregiving work (although, once again, the progressivity of the benefit formula generally helps low earners and their dependents). See Lampman & MacDonald, supra note 256, at 30. For an analysis of the distributional effects of spousal benefits, see Karen C. Holden, Supplemental OASI Benefits to Homemakers Through Current Spouse Benefits, a Homemaker Credit, and Child-Care Drop-Out Years, *in* *A Challenge to Social Security*, supra note 256, at 41, 44–51.

265. The analysis in the text assumes that (1) the homemakers' credits are financed by repeal of the spousal benefit, and (2) the repeal of the spousal benefit raises enough revenue to fund the new benefit. There are other ways to finance such a proposal. See, e.g., Staudt, supra note 99, at 1642 (recommending imposing payroll taxes on imputed income from women's family labor).

266. See Holden, supra note 264, at 54.

flict—created by the spousal benefit—between equal treatment and assisting caregivers. Repeal of the spousal benefit would eliminate the secondary-earner bias that current law creates, so that working wives would no longer pay payroll taxes without receiving additional benefits. Homemakers' credits, however, would recreate an incentive for wives to stay out of the labor force by awarding a new class of benefits that are not paid for (in the financial sense anyway).²⁶⁷ Second, critics point out that the credits would help only those women who can afford to be full-time housewives and would provide no benefit for women who work in the market while also performing significant family labor.²⁶⁸ While women who work in the market would pay payroll taxes beginning with the very first dollar of their earnings, housewives would earn Social Security credit without making any contribution at all.²⁶⁹ Although the current spousal benefit has somewhat the same effect—by definition, it provides "unearned" benefits to wives—the spousal benefit is available both to (low-earning) working wives and to homemakers. Third, homemakers' credits create a host of administrative difficulties, including identifying women and men engaged in family labor and valuing family labor for purposes of imputing earnings credits.²⁷⁰ Finally, it is not clear that homemakers' credits would effect any dramatic improvement in homemakers' retirement security, at least if the change is close to revenue neutral. One empirical simulation found that the distribution of the benefits of homemakers' credits would differ little from that of spousal benefits, unless family labor were valued highly enough to increase the aggregate benefits available to women.²⁷¹

c. *Earnings Sharing: Another Compromise Solution.* — Another popular Social Security reform proposal is earnings sharing, which seeks a compromise between the goals of equal treatment and assisting caregivers by

267. The spousal benefit discourages market work for women whose own earned benefits would ultimately be less than the "free" spousal benefits, equal to 50% of their husband's benefits. Homemakers' credits discourage market work for women whose own earned benefits would be less than the benefits created by the "free" homemakers' credits.

268. The homemakers' credit proposal is arguably worse in this respect than the current system of spousal benefits. Although the current system of spousal benefits assists housewives, it also helps wives whose earnings are low relative to their husbands'. In contrast, homemakers' credits help only those women who are full-time housewives.

269. Depending on the valuation of family labor, homemakers could receive a "free" credit that exceeds actual earnings of many low-earning working women. See Holden, *supra* note 264, at 58–59; see also Simon, *supra* note 249, at 1485 (arguing that homemakers' credits would benefit wealthy homemakers with or without children, but probably not working mothers). In addition, homemakers' credits would not guarantee a benefit even equal to the spousal benefit, so some women could be worse off. See Achenbaum, *supra* note 253, at 138.

270. See Achenbaum, *supra* note 253, at 138; Fierst, *supra* note 263, at 71; Holden, *supra* note 264, at 54–55; see also Staudt, *supra* note 99, at 1620–24 (proposing imposition of federal taxes on value of women's household labor and noting problems of distinguishing family labor from leisure, quantifying value of services, and gauging variability of quality and quantity of services performed).

271. See Holden, *supra* note 264, at 55–58.

removing the worst distortionary effects of spousal benefits while maintaining or improving Social Security coverage for women engaged in family labor.²⁷² Although earnings sharing proposals differ in important details, in general they would repeal the spousal benefit and provide that a husband and wife would each receive Social Security credit for half of the couple's combined earnings, regardless of the distribution of earnings between spouses.²⁷³ For example, suppose that in 1996 a husband earns \$100,000 and his wife is a full-time housewife. For 1996, the Social Security system would record \$50,000 of earnings credits for each spouse. If the husband earns \$60,000 and the wife earns \$40,000, again each spouse would receive \$50,000 in earnings credits.

Earnings sharing implements a "partnership" model of marriage, treating each spouse as making an equal economic contribution, whether through market work or family labor.²⁷⁴ Proponents point to three advantages of this model. First, earnings sharing would improve the situation of two-earner couples. Under earnings sharing, couples with equal aggregate incomes would receive equal total benefits; that change would tend to benefit two-earner couples, who can receive smaller benefits than single-earner couples under current law.²⁷⁵ Second, earnings sharing would eliminate the secondary-earner bias that the current spousal benefit rules create: both spouses would earn incremental credits for their work, although credits would be shared fifty-fifty with the other spouse.²⁷⁶ Finally, earnings sharing could help divorced women by creating "portable" earnings credits that could ensure some independent Social Security coverage for divorced women not now entitled to coverage.²⁷⁷

Although earnings sharing is an attractive compromise, it is not a panacea. Without a politically difficult increase in aggregate Social Security expenditures, larger benefits for some groups must come at the expense of others. The major tradeoff is that earnings sharing plans that are roughly revenue neutral would reduce benefits for single-earner couples and survivors (usually widows) of such couples or for other couples in which the wife does not have a significant work history.²⁷⁸ Even if these benefit reductions were seen as acceptable in the long run

272. See Blumberg, *supra* note 247, at 243-44 (arguing that Social Security rules "fail[] to take into account the effect of women's dual roles on their participation in the labor force," including women's shorter work lives, interrupted work lives, and lower earnings).

273. For a detailed discussion of several different earnings sharing plans, see CBO, *supra* note 251, at xvi-xviii; Blumberg, *supra* note 247, at 278-90.

274. See CBO, *supra* note 251, at 17-18.

275. See *supra* note 251 and accompanying text.

276. See Becker, *supra* note 247, at 286-87.

277. See *id.* at 284.

278. See Becker, *supra* note 247, at 36-37; Ferber, *supra* note 255, at 44; see also Achenbaum, *supra* note 253, at 139-40 (arguing that because earnings sharing would reduce benefits for one-earner couples, guaranteeing survivors' benefits as large as those under current law would require increasing taxes or cutting benefits); Simon, *supra* note 249, at 1483-84 (arguing that earnings sharing would "substantially redirect benefits away

as the price of change, the question of transition is a difficult one. As always, the tradeoff is between protecting expectations under the old regime and slowing the evolution to a new system, but Social Security changes are particularly sensitive because they can disappoint very long term expectations (and a sense of entitlement), and have a serious impact on elderly persons' economic security.²⁷⁹

d. *Conclusions.* — All of these proposals are enormously complex, due to the intricate structure of Social Security and the fact that the effects of any particular reform depend critically on the details of financing, benefit levels, and transition rules.²⁸⁰ Although a full evaluation of these proposals is beyond the scope of this Article, this discussion illustrates in another context the potential tensions among the three feminist goals and the tradeoffs inherent in a compromise approach.

II. BEYOND TAXATION: A COMPARISON OF TAX AND OTHER LEGAL INSTITUTIONS AND THE POTENTIAL OF LEGAL COORDINATION

Part I illustrates the inherent complexity of designing policies to implement feminist goals. Designing a feminist tax policy requires explicit choices among competing goals as well as careful attention to institutional details, which have important consequences for the incentive and distributional effects of any proposal. Further, policies that implement equal treatment, encourage women's market work, or assist caregivers may ultimately have only a limited impact on gender roles, women's economic well-being, and the distribution of resources within the family. Virtually any legal reform encounters institutional constraints of some kind, however, and the important question is whether feminist tax proposals are likely to be more or less effective than other legal reforms in achieving feminist goals. This Part briefly compares the institutional capabilities of tax law with those of family law, labor-market regulation, and welfare policy and suggests two conclusions. First, feminist reform proposals in other legal regimes encounter tensions among feminist goals that are analogous to those that arise in feminist tax proposals. However, different legal regimes have sharply divergent capabilities, and tax law changes have both comparative institutional advantages and weaknesses. Second, coordination between tax policy and other legal regimes can expand the available menu of policy options by drawing on the diverse strengths of different legal regimes. Although legal hybrids cannot eliminate tradeoffs among feminist goals or dramatically alter the capacity of modest

from many of the neediest women" by reducing survivors' benefits for widows, which are well targeted in terms of need).

279. Major earnings sharing proposals have devoted significant attention to issues of transition. See CBO, *supra* note 251, at 21–24.

280. See generally CBO, *supra* note 251, app. B at 110–13 (describing the difficulties of simulating effects of earnings sharing proposals, including predicting future demographic and economic trends and making assumptions about legal structure of transition).

legal reforms to change social attitudes and practices related to gender, they do provide another important avenue for using tax policy to advance feminist objectives.

It is not surprising that some scholars have looked to the federal tax system as a potentially attractive vehicle for implementing feminist goals. Because the federal income tax system affects the economic circumstances of a large segment of the population,²⁸¹ it offers an unparalleled opportunity to create incentives and income transfers with a potentially broad impact. Federal administration and automatic access to general federal revenues also allow the federal income tax system to create uniform rules that apply across state boundaries, and to redistribute income among all families, including the poorest.²⁸² Federal tax benefits, claimed by filing a tax return, also offer more privacy and dignity than other forms of legal administration.²⁸³ These advantages create corresponding constraints, however. Income tax administration, designed to be relatively cheap and automatic, cannot easily accommodate case-by-case factual determinations that might tailor benefits to individual circumstances.²⁸⁴ Tax rules can create "vouchers" for the purchase of goods and services²⁸⁵ but cannot create direct, in-kind transfers, and tax administration cannot easily enforce any regulation that requires information not provided by the current information reporting system.²⁸⁶

The remainder of this Part compares the capabilities and limitations of tax policy with those of other legal regimes and uses several examples to explore the potential for legal coordination.

A. Family Law

Family law rules have institutional characteristics that differ significantly from those of the federal income tax system. Family law rules re-

281. In 1994, individual taxpayers filed almost 110 million tax returns. A large number of those returns were jointly filed by married couples. See 15 IRS Stat. Income Bull. 21 tbl.1 (Fall 1995).

282. In fiscal year 1996, \$19.9 billion of EITC total expenditures of \$23.5 billion were "refunded" to taxpayers with insufficient tax liability to absorb the credit. See Joint Comm. on Taxation, Estimates of Federal Tax Expenditures for Fiscal Years 1996-2000. (Comm. Rep. Sept. 1, 1996), reprinted in JCT Forecasts Costs of Tax Expenditures, Tax Notes Today, Sept. 6, 1995, available in LEXIS, Fedtax Library, TNT File, 95 TNT 174-11.

283. See Alstott, *supra* note 69, at 565.

284. See *id.* at 589. The classic article is Stanley S. Surrey, Tax Incentives As a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 Harv. L. Rev. 705, 734-35 (1970) (arguing that tax expenditures should be compared carefully with direct expenditures but that in general it is unlikely that tax incentives will have clear advantages over direct programs).

285. The DCTC is a kind of voucher, which subsidizes the private purchase of childcare. See *supra* text accompanying notes 231-233.

286. See Heen, *supra* note 91, at 203 (noting that tax system cannot effectively regulate quality of childcare purchased with DCTC funds).

distribute private resources, primarily at divorce,²⁸⁷ between spouses (property and income division) or between parents (child support) and have the greatest potential impact on middle-class and high-income couples (who have sufficient property or income to be divided).²⁸⁸ Despite recent inroads made by federal legislation, family law remains largely a matter of state law and often differs significantly across states,²⁸⁹ and family law rules typically are applied case-by-case, based on the negotiations of the parties and some judicial participation. How effective and fair these individualized determinations are is a matter of considerable dispute.²⁹⁰

Despite these institutional differences, feminist proposals for family law reform encounter conflicts among feminist goals that are analogous to those created by tax reform proposals. Feminist scholarship on divorce law reform, for example, demonstrates quite clearly the conflict between the goals of equal treatment and encouraging women's market work on the one hand, and assisting caregivers on the other.²⁹¹ There is a large literature debating whether no-fault divorce and the equal division of property upon divorce help or harm women, and whether current rules should be amended to incorporate more generous alimony or property settlements for wives who are also caregivers.²⁹² Some feminists oppose special alimony or property division rules intended to benefit women upon divorce because they could encourage couples entering marriage to retain traditional gender roles, which could be "economically disabling for women."²⁹³ Others contend that current divorce rules encourage strategic behavior by men at women's expense²⁹⁴ and are inade-

287. Although some community property statutes also attempt to define legal entitlements in order to redistribute resources within an intact marriage, the efficacy of those rules is questionable. See *infra* text accompanying notes 302-303.

288. See Mary Ann Glendon, *The New Family and the New Property* 80-82 (1981).

289. Cf. Anne C. Dailey, *Federalism and Families*, 143 U. Pa. L. Rev. 1787, 1788-96 (noting trend toward larger federal role in family law and defending "state sovereignty over family law" based on "communitarian model of state authority under the federal Constitution").

290. See, e.g., Kay, *Beyond No Fault*, *supra* note 193, at 12-13 (describing criticism of judicial application of equitable distribution standard for property division); Becker, *supra* note 16, at 722 (noting that West Virginia courts have applied "primary caretaker" custody standard in way that fails "to adequately protect the emotional needs of children and their primary caretakers" and describing standard as "too discretionary in light of judicial bias").

291. See generally June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 Tul. L. Rev. 953, 992-1002 (1991) (describing variety of arguments relating to divorce reform and noting tension between arguments for equal treatment upon divorce and arguments that call for policies to protect women).

292. See Fineman, *supra* note 17, at 17-75; Kay, *Beyond No Fault*, *supra* note 193, at 31-35; Rhode, *supra* note 10, at 147-54.

293. Kay, *supra* note 23, at 80, 85.

294. See Carbone & Brinig, *supra* note 291, at 988.

quate to safeguard the interests of women who devote their time to family labor.²⁹⁵

The institutional characteristics of family law have made it difficult to use family law reform to implement feminist goals of encouraging women's market work and self-sufficiency, improving the economic well-being of caregivers, and increasing women's control over family resources during marriage. Consider three examples:

First, family law is an uncertain vehicle for encouraging women's market work, largely because generic financial incentives may not be well tailored to the task. Limiting alimony and other income support for divorced women may increase their work effort,²⁹⁶ but because many couples have only limited income and assets, incentives created by divorce settlements relating to income and property are relevant only to higher income classes.²⁹⁷ In theory, at least, family law might create transitional work incentives or training programs that are tailored to individual circumstances (e.g., "rehabilitative" alimony or educational assistance). Although awards of rehabilitative alimony have increased relative to permanent awards in recent years, relatively few women receive alimony of any kind, and critics argue that judicial expectations about "rehabilitation" often are unrealistic.²⁹⁸ Finally, whether work incentives for divorced women also influence the behavior of *married* women is particularly uncertain. Although the growing divorce rate has probably alerted women to the possibility that they will have to support themselves, women may discount the probability that they will be divorced or that they will suffer hardship upon divorce.²⁹⁹ If married women (perhaps short-sightedly) discount the likelihood of divorce in their own situation or lack information about the likely economic outcome of divorce, potential work incentives may fail to influence behavior in advance.

Second, the variability of state law, the uncertainty of judicial behavior, and the constraints of state-level administration have made it difficult to enhance the economic well-being of caregivers through child support awards. Current law requires noncustodial parents, whether divorced or never-married, to contribute to the support of their children, but critics point out the wide divergence of state-law rules determining child support awards, the potential for arbitrariness in the judicial application of

295. See Becker et al., *supra* note 10, at 517–18; Fineman, *supra* note 17, at 4.

296. Another potential work incentive, although unintended, arises from the high rate of noncompliance with child support orders, which often leaves divorced women with little income other than their own earnings. For data on noncompliance with child support orders, see Irwin Garfinkel, *Assuring Child Support* 7–8 (1992).

297. See Glendon, *supra* note 288, at 80–82.

298. See Becker et al., *supra* note 10, at 513.

299. See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average*, 17 L. & Hum. Behav. 439, 444–48 (1993) (reporting results from survey of marriage license applicants and law students who had taken basic course in family law, and finding that both groups had relatively accurate knowledge of societal divorce rates but perceived their own chances of divorce to be much smaller).

state standards, and the difficulty of enforcing child support rules, especially across state boundaries.³⁰⁰ And once again, the limited capacity of poorer fathers to pay child support also limits the potential upside of child support awards for the mothers of their children.

Finally, some family law scholars see community property laws as a means of redistributing property and income within the family, but there is no clear consensus on the relative merits of community property and common law regimes. Although community property laws may strengthen women's financial position at divorce compared to older, title-based divisions of property, some argue that newer, equitable distribution rules in common law states approximate community property, at least upon divorce.³⁰¹ There is also significant controversy about whether community property laws can improve the fairness of property allocations within an intact marital household. Advocates argue that recent reforms giving wives more immediate rights to manage and control the disposition of community property can strengthen wives' bargaining power during marriage,³⁰² but skeptics argue that management rights are at best a weak vehicle for improving wives' control over marital income and assets.³⁰³ Even if there were a clear consensus on the value of community property management rights, the variability of state laws is a considerable obstacle to coordinated reform.

The remainder of this section offers two examples to illustrate how coordination between family law and tax law might expand the institutional capabilities of either regime standing alone.

1. *Child Support Assurance*. — Irwin Garfinkel's popular proposal for a child support assurance system ("CSAS") suggests that legal coordination—including an enhanced role for the federal tax system—could improve the economic status of single mothers.³⁰⁴ Garfinkel's proposal combines some traditional functions of family law and welfare law to enhance the correspondence between child support awards and fathers'³⁰⁵ incomes, to improve the enforcement of child support awards, and to

300. See Garfinkel, *supra* note 296, at 29–31; Rhode, *supra* note 10, at 151–52.

301. See Ira M. Ellman et al., *Family Law* 224–61 (1986).

302. For a cautious endorsement, see J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 *Law & Contemp. Probs.* 99, 104 (1993) (noting that nonlegal factors may be dominant consideration that determines intrafamily allocations but arguing that legal rules "may have some effect" on management of funds).

303. For example, even if the law gives husbands and wives theoretically equal management rights, third parties will often be entitled to continue to deal with only one spouse. The result is that one spouse—often the husband, as titleholder—will in reality maintain control. See Ira M. Ellman et al., *supra* note 301, at 104–05; see also Oldham, *supra* note 302, at 105–54 (surveying state rules that determine degree of joint management).

304. See Garfinkel, *supra* note 296, at 8–9.

305. Although the CSAS would be available to custodial parents of either gender, the text (following Garfinkel's usage) refers to custodial parents who receive child support as "mothers," and to noncustodial parents who pay child support as "fathers," because about 85% of single parents are female. See *id.* at 11.

ensure a minimal level of support for all single mothers, regardless of the level of fathers' income.³⁰⁶

Under the CSAS, child support payments by fathers would be calculated as a flat percentage of income and would be collected through the federal income tax system.³⁰⁷ Single mothers would receive the greater of either the child support actually collected from the father or a minimum government-guaranteed payment which might range from \$2000 to \$2500 per year. Any shortfall due to nonpayment by fathers would be made up out of public revenues.³⁰⁸

Thus, the CSAS is a legal hybrid that uses a wholly traditional function of the tax law—tax collection—to enhance the performance of family law rules.³⁰⁹ It also draws on public funds to create a guaranteed minimum benefit for single mothers, using the linkage with private child support payments to enhance the political acceptability of a kind of family allowance for single mothers.³¹⁰ Garfinkel's simulations suggest that the CSAS with an assured minimum benefit of \$2000 could reduce the "poverty gap," or the difference between family income and poverty level income, among single mothers by 5% in the short run and almost 17% in the intermediate term.³¹¹ These estimates incorporate projections of difficulties in increasing child support awards or payment rates. A "perfect" implementation of the CSAS would reduce the poverty gap by 30%.³¹²

306. See *id.* at 45–46. Income withholding would be routine for all noncustodial parents.

307. See *id.* at 47–48.

308. Some features of the CSAS have been enacted into law. Until 1996, AFDC rules required recipients of AFDC to cooperate in establishing paternity. See 1994 Green Book, *supra* note 182, at 336. Welfare legislation adopted in 1996 requires states to provide child support enforcement services to recipients of the new block grant providing temporary assistance to needy families. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 301, 110 Stat. 2105, 2199 (1996) (Westlaw, US-PL database) (to be codified at 42 U.S.C. § 654). The Family Support Act of 1988, Pub. L. No. 100–485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C.), requires states to begin routine wage withholding of all new child support orders entered after 1994. See 1994 Green Book, *supra* note 182, at 460. The 1996 legislation also takes other measures to enhance the collection of child support, including the creation of a national registry of newly hired employees. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 313(a)–(b), 110 Stat. at 2209–12 (to be codified at 42 U.S.C. §§ 653a–654).

309. See Garfinkel, *supra* note 296, at 42–61.

310. The CSAS is similar, but not identical, to a family allowance. For single mothers who now receive no child support and would receive the minimum benefit under the CSAS, the program is a family allowance—a per child payment funded by general revenues. The payment is reduced dollar-for-dollar with increased private child support payments so that single mothers who receive sufficient private child support receive no public assistance.

311. See Garfinkel, *supra* note 296, at 54 tbl.3.1.

312. See *id.* But see Elaine Sorensen & Sandra Clark, A Child-Support Assurance Program: How Much Will It Reduce Child Poverty, and at What Cost?, 84 *Am. Econ. Rev.*, May 1994, at 114, 117 (measuring effectiveness of CSAS based on number of children lifted from poverty rather than by reductions in poverty gap and finding that even \$3000 per

Some feminists, however, may oppose the CSAS because of the linkage between fathers' payments and children's support, illustrating that there is significant controversy over how best to implement the goal of assisting caregivers. Garfinkel's plan would provide benefits only to single mothers who identify the father of their children. Martha Fineman objects that the identification requirement could result in domestic violence by the fathers in retribution for identification.³¹³ This particular problem might be addressed by removing the requirement that mothers identify fathers in order to receive the minimum payment. Although Garfinkel strongly opposes that change because it could raise the costs of the program and break the link between fathers' responsibilities and mothers' incomes,³¹⁴ there is a relatively straightforward policy tradeoff between eliminating identification requirements and keeping the public cost of the program low.³¹⁵ Another feminist objection, however, is virtually impossible to address within the scope of Garfinkel's plan: some feminists argue that *any* income support linked to fathers' payments is objectionable because it reinforces both women's economic dependency on men, and the message that fatherhood is largely a financial transaction.³¹⁶

2. *Intrafamily Redistribution Through Family Law.* — If one believes that family law rules governing women's control over marital property could achieve a degree of intrafamily redistribution during marriage, coordination between tax policy and family law might be productive in en-

child benefit, with zero reduction of AFDC benefits, would reduce child poverty rate by only 12.3%). The antipoverty benefits of the CSAS may be politically vulnerable, however, if politicians adopt the private payment reforms and reject the public benefit component. Wisconsin, for example, has implemented some of the collection-side reforms Garfinkel recommends, but not the assured benefit. See Garfinkel, *supra* note 296, at 57–58.

313. See Fineman, *supra* note 16, at 212–13 (arguing that aspects of paternity establishment process, which are mandatory for welfare recipients, are objectionable because single mothers must either lose privacy or lose benefits, may be exposed to violence and abuse, and may be subject to claims for visitation or custody by newly identified fathers).

314. See Garfinkel, *supra* note 296, at 67–68 (acknowledging that paternity-establishment process is “invasive” but arguing that requiring paternity establishment as condition for eligibility for assured child support award is appropriate and will create “a potentially powerful incentive” for mothers to cooperate).

315. For one effort to quantify that tradeoff, see Sorensen & Clark, *supra* note 312, at 117 tbl.1 (showing higher revenue cost and higher poverty reduction rates of eliminating requirement that single mother have child support award in order to collect assured minimum benefit).

316. Martha Fineman argues that paternity establishment reforms mandated by the Family Support Act of 1988 reinforce the ideology of fathers as “economic providers and disciplinarians in patriarchal nuclear families.” Fineman, *supra* note 16, at 113. The 1996 welfare legislation also requires recipients of block-grant funds to cooperate in paternity establishment. The new law contains a “good cause” exception, but also a 25% reduction in the grant for noncooperation. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 103(a), 110 Stat. 2105, 2134 (1996) (Westlaw, US-PL database) (to be codified at 42 U.S.C. § 608).

couraging states to adopt uniform rules. History suggests that federal tax rules can create a strong incentive for states to adopt community property statutes. In 1930, *Poe v. Seaborn* allowed married couples in community property states—but not in common law states—to reduce their income taxes.³¹⁷ The tax code at the time required spouses to file individual returns, and *Poe* ruled that community property laws required each spouse to report one-half of joint income. Given the progressive marginal tax rate schedule, this income splitting result was highly advantageous, because it minimized the couple's total taxes. Largely in response to *Poe*, several states adopted community property laws between 1930 and 1948.³¹⁸ The trend might have continued, except that federal legislation in 1948 adopted the joint return system, which extended the opportunity for income splitting to residents of common law states.³¹⁹

More recently, Pamela Gann has suggested that a system of individual filing might once again encourage states to adopt community property laws.³²⁰ Potential benefits for women could be magnified if federal tax recognition of state community property regimes were conditioned on the adoption of state-law provisions to enhance women's control over community property during marriage. It is important to note, however, that resurrection of the full *Poe* incentive for community property statutes would be at odds with the goal of eliminating the secondary-earner bias discussed in Part I.A. The kind of income splitting mandated by *Poe* would recreate a secondary-earner bias because a wife with no earnings of her own would still report half her husband's earnings on her return. If a nonworking wife decided to go to work, her earnings also would be split between the two returns, but in the end would be taxed at a higher marginal tax rate determined by her husband's earnings. We could modify the *Poe* system to allow income splitting only for unearned income, but restricting the benefit would reduce the incentive for states to adopt the community property regime—because the change would then benefit only those with significant income from capital.³²¹

Skeptics of community property's benefits for women argue that individual filing might be better used to enhance wives' property rights by *ignoring* state community property laws and respecting nominal property ownership for purposes of allocating investment income between spouses. This rule would allow couples with income from capital to minimize the marginal tax rate on the income by shifting legal title to the property to the lower earning spouse. Advocates argue that tax reduction conditioned on the transfer of legal title could benefit women—who are

317. 282 U.S. 101, 110–12 (1930).

318. See Gann, *supra* note 28, at 18 nn.67–68.

319. See *id.* at 18.

320. See *id.* at 59–60.

321. Any income splitting plan is most advantageous for single-earner, high-bracket couples, but restricting the opportunity to unearned income confines the strategy to an even smaller group.

typically the lower earning spouses—by increasing their property holdings.³²² Just as in the case of community property laws, however, there are questions about whether nominal legal title conveys effective control. In addition, this sort of incentive has potential benefits only for women in couples with income from property.³²³

Although these proposals are a thoughtful attempt to consider how tax law might reinforce and magnify the effects of family law, there are still serious questions about whether any of them would create significant gains for women during marriage. Family law rules, which can give women legal title to identifiable marital assets, may be significantly more effective than tax law rules alone, which can at most determine only which spouse's name is written on the check sent by the IRS. Nevertheless, the basic difficulty remains: in family law as in taxation, it is extremely difficult to predict whether changing legal title to assets or earnings will have significant practical benefits for wives. As argued above,³²⁴ if wives are hesitant to enforce their rights during marriage, or if husbands have other sources of financial or emotional leverage, changes in legal entitlements may do little.

B. *Labor-Market Regulation and Mandated Family Leave*

Part I described the institutional complexity of using tax law changes to encourage women's market work. Among the potential obstacles are labor-market conditions that make it difficult for women to combine market work and family labor.³²⁵ The Family and Medical Leave Act ("FMLA")³²⁶ takes a more direct approach to that problem by requiring employers to permit employees to take unpaid leaves of up to twelve weeks to care for family members. FMLA applies to employers with more than fifty employees and provides job protection for employees returning from leave.³²⁷

FMLA is not uncontroversial even among feminists, demonstrating once again the normative and institutional complexity of designing programs to help women. Some feminists hail FMLA as an important means of enhancing women's job security and reducing the earnings gap be-

322. See Davis, *supra* note 43, at 238–40.

323. A more far reaching incentive would legislatively overrule *Lucas v. Earl*, 281 U.S. 111, 114–15 (1930), which held ineffective for tax purposes contracts purporting to assign the earnings of one spouse to the other. See Gann, *supra* note 28, at 114–15. Overruling *Earl* in an individual filing system would allow couples to minimize taxes by splitting earned income, but only if the higher earning spouse gave the lower earner a contractual right to the income, perhaps with additional statutory conditions requiring that the contract have a certain duration and be irrevocable. Once again, however, full income splitting would recreate the second-earner bias, and whether changing legal title would have significant practical benefits for women is extremely hard to predict.

324. See *supra* Part I.A.3.

325. See *supra* text accompanying notes 91–102.

326. 29 U.S.C. §§ 2601–2654 (1994).

327. See *id.*

tween mothers and other workers.³²⁸ Feminist critics of FMLA raise three principal objections, however. First, some argue that FMLA provides little or no benefit to significant groups of women. They contend that unpaid leaves are of little use to low- and middle-income women, and that a benefit tied to long-term employment does nothing for women who are unemployed, self-employed, or are part-time or intermittent workers.³²⁹ Second, others argue that FMLA could be counterproductive to the extent that employers respond to the mandate by reducing women's wages or by discriminating against women of childbearing age, who are most likely to take the leave.³³⁰ Finally, some critics contend that employment benefits linked to family labor could even reinforce women's traditional role as caregivers by making it easier for women to take time off.³³¹

Some of these objections to FMLA arise in part from its structure as an employer mandate, which appears "costless" on the government's books but in effect imposes a hidden "tax" on workers, and possibly employers as well, in the form of lower wages, unemployment, and higher production costs.³³² Employer mandates may also encourage noncompliance or changes in the structure of the workforce, if employers misclassify employees as independent contractors or rely on part-time workers, temporary help, or overtime in order to avoid the costs of the mandate.³³³ FMLA's relief for small employers, although a perceived political neces-

328. See, e.g., Jane Waldfogel, *The Family Gap for Young Women in the U.S. and U.K.: Can Maternity Leave Make a Difference?* 13 (Oct. 1994) (unpublished manuscript, on file with the Columbia Law Review) (finding that job-protected maternity leave can reduce "family gap" in wages for working mothers by increasing likelihood that they will return to work after childbirth).

329. See, e.g., Nadine Taub, *From Parental Leaves to Nurturing Leaves*, 13 *N.Y.U. Rev. L. & Soc. Change* 381, 398 (1984-85) (arguing that paid leave would ensure that "the leave will be an option for everyone, not merely the well-to-do").

330. See Maria O. Hylton, "Parental" Leaves and Poor Women: Paying the Price for Time Off, 52 *U. Pitt. L. Rev.* 475, 493 (1991); Taub, *supra* note 330, at 401.

331. See, e.g., Fuchs, *supra* note 1, at 136 (criticizing employer mandates and arguing that public funding "usually introduces less inequity and inefficiency" than mandates, which distribute costs in an "arbitrary" way). But see Waldfogel, *supra* note 328, at 14 (arguing that average cost of FMLA per woman is likely to be small, and that employers may gain from lower turnover and increased employee commitment). See generally Lewis & Astrom, *supra* note 222, at 61, 72-74 (1992) (arguing that Swedish employment policies for women have not altered unequal division of family labor and may have reinforced sex segregation in workplace). In addition, giving women more time for caregiving work might not increase their leisure time but could instead just add to their domestic burden, if family demands increase in response to the increase in women's available time. See Spakes, *supra* note 199, at 38-39 ("[J]ob sharing and work at home, for example, too often mean that women do more work in less time, get paid less, [and] receive fewer benefits.").

332. For general critiques of employer mandates, see Fuchs, *supra* note 1, at 136-37; Michael Graetz & James Tobin, *Players and Payers*, *N. Y. Times*, Feb. 11, 1994, at A35.

333. For similar concerns in the context of employer mandates for health insurance, see GAO *Warns of Worker Status Fallout from Health Reform*, *Tax Notes Today*, Aug. 5, 1994, available in LEXIS, *Fedtax Library*, TNT file, 94 TNT 153-39; Graetz's Testimony at Senate Finance Committee Hearing, *Tax Notes Today*, Mar. 16, 1994, available in LEXIS, *Fedtax Library*, TNT file, 94 TNT 51-51.

sity, also offers opportunities for abuse and creates disparities in the treatment both of employers and of employees of different firms.³³⁴

One interesting institutional question is whether there are alternative ways of structuring family leave and other flexible-employment arrangements that could avoid some of these drawbacks. Tax policy plays no explicit role in FMLA now but might play a larger role in a restructured system. Instead of the current "unfunded" mandate, family leave might be financed by an explicit payroll tax or by general revenues, with different efficiency and distributional consequences. Even an unpaid leave program might use explicit tax financing to redistribute the costs of employer compliance with the mandate.³³⁵ A funded mandate would require explicit tax increases but, by spreading the costs of the program beyond employers and workers, could ameliorate some of the adverse effects of the employer mandate.³³⁶ Alternatively, tax incentives for family leave, part-time work, or flex-time could encourage these arrangements while spreading their cost to the taxpaying public.³³⁷

A tax-funded leave program or tax incentives for employers raise a host of institutional design issues, which require further research. For example, financing family leave through general revenues or creating tax incentives for flexible work policies would require tax rate increases, which create deadweight losses and potential work disincentives. Tax funding does not eliminate the cost of the program, but simply allows a more explicit method of assigning tax rate increases to different groups of taxpayers.³³⁸ Any proposal to fund *paid* family leave raises difficult issues regarding how large payments should be.³³⁹ An incentive program also must confront, among other difficult issues, the familiar problem of "buying the base": employer incentives may in many cases simply provide a windfall to employers who already have or would have adopted their

334. See 29 U.S.C. § 2611(2)(B)(ii), (4)(A)(i) (1994) (exempting employers of fewer than 50 workers). For criticism of the disparate burden employer mandates impose on firms in different industries, see Fuchs, *supra* note 1, at 137.

335. For a general treatment of the efficiency and distributional differences between government provided benefits and employer mandates, see Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 *Am. Econ. Rev.*, May 1989, at 177, 177 (arguing that under certain conditions, mandates may have smaller efficiency costs but may interfere with redistributive goals).

336. For example, employers might be less reluctant to hire women and to grant the mandated leave. A funded leave program also might have smaller effects on women's wages and unemployment.

337. President Bush proposed a family leave tax credit in 1992 as an alternative to his expected veto of that year's family leave mandate legislation. See *Bush Proposes Tax Credit for Firms Providing Family Leave to Employees*, *Daily Lab. Rep. (BNA)*, Sept. 17, 1992, at A-19.

338. See Summers, *supra* note 335, at 180-81 (discussing extent to which mandate replicates economic features of a tax).

339. See, e.g., Fuchs, *supra* note 1, at 134 (arguing that payments linked to wages are regressive).

policies in any case.³⁴⁰ Finally, this Article has consistently raised questions about the effects of incentives on *individuals'* behavior, and the natural corollary question is whether incentives for businesses merit a different conclusion. Businesses might be better informed than are individuals, and businesses have been quite responsive to some tax incentives in the past, but the design of an incentive program requires rules to monitor compliance and prevent "gaming" behavior that allows a business to qualify for the tax break without making the desired change.³⁴¹

C. Welfare Policy

Like tax law and family law, welfare rules create income transfers and potential behavioral incentives, but welfare rules reflect yet another distinct mix of institutional capabilities. The AFDC program, repealed in 1996, redistributed federal revenues using federal rules that created a minimal degree of uniformity in administration, although states set benefit levels, which varied widely, and controlled day-to-day administration.³⁴² Because only the very poor qualified for AFDC benefits, the welfare system encountered a limited subset of the population and provided little assistance to the working poor.³⁴³ AFDC administration was bureaucratic, in theory combining some degree of case-by-case factual determinations with highly routinized procedures, but in practice often falling short of even these modest ideals.³⁴⁴

The new substitute for AFDC, the Temporary Assistance for Needy Families ("TANF") program, provides federal block grants to states to be

340. See Harriet B. Presser, *Can We Make Time for Children? The Economy, Work Schedules, and Children*, 26 *Demography* 523, 525-30, (1989). See generally Michael J. Graetz, *Mandating Employer Health Coverage*, 60 *Tax Notes* 1765, 1766 (1993) (describing problem of buying the base in context of proposed incentives for health insurance).

341. The example of the targeted jobs tax credit ("TJTC") is troubling in several respects. The TJTC provided a tax credit for employers who hired certain disadvantaged workers. See I.R.C. § 51 (1994). The TJTC expired on December 31, 1994, but has been replaced, in slightly modified form, by the work opportunity credit. See *id.* § 51. For criticism of the TJTC, see, e.g., Testimony of Douglas Ross, Assistant Secretary of Labor for Employment and Training before the Subcomm. on Oversight of the Comm. on Ways and Means, 104th Cong. (1995), reprinted in Labor Department's Testimony on TJTC at W & M Oversight Panel Hearing, *Tax Notes Today*, May 10, 1995, available in LEXIS, Fedtax Library, TNT File, 95 TNT 91-47 (opposing reenactment of TJTC, in part because the credit was a "windfall" to employers of low-wage, high-turnover labor, and citing statistics projecting that 92% of workers would have been hired even without TJTC). Similar issues might plague tax credits for part-time or flexible hours; unless carefully designed, the "incentives" might be a windfall transfer to employers of part-time workers in, e.g., the fast food and retail industries.

342. See 1994 Green Book, *supra* note 182, at 324-333.

343. See *id.*

344. See Mary J. Bane & David T. Ellwood, *Welfare Realities* 2-7 (1994). For an anecdotal description, see Theresa Funicello, *Tyranny of Kindness* 24-53 (1993) (describing "brutality" of welfare bureaucracy).

used for assistance for low-income families.³⁴⁵ TANF both permits greater state discretion in setting the terms of assistance and imposes new federal restrictions on state programs, including work participation requirements and a time limit on benefits.³⁴⁶ Advocates of TANF argue that it will facilitate productive experimentation at the state level, but critics fear that disparities in state benefit levels will grow and that states will compete in a destructive "race to the bottom" that will further reduce benefit levels.³⁴⁷ It is impossible to predict the structure of new state programs under TANF, but it seems likely that the new programs will retain some of the basic institutional features of AFDC, including varying state benefit levels and a focus on income-tested programs for the very poor.

Like tax policy and family law, welfare policy also encounters the conflict between encouraging women's market work and assisting caregivers. During the past few decades, proposals for reform of AFDC have increasingly sought to reduce welfare use by encouraging recipients (the majority of whom are single mothers) to work in the market.³⁴⁸ (This is not, of course, solely a "feminist" debate, but the issues nevertheless echo the conflict between feminist goals, and feminists might take different positions on the appropriate policy.) Feminist critics argue that work-related welfare reforms penalize caregivers and devalue caregiving work.³⁴⁹ The debate over time limits in TANF revisits the familiar debate: advocates argue that limiting benefits will increase work among welfare recipients, but critics argue that greater work effort is unlikely to lead to economic self-sufficiency and may consign many welfare recipients to extremely harsh living conditions.³⁵⁰

Although debates over welfare policy are immensely complex, and a full discussion is well beyond the scope of this Article, several proposals

345. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (Westlaw, US-PL database).

346. See *id.* Section 103(a)(1) of the Act requires states participating in TANF to meet numerical goals for work participation by welfare recipients, see *id.* § 103(a)(1), (to be codified at 42 U.S.C. § 608) and imposes a 60 month lifetime limit on the receipt of benefits, see *id.*

347. See R. Kent Weaver, *The Politics of Welfare Reform*, in *Looking Before We Leap* 91, 100-01 (R. Kent Weaver & William T. Dickens eds., 1995). See generally Paul E. Peterson & Mark C. Rom, *Welfare Magnets* 15 (1990) (arguing that "states are more prone than the federal government to provide inadequate benefits for both political and economic reasons").

348. See Joel F. Handler, *The Poverty of Welfare Reform* 28-29 (1995). A variety of welfare reforms over the years have sought to provide direct, in-kind support for market work by welfare recipients (e.g., job training and childcare), but experience with welfare-to-work programs invites skepticism about their design, goals, and management. See *id.* at 56-88.

349. See, e.g., Martha A. Fineman, *The Nature of Dependencies and Welfare "Reform"*, 36 Santa Clara L. Rev. 287, 290-94 (1996).

350. See Rebecca M. Blank et al., *A Primer on Welfare Reform*, in *Looking Before We Leap*, *supra* note 347, at 27, 67-70.

and programs illustrate the possibilities of using legal coordination to alter the institutional features of welfare. Consider three examples:

First, family allowance proposals, discussed above in Part I.C, would replace all or a portion of welfare benefits with a universal, or non-income-tested transfer. The elimination of the income test would reduce high marginal "tax" rates on welfare recipients by spreading the tax rate increase among the general taxpaying population.³⁵¹ The elimination of the income test would also permit administration through the tax system, which is thought to be easier, cheaper, and less stigmatizing.³⁵² Most family allowance proposals also would incorporate a nationwide, uniform benefit financed by federal revenues. Although family allowances administered through the federal income tax system would make all three of these institutional changes, the three characteristics are not inseparable, and other permutations are possible. For example, some states have begun to experiment with limited family allowance programs for welfare recipients, administered through state welfare agencies; these programs would not create federally standardized benefit levels or utilize tax-based administration, but would reduce marginal tax rates on welfare recipients.³⁵³

Second, the CSAS, described above in Part II.A.1, is another combination policy that is often promoted as welfare reform. The CSAS attempts to replace at least a portion of welfare benefits with increased private child support collections and also creates a minimum family allowance for single mothers.³⁵⁴

Third, the EITC, described above in Part I.B, provides an alternative income transfer for the working poor. Advocates argue that the EITC encourages work, and that its tax-based administration eliminates the stigma of traditional welfare.³⁵⁵ Studies suggest that the EITC can increase labor force participation among the lowest income workers, particularly single mothers, although the net impact of the program on the work effort of slightly higher income recipients is probably close to zero.³⁵⁶

Of course, these proposals and programs create their own institutional tradeoffs; the argument here is not that legal coordination can create perfect institutions, but only that it can alter the traditional institu-

351. See *supra* text accompanying notes 181–183.

352. See Alstott, *supra* note 69, at 564–65. Although this Article focuses on family allowances administered through the tax system, they could be administered through other agencies, e.g., the Social Security Administration, possibly using tax data on family composition. See *supra* note 218.

353. See *Developing A Child Support Assurance Program: New York and Minnesota, Focus*, Spring 1996, at 38 (describing New York State's Child Assistance Program, which is a means-tested program that has smaller benefits but much more generous benefits disregards (and thus, lower marginal "tax" rates) than AFDC).

354. See *supra* Part II.A.1.

355. See Alstott, *supra* note 69, at 533–44.

356. See *supra* text accompanying notes 150–152.

tional characteristics of any particular legal regime. As described above, family allowance proposals are expensive in revenue terms and are perceived to be quite costly in real economic terms. The current popularity of "devolution" of responsibility for welfare initiatives to the states makes major federal family-allowance legislation in the near future rather implausible. Nevertheless, state experiments are underway, and as noted above, current proposals for federal child tax credits are potentially a limited step towards family allowances.³⁵⁷ Some general goals of the CSAS have been incorporated in recent welfare legislation intended to increase child support collections, but policymakers so far have not embraced the minimum benefit that Garfinkel recommends.³⁵⁸ And finally, in recent years the EITC has been widely criticized as a program "rife with fraud."³⁵⁹ Although my prior work suggests that these claims misunderstand the inherent tradeoffs of using tax-based administration to run a welfare-type program, the attacks may have undermined the historically strong bipartisan appeal of the EITC.³⁶⁰

CONCLUSION

This Article argues that tax policy can take important steps toward increasing or reforming income support for women and families and easing the way for women's labor market participation, but that the task of designing effective feminist tax policies is significantly more complex than some proponents have understood. Like any feminist legal reform, feminist tax proposals face difficult tradeoffs among competing goals, and no solution will be uniformly acceptable to all. Feminist tax proposals also encounter the inherent difficulty of using incremental changes in financial incentives and entitlements to influence patterns of behavior that reflect deep-seated attitudes about gender roles.

The Article suggests four conclusions. First, the traditional equal treatment rationale for individual filing is weaker than proponents have conveyed. The purely symbolic impact of individual filing is likely to be limited, and advocates have overstated the practical capacity of individual filing to change gender roles, women's economic well-being, and women's power within the family. Although individual filing might be structured to reinforce family law rules giving wives greater legal control over marital property, the most effective means of doing so would undermine the central goal of individual filing—eliminating the secondary-earner bias.

357. See *supra* text accompanying notes 231–245.

358. See *supra* notes 308–312 and accompanying text.

359. See Anne L. Alstott, Comments on Samansky, "Tax Policy and the Obligation to Support Children," 57 Ohio St. L.J. 381, 390–91 (1996); see also James Bovard, Clinton's Biggest Welfare Fraud, Wall St. J., May 10, 1994, at A18; Lisa Schiffren, America's Best-Kept Welfare Secret, Am. Spectator, Apr. 1995, at 24.

360. See Alstott, *supra* note 359, at 390–91.

Second, feminist tax proposals for encouraging women's market work illustrate the importance of attention to institutional detail and the inevitable compromises inherent in any work incentive plan. A basic problem is that the feminist goal of "encouraging women's market work" is ultimately too simple to give authoritative guidance for policy design. Any marginal tax rate cut for women can literally accomplish that goal to some degree, but there are significant normative and empirical questions about which women's market work should be encouraged, what kinds of policies are best able to overcome institutional barriers to women's market work, and what increased market work can do to advance the underlying objectives of enhancing choice and economic well-being. The feminist case for marginal tax rate cuts for wives requires disregarding the goal of assisting caregivers and rests on contingent empirical predictions about the effects of women's increased market work on the structure of the labor market. An expanded DCTC, in contrast, offers a popular compromise among the goals of equal treatment, encouraging women's market work, and assisting caregivers. Although further research is necessary, a modified program of family leave might also offer another approach to helping women combine family labor and market work.

Third, family allowances—or a hybrid variant like the CSAS—illustrate the possibility of using tax policy to improve the economic security of caregivers. The CSAS could modestly enhance the incomes of single mothers, and family allowances could do the same for the incomes of single mothers and families with children, although neither policy can do much to reliably redistribute income within the marital household. The modest size of the transfer would mitigate the potential conflict with the goal of encouraging women's market work—at the cost, of course, of reducing potential gains in the economic well-being of women and families with children.

Finally, any effort to use tax policy to implement feminist goals can usefully look beyond taxation to consider the possibilities for coordinating tax law change with reforms in other legal regimes. Legal coordination is not a panacea; it cannot resolve basic tensions among feminist goals, and legal hybrids sometimes substitute new institutional complexities for older, more familiar ones. Nevertheless, tax policy has a potential role to play in altering the distribution of the economic costs of regulation, reinforcing the effects of other legal reforms, and improving the collection and distribution of income transfers.

This Article suggests that a better understanding of the normative and empirical complexity of policy design can enhance the feminist case for legal reform. A more informed awareness of competing feminist goals, of the differences among seemingly similar tax policies, and of the diverse capabilities of tax and non-tax legal reforms, allows feminists to make careful and informed choices about how best to implement a particular set of goals. Given the reality of scarce resources and the difficulty of marshaling political support for feminist legal reform, we can ulti-

mately do the most for women by concentrating on what tax law reforms really can accomplish. A nuanced and realistic appraisal of the capabilities of feminist tax and transfer policies can focus attention and resources in ways that maximize the potential impact and can prevent feminists from settling for overly simple proposals that promise much but deliver relatively little.