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The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law

Amy C. Christian

Male bias has paraded as neutrality[.] ... Women's perspectives and experiences have [routinely, some would say systematically,] been left out of [statutory] development and [the] ... application [of the law]. ... We have a responsibility to inform ourselves ... about women's lives and needs, about ways in which women's perspectives have been ignored or marginalized in law, and about ways that legal doctrines and concepts need to be changed. 1

I. INTRODUCTION

Imagine landing on the planet Ames, discovering that human life inhabits it, and that, like Earth, two things are inevitable: death and taxes.2 Upon learning that the Amesians have an income tax system, your first impulse is to examine it in the hope of discovering how the Amesians live, how they think, and what they believe.3 In doing so, you learn the following. The

† Associate Professor, Detroit College of Law at Michigan State University; B.S.B.A., Georgetown University, School of Business Administration, 1988; J.D., Harvard Law School, 1991. I am indebted to Professors Anne L. Alstott, Susan H. Bitensky, Edward J. McCaffery, Robert A. McCormick, and Katherine B. Silbaugh and to Angela Lykos and Mark A. Sacks for reviewing prior drafts of this Article. I also wish to express my thanks to Lawrence DeAngelo, Gary Remer, Jeffrey Dworin, and Peter Carayannis for their able research assistance and to R. Daniel Barahona and Dora J. Hetrick for their encouragement. Special gratitude is extended to the library staff of DCL at MSU, especially Michele Howard and Charlotte Bynum, for their invaluable assistance.


2 "Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes." Letter from Benjamin Franklin to Jean-Baptiste Leroy (Nov. 13, 1789), reprinted in JOHN BARTLETT, FAMOUS QUOTATIONS 310 (Justin Kaplan ed., 16th ed. 1992).

3 See generally Carolyn C. Jones, Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s, 6 L. & Hist. REV. 259, 296 (1989) (asserting that tax laws "are cultural
government pays male Amesians to marry females who do not work. When a female Amesian who does work marries, by law her income is cut. In fact, the Amesian government discourages her from working at all after marrying. By contrast, when a male marries, his income is automatically increased. Perhaps most astonishing of all is the phenomenon in which most female Amesians pay their husbands every year for the privilege of being married to them, even when the female earns significantly less than her husband. Each year at tax time, there is, in effect, a massive transfer of wealth from the married women in the population to their husbands. You are shocked and dismayed that a government would systematically favor men over women in so many respects. You conclude, based on your research into the Amesian tax system, that life on Ames, while interesting, cannot be intelligent life. Accordingly, you cancel your plans for a press conference to announce the existence of alien intelligent life. You cancel the book tour you had envisioned. With great regret and some financial trepidation, you also decide that you will be unable to join the lecture circuit.

Later, after returning to Earth, lamenting your misfortune, and pondering the oddities of the Amesian tax code, you still cannot believe that seemingly intelligent beings would devise a tax system with such overt bias against females,\(^4\) one that departed so dramatically from neutral principles. You decide to establish interplanetary communications and to ask the Amesians why they chose a tax system with such an egregious impact on females. You gain access to a government satellite, transmit your inquiry to the Amesians, and a few weeks later, their reply arrives: “We got our tax system from you. It is a copy of your U.S. tax code. We have been watching you Americans for years. As we study your society, we adopt some of your more salient customs.” You are shocked. You had believed that your country was much more enlightened than Ames, and accordingly, you undertake an examination of the U.S. tax code. Much to your horror, you discover that the Amesians are correct: the U.S. tax system is artifacts—understood as a part of a larger societal structure and, simultaneously, revealing of that culture\(^4\).

\(^4\)It should be noted that the Amesians do not condone gender discrimination. In fact, their constitution, like that of the United States, contains an equal protection clause which would prohibit many gender-based laws.
identical to that of Ames. How could this be? How could the United States have a tax system that contains such egregious biases against women? Energized with indignation, you begin an inquiry into this travesty.

This Article exposes and explains how the income splitting and income aggregation elements of the joint return tax rates substantially harm women in a shocking variety of ways. Not only do those elements contribute to behavioral patterns which discourage wives from working, but they participate as well in an annual coerced transfer of wealth from women to men. Furthermore, the self-reinforcing incentive of the rate structure to induce joint, rather than separate, filing locks women into these highly injurious patterns. The compound effect of the variety of problems the joint return rates impose on women renders the current rate structure dramatically unjust.

As our visitor to Ames has discovered, law is not always neutral. Law is powerful and authoritative, in part, because it appears to be objective. "$[M]embers of the legal profession [have continually tried] to effectuate a sharp separation between law and politics, so that law appears as a neutral, nonpolitical, transcendent entity, symbolized in the phrase a government of laws rather than men." Yet, such separation, although desired, is frequently more imagined than real. As one feature of an imperfect society, law not only reflects long-standing social inequalities but may also exacerbate them. Legal scholars have identified many respects in which the law is male. That is, the hidden norm in the law is consistent

5 This fact is not surprising given that Ames is in a parallel universe and is, in fact, the sister planet to Earth. The country in which your space ship landed, in fact, is identical in all relevant respects to the United States.


with male experiences and treats those experiences as neutral. To
the extent women’s experiences differ from those of men, those
experiences are often not accounted for within prevailing legal
disciplines and doctrines.

What is true for law generally is also true for tax law in
particular. Tax law is especially prone to hidden biases because it
has not been subjected to as much critical scrutiny as have other
legal disciplines. It has not been analyzed for gender or racial
bias to the same extent that constitutional law, employment law,
criminal law, and even tort law have been, for example. Not until
the 1970’s did scholars begin identifying as gendered certain
aspects of the tax code. More recently, studies have emerged

See Jones, supra note 3, at 26041 (describing and criticizing this “tendency in

9 See, e.g., Regina Austin, Employer Abuse, Worker Resistance, and the Tort of Intentional
Infliction of Emotional Distress, 41 STAN. L. REV. 1 (1988); Mary E. Becker, Obscuring the
Struggle: Sex Discrimination, Social Security, and Stone, Sunstein & Tushnet’s
Constitutional Law, 89 COLUM. L. REV. 264 (1989); Leslie Bender, An Overview of Feminist
Torts Scholarship, 78 CORNELL L. REV. 575 (1993); Leslie Bender, Feminist (Re)torts: Thoughts
on the Liability Crisis, Mass Torts, Power, and Responsibilities, 1990 DUKE L.J. 848; Leslie
Bender, Teaching Torts as if Gender Matters: Intentional Torts, 2 VA. J. SOC. POL’Y & L. 115
(1994); Susan Biskirn-Rapp, Contextualizing the Debate: How Feminist and Critical Race
Scholarship Can Inform the Teaching of Employment Discrimination Law, 44 J. LEGAL EDUC. 366
(1994); Arthur L. Burnett, Sr., Permutation of Race, National Origin and Gender Issues from
Initial Law Enforcement Contact Through Sentencing: The Need for Sensitivity, Equalitarianism
and Vigilance in the Criminal Justice System, 31 AM. CRIM. L. REV. 1153 (1994); Martha
Chamallas, Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort
Litigation: A Constitutional Argument, 68 FORDHAM L. REV. 75 (1994); Martha Chamallas &
(1990); Colloquy, “Feminist Jurisprudence”—The 1990 Myra Bradwell Day Panel, 1 COLUM. J.
GENDER & L. 5 (1991); Deborah W. Denno, Gender, Crime, and the Criminal Law Defenses, 85
J. CRIM. L. & CRIMINOLOGY 90 (1994); Lucinda M. Finley, A Break in the Silence: Including
Women’s Issues in a Torts Course, 1 YALE J.L. & FEMINISM 41 (1989) [hereinafter Finley, A
Break in the Silence]; Lucinda M. Finley, Sex-Blind, Separate but Equal, or Anti-Subordination?
The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination, 12 GA. ST. U. L.
REV. 1089 (1996); Finley, Transcending Equality Theory, supra note 7; Thomas Koenig &
Michael Rustad, His and Her Tort Reform: Gender Injustice in Disguise, 70 WASH. L. REV. 1
(1995); Jean C. Love, Discriminatory Speech and the Tort of Intentional Infliction of Emotional
Distress, 47 WASH. & LEV. L. REV. 123 (1990); Frances Olsen, Constitutional Law: Feminist
Critiques of the Public/Private Distinction, 10 CONST. COMMENT. 319 (1993); Stephen J.
L. Seymore, Isn’t It a Crime: Feminist Perspectives on Spousal Immunity and Spousal
Violence, 90 NW. U. L. REV. 1032 (1996); Symposium, supra note 7 (identifying gender bias in tort
law, family law, criminal law, and the law of experts); Carl Tobias, The Case for a Feminist
Torts Casebook, 38 VILL. L. REV. 1517 (1993); Barbara Y. Welke, Unreasonable Women: Gender
1249 (1983); Paul M. George & Susan McGlamery, Women and Legal Scholarship: A

10 See Grace Blumberg, Sexism in the Code: A Comparative Study of Income Taxation of
Working Wives and Mothers, 21 BUFF. L. REV. 49 (1971); George Cooper, Working Wives and
which examine the Code's impact along racial lines and upon same-sex couples.  

While neutral on their face, joint return tax rates have a substantially biased effect against women in their application. For a variety of reasons, seemingly neutral tax principles consistently disadvantage women more than men and, therefore, lack real neutrality. While the Code may not have been intended to discriminate against women, it has that effect because of its application to larger, preexisting social patterns. Such patterns include the tendency for husbands to earn more than their wives and result from both voluntary practices, like wives opting to work part-time or only at unpaid labor, and from involuntary factors, including wage discrimination. While the tax laws did not cause patterns of wage disparity, they reinforce and exacerbate those patterns. Consulting the social context in which law operates

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This Article does not attempt to examine the impact of joint return taxation specifically with regard to people of color or to examine the effect of its lack of availability to same-sex couples. Because the earning patterns among African-American men and women may differ from those of the population generally, the patterns of bias described in this Article may be different for African-Americans than for other couples. Similarly, other types of problems that arise for same-sex couples are not described here. See, e.g., Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 97 (1991); Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359 (1995); Bruce Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 UCLA L. REV. 1240 (1980).

12 Some evidence of intentional discrimination does exist, however. Tax policy experts knew that automatic income splitting would have the effect of keeping women in the home and out of the work force. For a more detailed explanation of this phenomenon, see infra notes 131-34 and accompanying text. Other evidence of intentional discrimination included the fact that Congress enacted automatic income splitting despite contemporary opposition from women's groups who argued that income should not be split for tax computation purposes without an actual transfer of that income to the nonearning spouse. See Jones, *supra* note 3, at 295 (referring to supporters of the Gearhart proposal who opposed automatic income splitting). For further explanation of this problem see infra notes 135-60 and accompanying text. Furthermore, some scholars have speculated that Congress adopted automatic income splitting in 1948, in part, because of pressure from male constituents intent on avoiding the institution of community property regimes in their states and the concomitant loss of full ownership in their earnings. See infra note 399 and accompanying text.

has long been an accepted method for analyzing whether the law is biased as applied. Similarly, the social reality in which the tax laws function must be scrutinized to determine whether those tax laws operate in a biased fashion.

The purpose of this Article is to identify various aspects of the U.S. joint return rate structure that contain gender bias and to critique that current rate structure in the hope of inspiring further debate regarding the sources of bias and their possible solutions and in the hope that such bias will eventually be eliminated. Critics might argue that the tax laws should not be used to combat societal discrimination. However, to the extent tax law participates in, facilitates, or reinforces the subordination of women, then reforming the tax laws to redress those problems is appropriate. Even critics of using the tax code to address social policy would probably agree that the tax laws should not further or contribute to social injustice. Moreover, society has already sanctioned the use of taxation to effectuate social policy in other areas, such as encouraging charitable contributions by making

1035-46 (1993) [hereinafter McCaffery, Fresh Look] (arguing that structural "aspects [of the tax laws] persist to this day, serving as an anchor against the emergence of more modern and flexible family models"), id. at 988.


15 See Brown, supra note 11, at 45, 49-54 (using sociological data regarding spouses' relative incomes to argue that black couples are more likely to experience marriage tax penalties and white couples are more likely to experience marriage tax bonuses); Jones, supra note 3, at 261-62 (arguing that one must understand social patterns to understand tax laws); William A. Klein, Tax Effects of Nonpayment of Child Support, 45 TAX L. REV. 259, 259 n.4 (1990) ("while the tax rules are on their face gender neutral, in their practical application they are not"); McCaffery, Fresh Look, supra note 13, at 897, 993, 1009-10, 1023, 1034, 1054, 1059 (noting, in various contexts, that even if tax rules are neutral on their face, it is appropriate to examine how they apply in the social context, and that in evaluating tax laws, considering social context is crucial); McCaffery, Slouching Towards Equality, supra note 15, at 617, 619, 644 (noting that tax laws must be considered in the context of how they interact with real-world wage structures to determine their real impact); powell, supra note 11, at 80, 83-92 (discussing the impact of tax subsidies to homeowners in a country in which home ownership is highly correlated with race).

16 See, e.g., James Edward Maule, Tax and Marriage: Unhitching the Horse and the Carriage—But Let There be Spaces in Your Togetherness, 67 TAX NOTES 539, 548, 550-51 (1995) (arguing that it is inappropriate to use the tax law to regulate social relationships and that the sole purpose of the tax system should be to raise revenue).
them deductible.\textsuperscript{17} For the tax code to promote social goals openly in some respects, but avoid them in areas in which bias is found is not only inconsistent and hypocritical but also allows such bias to continue unabated. Those who argue that the only legitimate function of the tax system is to raise revenue fail to recognize that no tax system is socially neutral. Even a tax system designed only with revenue raising in mind will tend to promote certain social behaviors over others.\textsuperscript{18} Therefore, the argument against using tax laws to effectuate social policy ignores the fact that the current structure already has social consequences. Retaining the status quo is merely a decision to promote currently favored social patterns, not a decision to insulate tax from social policy.

Part II of this Article undertakes a history of the two components that generate the joint return rate structure: automatic income splitting\textsuperscript{19} and income aggregation.\textsuperscript{20} Following an explanation of the evolution and purposes of those concepts and how they function, Part III identifies their general distributional and behavioral effects. In particular, I analyze which types of couples benefit and which types are harmed from income splitting and aggregation.\textsuperscript{21} I will show that income splitting and aggregation treat couples in which the spouses’ incomes diverge much differently from couples in which spouses have similar incomes. I review the impact of aggregation on the effective tax rate of the family’s secondary earner\textsuperscript{22} and note its effect on that secondary earner’s decision of whether or not to participate in the paid labor force. Furthermore, I address the previously unexamined distributional question of who benefits and who is harmed by income splitting and aggregation as

\textsuperscript{17} I.R.C. § 170 (1996) (providing a deduction for contributions to charitable organizations to encourage charitable donations).


\textsuperscript{19} See infra notes 46-75 and accompanying text.

\textsuperscript{20} See infra notes 76-90 and accompanying text.

\textsuperscript{21} See infra notes 91-97 and accompanying text.

\textsuperscript{22} See infra notes 98-125 and accompanying text.
between the two spouses. I will argue that compared to the rates applicable to separately filing spouses, the joint return rates operate frequently to benefit one spouse over the other.

In Part IV I illustrate how the distributional and behavioral effects of income splitting and aggregation that are described in Part III are of particular concern to women. Because income splitting and aggregation combine to reward couples in which one spouse earns significantly more than the other and to punish those in which spousal earnings are similar, joint returns are thought to reinforce traditional gender roles in which the husband works and the wife does not. They certainly reward couples who comply with conventional roles in which one spouse, historically the husband, works and the other serves as a homemaker, and they harm couples who depart from that traditional norm. This pattern, sometimes described in literature discussing the marriage bonus and penalty, is thought to induce a behavioral response: to discourage wives from entering or remaining in the paid labor force. I explain how income splitting has this effect, and I outline previous scholarship discussing the impact of aggregation on the secondary earner’s marginal tax rate and the resulting behavioral effects.

Part IV also notes the incongruity of allowing income to be shifted to the nonearning spouse for beneficial tax computation purposes without requiring that it be transferred for ownership purposes as well. This feature of joint return filing is an aberration because it remains unavailable to related taxpayers who are not spouses. Income should not be treated as shared unless it is actually shared, and automatic income splitting violates this norm.

Tax discourse has tended to focus on the contrasting tax

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25 See infra note 126 and accompanying text.
24 See infra notes 127-34, 161-63 and accompanying text.
25 Income splitting and aggregation combine to exacerbate the marriage penalty for two-earner couples while creating a marriage benefit or bonus for one-earner couples. See infra notes 117-25 and accompanying text.
26 See infra notes 131-34 and accompanying text.
27 See infra notes 164-227 and accompanying text.
28 See infra notes 135-60 and accompanying text.
liabilities of single and married taxpayers, and on the resulting behavioral incentives regarding the decision to marry. Because many non-tax reasons exist for marrying, most people eventually marry despite the marriage penalty. Furthermore, tax-motivated divorces are probably quite rare. Consequently, more couples are likely to face the issue of whether to file jointly or separately than will face the issue of whether to file jointly or to divorce and file as single individuals. Although many commentators have addressed the issues of the marriage penalty and bonus by contrasting single and joint rates, I believe an examination of the separate return versus the joint return would be more relevant to the majority of married couples. Once married, spouses typically consider the question of whether to file jointly or separately, not whether they should divorce to lower their tax bill. Therefore, this Article focuses to a great extent on the choice spouses face between filing jointly and filing separately. Part IV outlines the behavioral effects of the rate differences between joint and


Anne L. Alstott, Tax Policy and Feminism: Competing Goals and Institutional Choices, 96 Colum. L. Rev. 2001, 2011 (1996) (discussing the difficulty of determining the impact of the marriage penalty on actual behavior and noting that existing empirical evidence suggests that the marriage penalty probably does not discourage marriage in most cases).

The effect of the marriage penalty on the marriage decision is unproven. See Toni Robinson & Mary Moers Wenig, Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant, 8 Va. Tax Rev. 775, 787 n.50 (1989) (noting that it is unclear to what extent the marriage penalty influences couples either to divorce or not to marry); Zelenak, supra note 29, at 364-65 (noting that in most cases whether the marriage penalty has an effect is uncertain but acknowledging that it may indeed discourage low-income taxpayers from marrying); Contract with America: Hearings Before the House Comm. on Ways and Means, 104th Cong 85, 86 (1995) (statement of Anne L. Alstott, Professor of Law, Columbia University School of Law), reprinted in 66 Tax Notes 1343, 1544 (1995) [hereinafter Contract with America Hearings]. But see Boyer v. Commissioner, 668 F.2d 1582 (4th Cir. 1981) (holding that the transaction doctrine could apply to a tax-motivated divorce and remarriage); McCaffery, Slouching Towards Equality, supra note 13, at 617-18 (suggesting that among low-income couples, the marriage penalty may indeed discourage marriage because the alternative of marrying and having one earner may be economically unfeasible); All Things Considered: Nation's Wealthy Look for Ways to Avoid Tax Hike (National Public Radio broadcast, Aug. 15, 1993) [hereinafter All Things Considered] (interviewing Robert Willard, financial planner, who described one couple considering a tax-motivated divorce).
separate returns: that is, it describes the incentives to file jointly rather than separately that are built into the rates.\textsuperscript{32}

The literature examining joint tax rates has also tended to focus on their behavioral incentives: how they favor one-earner couples over two-earner couples, thereby discouraging women from working.\textsuperscript{33} In addition to examining these behavioral incentives arising out of the joint and separate rates,\textsuperscript{34} this Article focuses on an aspect of the joint return rates that has been neglected in the tax literature until now: the important distributional question of who within the marriage benefits economically from the decision to file jointly rather than separately.\textsuperscript{35} In examining this long-neglected issue, this Article identifies a previously unrecognized distributional inequity with serious gender consequences. Because of the manner in which joint return rates relate to separate rates and because the rates apply in a society in which husbands tend to earn more than their wives and in which real sharing of resources between spouses is frequently limited, filing jointly rather than separately tends to benefit husbands and to harm their wives. Essentially, the decision to file jointly rather than separately may result in a transfer of wealth from the lower-income wife to her higher-income husband. Tax law is inadequate in that to avoid this result, it relies on voluntary spousal sharing of resources even though such sharing between spouses is often absent.

In demonstrating the gender bias resulting from the application of the joint tax rates, Part IV identifies two ways in which the joint return rate structure operates to reinforce the status quo, almost guaranteeing both a perpetuation of wives' economic inferiority to their husbands, and the continued biased application of the tax code.\textsuperscript{36} While Professor McCaffery has described other means by which tax contributes to a self-

\textsuperscript{32} See infra notes 228-35 and accompanying text.
\textsuperscript{33} See supra note 29.
\textsuperscript{34} See infra notes 228-35 and accompanying text.
\textsuperscript{35} See infra notes 236-385 and accompanying text.
\textsuperscript{36} Cf. supra note 13, infra note 219 and accompanying text (illustrating in related contexts how tax law perpetuates bias).
perpetuating pattern of gender bias, no literature to date has discussed the following examples of self-reinforcing bias. First, when spouses' incomes differ, a compelling financial incentive arises for them to file jointly rather than separately. Once they file jointly, aggregation reduces the incentive for the wife to participate in the paid labor market. This behavioral incentive triggers further disparity in spousal incomes, thereby inducing further joint filing. In this respect the joint return rate structure is self-reinforcing, tending to maintain the conditions which lead to joint returns: gainfully employed husbands and wives with diminished financial security. This pattern is unlikely ever to lead to the use of separate returns in which the wife would no longer be discouraged from working.

Second, the fact that divergent spousal incomes induce joint filing also perpetuates bias in that the disparity in spouses' incomes triggers the incentive to file jointly. Joint filing, in turn, lowers the tax of the higher-income husband and increases that of his lower-income wife relative to separate filing. Through the operation of the joint return rates as they apply in the social setting, the disparity in spousal incomes essentially results in a transfer of wealth from the poorer wife to her richer husband. Moreover, the greater the disparity in incomes, the larger the transfer from the wife to her husband. Such systematic transfers operate to keep money out of women's hands and to perpetuate the economic superiority of men over women. Consequently, through the operation of the joint return rates, a disparity in incomes functions to perpetuate economic inequality.

Because joint filing harms women by discouraging them from working and by requiring them to transfer their relatively scarce resources to their wealthier husbands, Part IV concludes by identifying and discussing a previously unexamined conflict that

57 See McCaffery, Slouching Towards Equality, supra note 13, at 615-24 (describing how women's shorter average job persistence than men's induces firms to lower women's wages, rendering women secondary earners, and that income aggregation found in the tax code compounds this problem, giving women further reason to flee the work force, thereby shortening their persistence on the job); McCaffery, Fresh Look, supra note 13, at 1013 (describing the tendency of the pension and social security systems to protect and, therefore, to encourage non-working wives).

58 See infra Part IV.C.1.

59 See infra notes 268-77 and accompanying text.

60 See infra notes 274-78 and accompanying text.
women face: the conflict between filing separately to further their own best interests and filing jointly to serve the best interests of the marital unit. This is a conflict which husbands largely do not face when choosing a filing status.

Given the participation of the tax code in reinforcing and perpetuating gender bias, tax reform is an appropriate means for advancing justice. Accordingly, Part V briefly outlines various proposals for tax reform that have been proffered in academic circles as potential means of eliminating gendered effects of the joint return rate structure.

Part VI concludes this Article by summarizing the themes that emerge from it and then by briefly acknowledging the more general issue of whether tax reforms designed to address current patterns of gender bias would serve women's interests. Having demonstrated that the joint return rate structure systematically harms women's economic status both distributionally, by requiring them effectively to transfer resources to their husbands, and behaviorally, by discouraging them from working, an appropriate remedy might be to institute tax policies which encourage women to enter the paid work force. In doing so, tax policy would put more economic resources at women's disposal. Before such a proposal is implemented, however, scholars should examine whether or not women would benefit from increased labor force participation. Although a thorough analysis of that issue is beyond the scope of this Article, Part VI briefly examines whether women would be served or harmed by tax incentives that encourage women to enter the paid labor force in greater numbers. It examines the question of what direction tax reform should take by asking what reforms would really serve women's best interests. Tax scholars interested in advancing women's interests have almost uniformly ignored this issue, assuming that those interests would be advanced only through policies designed to increase women's paid labor participation. Among tax

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41 See infra notes 284-86 and accompanying text.
42 See infra notes 406-50 and accompanying text.
43 See Katharine Silbaugh, Turning Labor into Love: Housework and the Law, 91 Nw. U. L. Rev. I, 47 (1996) (arguing that if unpaid labor were appropriately rewarded, tax scholars' conventional academic stance that women's interests are served only through increased labor force participation would be unnecessary); Nancy C. Staudt, Taxing Housework, 84 Geo. L.J. 1571, 1572 (1996).
scholars, only Professors Alstott and Staudt have explicitly questioned the assumption that increased work force participation is the best avenue to improved social status. Many scholars in the area of feminist jurisprudence have, by contrast, explicitly acknowledged this issue and have struggled with it for years. In Part VI, I briefly review the literature relevant to this issue and tentatively conclude that eradicating the disincentives to work that are contained in the tax code would be appropriate but that reforms affirmatively encouraging women's increased labor force participation should not be adopted without further research.

This Article is, therefore, primarily a critique of the joint return rate structure. It explores the gendered impact that joint return rates have both with respect to different types of couples, one-earner versus two-earner, and with respect to different spouses within a couple, the higher-earning husband and the lower-earning wife. The issues of women's economic independence and access to the labor force that arise upon examining the gendered features of the joint return tax structure lead to the question of whether or not greater access to the paid work force would really benefit women. Accordingly, this Article briefly acknowledges that issue as well.

II. THE HISTORICAL ORIGINS OF INCOME SPLITTING AND INCOME AGGREGATION

An understanding of the separate elements of income splitting and income aggregation and their historical developments is necessary to grasp the structure of the joint return tax rates and to comprehend the biased patterns which the current rate structure induces.

A. Income Splitting

Income shifting provides a potential financial benefit whenever different tax rates apply to different taxpayers. Under the progressive U.S. tax rates, such a possibility is present: the

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44 See Alstott, supra note 30 (describing conflicting feminist goals); Staudt, supra note 43.

45 See infra notes 451-81 and accompanying text.
higher a taxpayer's taxable income, the greater the marginal tax rate on the last dollar of income earned and the higher the effective tax rate on income overall. Thus, a high-income taxpayer can obtain a tax savings by shifting income to a low-income taxpayer, preferably one with whom the high-income taxpayer shares resources. The shifted income would, simultaneously, be subject to tax at a lower marginal rate rather than at that of the higher-income earner, and if the two taxpayers share resources, that "shifted" income would, simultaneously, remain available for the earner's enjoyment.

The IRS, Congress, and the courts have viewed income shifting

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46 Many rationales have been advanced in defense of progressivity, each meeting varying degrees of acceptance. First, it is argued that progressivity results in payments commensurate with the benefits that the government has provided. See Walter J. Blum & Harry Kalven, Jr., The Uneasy Case for Progressive Taxation, 19 U. Chi. L. Rev. 417, 451-55 (1952). It has also been defended on the grounds of equality of sacrifice, ability to pay, and redistribution of wealth. See id. at 455-79, 480-84, 486-501. Progressivity has been defended on feminist grounds as well. See Marjorie E. Kornhauser, The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction, 86 Mich. L. Rev. 465, 504-25 (1987). However, progressivity has been attacked on the grounds that it is inequitable, that it lacks simplicity, that it subverts fiscal responsibility, and that it engenders uncertainty. See 2 Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 825-28 (Roy H. Campbell & Andrew S. Skinner eds., The Glasgow Edition of the Works and Correspondence of Adam Smith, Oxford University Press 1976). Current arguments against progressivity focus on fiscal irresponsibility, see David G. Davies, United States Taxes and Tax Policy 16-18 (1986), harm to market efficiency, see id. at 16-17, the presumption that income and wealth are manifestations of merit, see Michael J. Graetz, Federal Income Taxation 21-25 (1985), and the preference for individual autonomy over government control, see Robert Nozick, Anarchy, State, and Utopia 169-72 (1974). A complete discussion of whether or not progressive tax rates are justified is beyond the scope of this Article.


48 In general, the tax savings equal the amount of income shifted multiplied by the difference in the marginal rates. If a significant amount of income is shifted so that the higher earner's top bracket is completely emptied and the income from the next highest bracket is also shifted, then the total tax savings equals the sum of two amounts: the amount of income from the highest bracket multiplied by the difference between the low earner's marginal rate and the high earner's top marginal rate plus the amount of income shifted from the earner's second-highest bracket multiplied by the difference between that second-highest marginal rate and the lower earner's marginal rate. Similarly, if shifting causes the lower earner to be pushed into a higher tax bracket, then the total tax savings is the sum of two or more amounts: the amount of income shifted into the lower earner's new top marginal rate multiplied by the difference between the higher earner's marginal rate and the lower earner's new top marginal rate.

Of course, the higher earner and the lower earner may both simultaneously move into new tax brackets. Consequently, the best way to determine the tax savings in any specific situation is to compute the combined liability of the two individuals first assuming that income is not shifted and then assuming that income is shifted. The two results should then be compared.
as a tax avoidance technique in situations in which the higher-bracket earner retains effective control over the shifted income, and have generally prohibited taxpayers' attempts to shift earnings to another for tax computation purposes when they retain control or ownership of the earnings for purposes of enjoying them.\(^4\) Income shifting has been permitted historically only in situations in which the high-income taxpayer surrendered ownership and control over the shifted income.\(^5\) Despite the general prohibition against income shifting when the taxpayer retains earnings, joint filing permits income to be shifted without requiring a transfer in the ownership of those earnings.\(^5\) The higher-earning spouse effectively shifts his income to the lower-earning spouse for purposes of computing tax liability, even though the higher earner continues to own the "shifted" income and to have complete control over it under common law property

\(^{4}\)See, e.g., Lucas v. Earl, 281 U.S. 111 (1930) (earner was not permitted to shift income to his spouse because the earner controlled whether or not the income would be earned); Corliss v. Bowers, 281 U.S. 576 (1930) (grantor was not permitted to avoid taxation by shifting income to a beneficiary through a transfer of income-producing property to a trust which grantor could revoke at any time); Helvering v. Clifford, 309 U.S. 381 (1940) (grantor was not permitted to shift income to his spouse by transferring income-producing property to a trust and naming the spouse as a beneficiary because grantor retained significant control over the trust property); I.R.C. §§ 671-679 (1994) (the grantor trust rules codifying Clifford and similar cases). See also I.R.C. § 1(g) (1996) (the Kiddie Tax which taxes certain children's net unearned income at their parents' top marginal rate to preclude the tax savings parents might seek by shifting unearned income to their low-bracket children).

\(^{5}\)See, e.g., Poe v. Seaborn, 282 U.S. 101 (1930); Rosenfeld v. Commissioner, 706 F.2d 1277 (2d Cir. 1983); Broide v. United States, 156 F. Supp. 12 (N.D. Ill. 1957); First Teachers Inv. Corp. v. Commissioner, 40 T.C.M. (CCH) 892 (1980). See also Frederick R. Schneider, Which Tax Unit for the Federal Income Tax?, 20 DAYTON L. REV. 93, 106 (1994) (noting that it is out of the ordinary to tax income to a person who did not actually receive it); Zelenak, supra note 29, at 354 & n.73. Surrendering ownership is not always sufficient to guarantee the tax savings from shifting, however. The Kiddie Tax under I.R.C. § 1(g) prevents that tax savings even when ownership of the unearned income is shifted from parent to child. The assumption underlying the Kiddie Tax is that even if a parent transfers legal ownership of income-producing property to a child, the parent will essentially have control and use of that income, if for no other purpose, than to extinguish or to minimize his or her obligation to support the child.

\(^{5}\) Upon filing a joint return, the rates that cause the income-shifting result are triggered automatically. Compare I.R.C. § 1(a) (1994) with I.R.C. § 1(d) (1994) (illustrating the different income brackets created for joint versus separate returns). See also Bittker, supra note 29, at 1394-95; Michael J. McIntyre & Oliver Oldman, Taxation of the Family in a Comprehensive and Simplified Income Tax, 90 HARV. L. REV 1573, 1583 (1977). The phenomenon of income shifting is built into those rates and occurs whether or not ownership or control of the shifted income is transferred to the nonearning spouse. Cf. Zelenak, supra note 29, at 355; Lily Kahng, Gender Bias in the Estate and Gift Tax 15, 34 (Aug. 14, 1995) (unpublished manuscript on file with author) (noting in the estate tax context the unfairness of granting tax benefits as if property were transferred when the property is not, in fact, transferred).
principles. In fact, married taxpayers who file jointly automatically get the greatest possible benefit from income shifting is legally available to married taxpayers who file jointly. In common-law states, the earnings of one spouse are owned by that spouse, even if contributed by the other spouse. Income shifting is legally available to married taxpayers who file jointly. IRS Publication 555 establishes that for federal income tax purposes, only residents of the nine community property states are considered to have a present ownership interest in their spouses’ earnings. IRS Publication 555, Federal Tax Information on Community Property 2 (1996) [hereinafter Publication 555]. See also Fred F. Murray, Problems of Taxation of the Income of Spouses in the Context of Divorce and Separation, Community Prop. J., July 1987, at 20, 23. These states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. See Publication 555, supra, at 1. From the perspective of the federal government, residents of other states do not have a present ownership interest in the earnings of their spouses.

52 Common-law states confer ownership of earnings solely on the earner. See Jones v. Farris, 69 P.2d 344 (Okla. 1937) (holding that a wife’s heirs could not inherit a farm because it had been acquired with the husband’s earnings, precluding her from having a vested or devisable interest in it); William J. Brockelbank, The Community Property Law of Idaho 41-43 (1962) (in common-law states savings out of earnings belong to the earner spouse); Gann, supra note 29, at 27; Scott Greene, Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women, 15 CREIGHTON L. REV. 71, 83 (1979) (‘Property acquired by the spouses [subject to the common-law property system] during marriage is either his or hers, never theirs. ... The common-law system rewards the spouse who is directly responsible for the acquisition of property and generally ignores the nonmonetary contributions of the other spouse toward that acquisition.’) (footnote omitted); O. Kahn-Freund, Inconsistencies and Injustices in the Law of Husband and Wife, 15 MOD. L. REV. 133, 133-36 (1952) (savings out of earnings belong to the earner spouse); Susan Westerberg Prager, Shifting Perspectives on Marital Property Law, in Rethinking the Family: Some Feminist Questions 111, 116 (Barrie Thorne & Marilyn Yalom eds., 1982); Silbaugh, supra note 43, at 51 (noting that “nothing in family law requires couples to share their monetary income”); Jeannette Anderson Winn & Marshall Winn, Till Death Do We Split: Married Couples and Single Persons Under the Individual Income Tax, 34 S.C. L. REV. 829, 878 (1983); Elizabeth A. Cheadle, Comment, The Development of Sharing Principles in Common Law Marital Property States, 28 UCLA L. REV. 1269, 1276, 1508 n.208 (comparing Texas, where only the earner controls his own earnings, with common-law states like Missouri and indicating that in common-law states, one spouse’s earnings are shielded from the other spouse), 1312. See also NEB. REV. STAT. § 42-203 (1995) (earnings of a married woman belong solely to her).

Even the Married Women’s Property Acts, which were adopted in the last half of the nineteenth century and which gave wives in common law jurisdictions the right to own and manage their own property, did not give them any present property interest in their husband’s earnings. The act[1] ... ignored the realism that it was the husband who was largely responsible for acquiring property during the marriage. The wife was left with hollow legal equality since she had little opportunity to acquire property to which the Married Women’s Property Acts could apply.” Greene, supra, at 80 (footnote omitted). See also Henry H. Foster, Jr. & Doris Jonas Freed, Martial Property Reform in New York: Partnership of Co-Equals, 8 FAM. L.Q. 169, 173 (1974); Mary Ann Glendon, Is There a Future for Separate Property?, 8 FAM. L.Q. 515, 516 (1974); Prager, supra, at 115-16.

1[1] In common law states, sharing principles are never legally applied until the end of the marriage. As long as the marriage continues, each spouse is the sole owner of his or her earnings. ... Any rights of the other spouse to a portion of those earnings are inchoate and vest only at death or upon the filing of a divorce action.

Cheadle, supra, at 1269 n.2.

52 See supra note 51.
shifting. Income is shifted from one taxpayer to the other until the two taxpayers are treated as having earned exactly equal incomes. This regime of maximum shifting is known as income splitting. This name was originally derived from the fact that traditionally the husband earned all the family income, and, by filing jointly, he could "split" his income in half for purposes of tax computation. The couple’s tax liability would be computed as if the husband had earned half of his income and as if his wife had earned the other half. A large tax savings would typically result because of the progressive rate structure. Lower marginal and effective rates would usually apply to the incomes of two people each reporting half of what one of them had actually earned. The total joint return tax would be computed by doubling the tax that a separate filer would pay on half of the couple’s combined net taxable income. The net effect is that some of the income of the higher-earning spouse would be treated as if the other spouse had earned it and would be shifted into that other spouse’s lower marginal bracket.

Congress and the Treasury Department did not always permit income splitting between jointly filing spouses. Prior to 1930...
married couples generally could not split their incomes. In 1930, however, the Supreme Court altered this approach through its decision in Poe v. Seaborn. In Seaborn the Court held that couples living in certain community property states like Washington could split their incomes for purposes of computing their federal income tax liability. Eight months earlier in Lucas v. Earl the Court had denied income-splitting privileges to married couples in California. The difference in Seaborn was that Washington state's community property laws were held to invest the nonearning wife with a present ownership interest in her husband's earnings while California's community property laws were not. Essentially, each time the husband in Seaborn rendered services, the marital community consisting of both the husband and the wife had, by operation of Washington's state law, earned income. The Seaborn Court adopted a legal ownership standard,

60 This was true not only for couples residing in common law states but also for those living in community property states in which each spouse had a present ownership interest in the earnings of the other. See Murray, supra note 52, at 23. The Treasury initially denied income splitting to community property residents because state laws conferred on the husband the exclusive right to manage and control the community property. The Department reasoned that if only the husband could manage and control his earnings, he ought to be the only party taxed on those earnings. No part of them should be attributed and taxed to his wife in the absence of control or management powers for her. See Maggs, supra note 59, at 354. However, in 1920 and 1921 the Attorney General decided that residents of most community property states should be able to split their incomes because most community property jurisdictions gave each spouse a present, one half undivided property interest in those earnings. See 32 Op. Att'y Gen. 298 (1920); 32 Op. Att'y Gen. 435 (1921). The Treasury Department followed the Attorney General's position and issued T.D. 3071, 3 C.B. 221 (1920) and T.D. 3138, 4 C.B. 238 (1921) which briefly permitted income splitting to residents of most community property states. Soon thereafter the government withdrew all administrative rulings on the topic, see 35 Op. Att'y Gen. 265 (1927), and argued once again that income splitting should be denied to community property residents because management and control powers were conferred solely on the husband. For example, see Poe v. Seaborn, 282 U.S. 101 (1930) (testing Washington state law) in which the Commissioner asserted this legal position and lost.

61 282 U.S. at 115.

62 281 U.S. 111, 111 (1930).

63 Id. at 114-15. Earl was a case involving California taxpayers. California was a community property state, but under the state law in effect during the tax years in question, the wife's interest in her husband's earnings was held not to rise to the level of a present ownership right. It was not until 1927 that California changed its state law sufficiently to be considered a community property state for federal income tax purposes. See United States v. Malcom, 282 U.S. 792 (1931) (holding that the change in California law was effective to make that state a community property state for federal income tax purposes, thereby conferring the income-splitting benefit of Seaborn on Californians). The 1927 changes provided that each spouse had "present, existing and equal interests [in the community property] under the management and control of the husband." 1927 Cal. Stats. 484, ch. 265, §161a. This provision is now codified in CAL. FAM. CODE § 751 (West 1996) but no longer limits management powers to the husband. For more in-depth analyses of Seaborn and Earl, see Bittker, supra note 29, and Gann, supra note 29.

64 282 U.S. at 116-18.
whereby income would be taxed to the spouse who owned it under state law, and rejected the government’s argument that because community property law conferred management and control powers solely on the husband, he should be the proper taxpayer for all of his earnings. Because state property law determined the income owner, it also determined the proper earner for federal income tax purposes. As a result, the Supreme Court held that the wife in *Seaborn* must be taxed on half of her husband’s earnings. Couples in community property jurisdictions began enjoying the benefit of income splitting under the authority of *Seaborn*. By contrast, residents of other jurisdictions could not split their incomes for tax computation purposes because state law did not provide the nonearning spouse with a present ownership interest in the other’s earnings.

The Supreme Court’s decisions in *Earl* and *Seaborn* provided more favorable tax computation rules for taxpayers living in community property states than for residents of common law jurisdictions where wives did not enjoy a present, vested interest in their husbands’ earnings. Married taxpayers living in community property states could generally enjoy the financial benefits of income splitting.

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65 Id. at 110-13. Marjorie Kornhauser has suggested that the *Seaborn* Court should have adopted a management and control standard which would have precluded income splitting in community property states at the time. See Kornhauser, *supra* note 29, at 75.

66 See *Seaborn*, 282 U.S. at 110 (“[t]he Commissioner concedes that the answer to the question [of who should be taxed on the husband’s earnings] ... must be found in the provisions of the law of the State, as to a wife’s ownership of or interest in community property”). See also United States v. Mitchell, 403 U.S. 190, 205 (1971) (state law determines the amount of income that is owned by the wife as community property and, therefore, the amount that is taxed to her); Commissioner v. Estate of Bosch, 387 U.S. 456, 457 (1967) (acknowledging that federal estate tax liability often turns upon the character of a property interest under state law).

67 282 U.S. at 118.


69 See *Gann*, *supra* note 29, at 14-15, 16 n.56; McCaffery, *Fresh Look*, *supra* note 13, at 989-90; Staudt, *supra* note 43, at 1606-07; Zelenak, *supra* note 29, at 345; Davis, *supra* note 18, at 201. See also Druker v. Commissioner, 697 F.2d 46, 48 (2d Cir. 1982); Mapes v. United States, 576 F.2d 896, 899 (Ct. Cl. 1978); Johnson v. United States, 422 F. Supp. 958, 966 (N.D. Ind. 1976). In common law states, as well as in certain community property states like California, the wife did not have a present, vested, and undivided one half interest in her husband’s earnings. Rather, under common law, a wife’s only legal interest in her husband’s earnings was an inchoate dower or expectancy interest. The dower right was a life estate in some portion of the husband’s property, usually his realty, which would commence only upon his death provided the wife was still living at that time. In community property states like Washington, by contrast, the wife had an immediate, vested, undivided one half interest in her husband’s earnings. See ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY 69-72 (2d ed. 1993). See also Murray, *supra* note 52, at 23; Robinson & Wenig, *supra* note 31, at 774 n.4.
benefit of income splitting while residents of common law states could not. By 1948, Congress responded to this geographic disparity, partly to achieve equal tax treatment between the citizens of community property and common law states, but also to avert the growing movement among states to shift to community property regimes. Congress resolved the disparity by enacting income splitting for all married couples who filed jointly regardless of their domiciliary, building the tax benefits into the joint return tax rates.

Congress did not make this income splitting benefit available to couples who chose to file separately. Income splitting is available to couples residing in common law states only if they elect to file a joint return. However, because of the Seaborn decision, couples in community property states who file separately would not have the benefit of income splitting while residents of common law states could not. By 1948, Congress responded to this geographic disparity, partly to achieve equal tax treatment between the citizens of community property and common law states, but also to avert the growing movement among states to shift to community property regimes. Congress resolved the disparity by enacting income splitting for all married couples who filed jointly regardless of their domiciliary, building the tax benefits into the joint return tax rates.

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See also Druker, 697 F.2d at 48 (describing common-law states' conversions to community-property regimes as "something of a stampede"); Bittker, supra note 29, at 1411-12; Gann, supra note 29, at 24; Kornhauser, supra note 29, at 65; Robinson & Wenig, supra note 31, at 774, 777-78.

Of course, had Congress not acted in 1948, the community property regime probably would have been adopted universally, see, e.g., Bittker, supra note 29, at 1412, and women might have obtained greater property rights as a result, whether during marriage, upon divorce, or upon the husband's death. See, e.g., Davis, supra note 18, at 215. Essentially the incorporation of automatic income splitting into the joint return rates stemmed the earlier incentive states had to adopt community property laws, laws which at the time were widely viewed as benefiting women. See, e.g., Kahng, supra note 51, at 27. See also Gann, supra note 29, at 16, 18 & nn.67-68 (discussing state law shifts to community property systems prior to 1948).

Married spouses who filed separately from 1948 through 1969 used tax rates identical to the rates applying to unmarried individuals.
enjoy the benefit of income splitting. Thus, for separate filers, disparate treatment between community property and common-law residents continued even after 1948. Congress eliminated geographic disparity for joint filers by enacting automatic income splitting in 1948, but in doing so, it created a new disparity, as demonstrated below, which adversely impacted wives. It sanctioned, for the first time, the shifting of income for tax computation purposes without requiring its transfer for ownership purposes.

B. Income Aggregation

The burdens of income aggregation and of joint and several liability accompany the advantages of income splitting when a couple files jointly. In addition to income splitting, income aggregation is the other feature of the joint return rate structure that determines how joint return rates relate to those of separate returns. As I will demonstrate later in this Article, the combined impact of income splitting and aggregation gives rise to patterns in the rate structure that adversely impact women. While income aggregation seems to reverse the impact of income splitting, it usually does not have that effect. This fact gives rise to the patterns of gender bias that are the primary focus of this Article.

74 In Poe v. Seaborn the Supreme Court permitted income splitting to a couple that had filed separate, individual tax returns. The effects of state law vesting the earnings of one spouse in the marital community were not dependent on the filing status chosen for federal income tax purposes. Consequently, income splitting is mandatory in community property states for spouses regardless of filing status. See Beck, supra note 58, at 324 & n.19; Murray, supra note 52, at 21, 53, 57, 61. See also Publication 555, supra note 52, at 3-4 (stating that if spouses in community property states file separate federal returns, then each spouse must report half of the other spouse’s earnings). In Harrold v. Commissioner, 22 T.C. 625, 627 (1954), rev’d on other grounds, 232 F.2d 527 (9th Cir. 1956), the Tax Court held that when spouses come under the jurisdiction of a community property state, that community property system is “not a means of splitting income which may be voluntarily chosen or elected to minimize taxes.” Rather, each separately filing spouse is required to report half of the community earnings as income. Id. at 627-28. See also United States v. Mitchell, 405 U.S. 190 (1971) (involving a taxpayer who was a resident of a community property state and who owed tax on half of the earnings of her spouse for tax years in which the spouses had filed separately); Galliher v. Commissioner, 62 T.C. 760 (1974), aff’d, 512 F.2d 1404 (5th Cir. 1975) (same); Quick & DuCanto, supra note 57, at 78. Cf. Murray, supra note 52, at 53 (stating that income splitting was not optional, but required, in community property states as a result of Seaborn). Income splitting was, therefore, required in community property states even if couples filed separately.

75 See infra notes 135-60 and accompanying text.

76 See infra notes 78-80 and accompanying text.

77 Joint and several liability as well as the innocent spouse exception is the subject of another article that is currently in progress. For more detailed discussions of these topics, see generally Beck, supra note 58.
Income aggregation requires spouses' incomes to be combined before tax liability is computed.\textsuperscript{78} The effect of aggregation in a progressive tax system is to push some of the combined income into a tax bracket that is higher than those that would have applied to the incomes separately.\textsuperscript{79} Total tax liability, therefore, increases as a result of aggregation. Aggregation is required only if spouses file jointly.\textsuperscript{80}

Although they exist simultaneously in the U.S. tax system, income splitting and income aggregation are, conceptually, two different phenomena. While Congress incorporated income splitting into the Internal Revenue Code in 1948,\textsuperscript{81} income aggregation has been a feature of joint filing ever since 1921.\textsuperscript{82}

The following examples illustrate the separate features of income splitting and aggregation. Prior to the adoption of income splitting, only the aggregation rule applied to joint filers. In such a regime, a couple filing jointly in which the husband earned $100,000 and the wife earned $40,000 would have computed its tax liability as if one individual had earned the aggregate, or $140,000.\textsuperscript{83} Because of the progressive rate structure, the aggregation effect associated with joint filing would have pushed this married couple into a much higher tax bracket than would

\textsuperscript{78} I.R.C. § 6013(d)(3) (1994) ("if a joint return is made, the tax shall be computed on the aggregate income").

\textsuperscript{79} See Beck, supra note 58, at 335. See also sources cited infra note 99.


\textsuperscript{82} Revenue Act of 1921, Pub. L. No. 98, § 223(b)(2), 42 Stat. 227, 250 (a husband and wife may either file returns individually, or include "[t]he income of each ... in a single joint return, in which case the tax shall be computed on the aggregate income").

\textsuperscript{83} Before 1948, only one rate schedule existed, one for individuals. A married couple was treated as one individual if it elected to use a joint return. If the spouses filed separately, each spouse was treated as an individual. See Bittker, supra note 29, at 1400 ("The right of married couples to file a joint return (first recognized by statute in 1918) was not an exception to this individualistic bias, since the same rate schedule applied to both separate and joint returns, with the result that joint filings were disadvantageous except in unusual circumstances") (footnote omitted). See also Davis, supra note 18, at 200. Currently, the Internal Revenue Code contains five rate schedules: § 1(a) for Married Individuals Filing Joint Returns and Surviving Spouses; § 1(b) for Heads of Households; § 1(c) for Unmarried Individuals (Other than Surviving Spouses and Heads of Households); § 1(d) for Married Individuals Filing Separate Returns; and § 1(e) for Estates and Trusts. I.R.C. § 1(a)-(e) (1994).
have applied to either spouse filing individually. 84

Had income splitting existed in the U.S. tax system in the absence of aggregation, the couple in the above example would have computed its tax liability as follows: the husband would compute his share of the couple’s tax liability by doubling the tax that would result from $50,000, or half of his income. The wife would compute her share of the couple’s tax liability by doubling the tax that would result from $20,000, or half of her income. The spouses would each enjoy the benefits of income splitting with regard to their individual incomes without suffering the burden of higher rates due to aggregation. The only aggregation would be that of the two spouses’ individual tax liabilities to arrive at the couple’s total liability.

When adopting income splitting in 1948, Congress superimposed it on the already existing requirement of income aggregation. 85 Applying income splitting and income aggregation simultaneously, tax liability is computed by doubling the tax that is determined on one half of the couple’s combined taxable income. 86 For couples in which both spouses have earnings, the incomes of each are “split.” Then each half is aggregated with half of the other spouse’s income. For a couple in which the husband earns $100,000 and the wife earns $40,000, half of the husband’s income, or $50,000, would be attributed to the wife, and half of the wife’s income, or $20,000 would be attributed to the husband. The couple would then be taxed under the individual, or married filing separately, rates as if the husband and wife had each earned $70,000. The net effect would be that $30,000 of the high-bracket husband’s income would be treated as if his wife had earned it and would be shifted into her lower marginal bracket. Under the current system of joint return tax computation, the separate phenomena of income splitting and income aggregation are both present 87 and are built into the joint

84 See sources cited infra note 99.
87 See Blumberg, supra note 10, at 52.
return rate structure.

It would be inequitable, in the present system, to permit the benefits of income splitting without exacting the burden of aggregation. For computation purposes, the current tax system treats married couples who file jointly as one economic unit, as one taxpayer. Through income aggregation, that one taxpayer reports both sources of income and moves into a higher tax bracket. However, the tax brackets rise half as quickly relative to the rate schedule for married couples who file separately to allow for what is, in effect, income splitting. If Congress were to repeal aggregation but leave income splitting in place, the brackets would rise slowly, benefiting joint filers, but in the absence of aggregation, the lower tax rates would apply to smaller levels of income. Congress would have essentially flattened the progressive rate structure for couples filing jointly while leaving rates relatively steep for all other taxpayers. A less progressive rate schedule for only one filing status, Married Filing Jointly, would further encourage married couples to file jointly rather than separately, and would subject even more couples to the regime of joint and several liability.

It is tempting to regard income splitting as simply reversing the harm that aggregation causes in requiring higher rates to apply to the couple's combined income. This view is generally true for couples in which spouses have similar incomes. For couples in which spouses have equal incomes the income-splitting benefit exactly offsets the harm from aggregation and makes them generally indifferent between filing jointly and filing separately. However, for couples in which spouses have disparate incomes, that is, for couples in which one spouse earns more than the other, the joint return benefit of income splitting always outweighs the concomitant harm from aggregation.

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88 Compare the brackets contained in § 1(a) for married taxpayers filing jointly with those of § 1(d) for married taxpayers filing separately. See also Kornhauser, supra note 29, at 94 n.97.

89 See Beck, supra note 58, at 374 n.267.

90 See infra Table 2 and accompanying text.
III. DISTRIBUTIONAL AND BEHAVIORAL EFFECTS OF JOINT FILING: PATTERNS THAT EMERGE FROM INCOME SPLITTING AND AGGREGATION

A. Distributional Effects Relating to the Distribution of Earnings Between Spouses and Concomitant Behavioral Responses

1. Distributional and Behavioral Effects of Income Splitting

Income splitting is most beneficial to couples in which one spouse earns significantly more than the other. Income splitting could not effectively shift income of either spouse into a much lower tax bracket. On the other hand, spouses with substantially different income levels enjoy a significant economic benefit from income splitting because they are likely to fall in different tax brackets. In such circumstances, the different marginal rates allow the higher-earning spouse to shift income from a high marginal rate to the lower rate of the other spouse. The greater the disparity in incomes, the greater the financial benefit from income splitting and the greater the incentive to file jointly. Income splitting, therefore, encourages highly disparate incomes, that is, patterns in which one spouse works and the other does not.

91 See Johnson v. United States, 422 F. Supp. 958, 965 (N.D. Ind. 1976). See also Beck, supra note 58, at 374; Blumberg, supra note 10, at 55-56 (noting that income splitting is a benefit to couples with only one wage earner); Cooper, supra note 10, at 68-69; Gann, supra note 29, at 340-41 (noting that the one-earner couple experiences a marriage bonus because of the benefit of income splitting).

92 See Mapes v. United States, 576 F.2d 896, 898 (Ct. Cl. 1978). See also Beck, supra note 58, at 369, 374 n.267 (implying that similar-income couples do not experience savings from income splitting by stating that spouses with substantially disproportionate incomes benefit from it). Cf. Zelenak, supra note 29, at 340 (noting that equal-income couples experience a marriage penalty because of the fact that income splitting confers no value on them).

93 See Johnson, 422 F. Supp. at 965; Beck, supra note 58, at 369.

94 See infra Table 2 and accompanying text.

95 See infra notes 127-34 and accompanying text.
2. Distributional and Behavioral Effects of Income Aggregation

Because aggregation requires income from both spouses to be combined before the progressive rate schedule applies, aggregation pushes some of the combined income into a higher tax bracket than would apply otherwise. Consequently, aggregation disadvantages all couples who file jointly. At the same time, however, the harm from aggregation is the least severe for couples in which the spouses' income levels differ substantially. A couple in which the husband earns $100,000 and the wife earns $5,000 would experience limited harm from aggregation because the wife's $5,000 of income may not push the couple into a higher bracket than would apply to the husband's last dollar of earnings. Even if the couple moves into a higher bracket as a result of the additional $5,000, the extra marginal rate will be minimal. By contrast, if the husband and wife each earn $100,000, then aggregation would push a relatively large amount of income into a much higher tax bracket than would have applied in the absence of aggregation. The top marginal rate for $200,000 of net income would apply rather than that for $100,000, and the resulting total tax liability would be significantly higher. Income aggregation, therefore, tends to harm disparate-income couples only slightly and equal-income couples much more significantly.

Many tax scholars have noted that one of the most troubling aspects of joint filing is that aggregation causes the perceived secondary earner's first dollar of income to be taxed at the highest marginal rate of the primary earner rather than at the lower marginal rate that would have applied had the secondary

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96 See sources cited infra note 99.

97 Cf. sources cited supra note 91 (discussing a similar pattern with regard to income splitting).

98 The term "secondary earner" refers to the spouse whose earnings are discretionary. Generally, the secondary earner is the spouse who earns less. See, e.g., McCaffery, Fresh Look, supra note 13, at 992-94 (defining the marginal worker as "that worker whose labor market hours are most discretionary, or 'at the margin' to the family"); Blumberg, supra note 10, at 49.
earner filed separately. The following table demonstrates this phenomenon.

**TABLE 1**

Impact of the Secondary Earner’s Decision to Enter or Remain in the Paid Labor Force

<table>
<thead>
<tr>
<th>Taxable Income(s)</th>
<th>MFJ</th>
<th>MFS(^{101})</th>
<th>Single</th>
</tr>
</thead>
<tbody>
<tr>
<td>PE’s TI = $60,000</td>
<td></td>
<td>PE’s tax = $14,864</td>
<td>PE’s tax = $14,122</td>
</tr>
<tr>
<td>SE’s TI = $0</td>
<td></td>
<td>SE’s tax = $0</td>
<td>SE’s tax = $0</td>
</tr>
<tr>
<td></td>
<td>Total tax = $12,003</td>
<td>Total tax = $14,864</td>
<td>Total tax = $14,122</td>
</tr>
<tr>
<td>PE’s TI = $60,000</td>
<td></td>
<td>PE’s tax = $14,864</td>
<td>PE’s tax = $14,122</td>
</tr>
<tr>
<td>SE’s TI = $30,000</td>
<td></td>
<td>SE’s tax = $6,002</td>
<td>SE’s tax = $5,527</td>
</tr>
<tr>
<td></td>
<td>Total tax = $20,429</td>
<td>Total tax = $20,866</td>
<td>Total tax = $19,649</td>
</tr>
</tbody>
</table>

\(^{99}\) See *Contract with America* Hearings, supra note 31, at 85, reprinted in 66 TAX NOTES at 1344 (statement of Professor Alstott); Bittker, supra note 29, at 1431; Blumberg, supra note 10, at 52-55; Davis, supra note 18, at 201, 210-14; Gann, supra note 29, at 41; McCaffery, *Slouching Towards Equality*, supra note 13, at 617; Robinson & Wenig, supra note 31, at 849 n.328 (quoting DAVID L. KIRP ET AL., GENDER JUSTICE 188-89 (1986)); Zelenak, supra note 29, at 365.

\(^{100}\) This table is derived from the rate schedules in I.R.C. §§ 1(a), (c), and (d), unadjusted for inflation, for married individuals filing joint returns, for unmarried individuals (single individuals), and for married individuals filing separate returns, respectively. See Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, § 13201, 1993 U.S.C.C.A.N. (107 Stat.) 416, 458. Taxable incomes, rather than gross incomes, are used in the table to avoid the complication of deduction allocation between the two spouses. Therefore, this table illustrates the relationships between taxable income levels and precredit tax liability for joint, separate, and single filing statuses. "MFJ," "MFS," and "Single" refer to the filing statuses of Married Filing Jointly, Married Filing Separately, and Unmarried Individuals, respectively. "PE" signifies primary earner, and "SE" signifies secondary earner. "TI" refers to taxable income. To facilitate readability, all figures in this table, and in subsequent tables and examples, are rounded to the nearest dollar. Any computations using these figures were performed using non-rounded numbers, and the results were then rounded to the nearest dollar or percentage point.

\(^{101}\) The tax liabilities computed for couples filing separately assume that the spouses reside in a common law state. If the spouses lived in a community property state, their total tax upon filing separately would equal the tax they would incur had they filed jointly because of the income splitting required for such separate filers under Poe v. Seaborn. See *Publications* 555, supra note 52, at 3-4. Furthermore, each spouse’s separate return liability would amount to half the total separate return liability.
The table demonstrates the impact on tax liability of the secondary earner's decision to enter the work force. In both situations the primary earner makes a constant amount, $60,000.

The effect of the secondary earner's decision to take a job paying $30,000 is to increase the couple's tax liability to $20,429. Had that spouse not worked outside of the home, he or she would have generated no taxable income, and the family's tax liability would have been $12,003, assuming joint filing. Therefore the couple owes additional tax of $8,426 as a result of the secondary earner taking a job paying $30,000.\textsuperscript{102} The tax on his or her income would have amounted to only $6,002 had he or she filed separately or $5,527 had the secondary earner made $30,000 as a single person. The higher tax under the joint filing status results from the aggregation effect: the secondary earner's first dollar of earnings is essentially taxed in his or her spouse's highest bracket once that spouse's income has been split, the 28% bracket. Some of the low earnings of the secondary earner, which otherwise would have been taxed primarily at 15% but to some extent at 28% as well, would reach the 31% tax bracket. None of his or her income would be taxed in the lowest 15% bracket. The additional $8,426 of tax incurred as a result of the secondary earner's decision to work translates to an effective tax rate of 28% on his or her first $30,000 of taxable income, rather than the effective tax rate of 20% that would have applied had he or she filed separately. This distributional pattern induces the behavioral response in some secondary earners of discouraging them from participating in the paid labor force.\textsuperscript{103}

3. Distributional and Behavioral Effects Resulting from the Combined Impact of Income Splitting and Aggregation

Because income splitting alone is most beneficial to disparate-income couples and because aggregation alone is least harmful to those same couples, both phenomena converge in the joint return to favor disparate-income couples dramatically over those in which the two spouses have similar earnings. The following table demonstrates these distributional effects.\textsuperscript{104} It shows the tax

\textsuperscript{102} $20,429 - $12,003 = $8,426.

\textsuperscript{103} See infra notes 228-35 and accompanying text.

\textsuperscript{104} This table is derived from the tax rate tables in I.R.C. §§ 1(a), (c), and (d), unadjusted for inflation. Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, § 13201.
liabilities for various filing statuses and for various combinations of income between husband and wife. In each of the three situations the total taxable income of the couple is $120,000.\footnote{The figures supplied for separate return liabilities assume each couple resides in one of the forty-two common-law jurisdictions. The forty-two common-law jurisdictions consist of the forty-one states that do not employ community property regimes and the District of Columbia. Because \textit{Seaborn} requires income splitting for separate filers living in community property states, separate returns for residents of those states would generate total tax liabilities equivalent to the tax liability under joint returns, and each spouse would be liable for half of the total separate return liability. \textit{See supra} note 101.}

\begin{table}
\caption{Tax Liabilities for Varying Combinations of Income Between Spouses for Couples with Identical Total Incomes}
\begin{tabular}{|c|c|c|c|}
\hline
Taxable Income(s) & MFJ & MFS & Single \\
\hline
H= $60,000 & Total tax = $29,729 & H's tax = $14,864 & H's tax = $14,122 \\
W= $60,000 & & W's tax = $14,864 & W's tax = $14,122 \\
Same incomes. & Total tax = $29,729 & Total tax = $29,729 & Total tax = $28,244 \\
\hline
H = $80,000 & Total tax = $29,729 & H's tax = $21,564 & H's tax = $20,322 \\
W = $40,000 & & W's tax = $8,802 & W's tax = $8,327 \\
Disparate incomes. & Total tax = $30,566 & Total tax = $28,649 & \\
\hline
H = $120,000 & Total tax = $29,729 & H's tax = $35,964 & H's tax = $32,972 \\
W = 0 & & W's tax = $0 & W's tax = $0 \\
Very disparate incomes. & Total tax = $35,964 & Total tax = $32,972 & \\
\hline
\end{tabular}
\end{table}

This table reveals a number of patterns resulting from the rate structure, including the behavioral incentive for most couples to file jointly rather than separately. The greater the income differences between husband and wife, the greater their financial
benefit from filing jointly rather than separately. For the couple in which each spouse earns $60,000, total tax liability would be $29,729 whether the couple files jointly or separately. This couple experiences no financial incentive to file jointly rather than separately because the spouses are in the same tax bracket and, consequently, derive no net benefit from income splitting.\footnote{See supra notes 92-93 and accompanying text.} Shifting the income of one spouse into the marginal tax bracket of the other would generate no tax savings. Alternatively, any benefit resulting from income splitting has been exactly offset by the cost from aggregation.

By contrast, the couple in which the husband earns $120,000 and the wife earns nothing would have a total tax liability of $35,964 by filing separately versus $29,729 by filing jointly, a difference of over $6,200. As this example demonstrates, the benefit from income splitting provides a compelling financial incentive for this couple to elect joint filing status over separate returns,\footnote{See Gann, supra note 29, at 35 n.122.} and outweighs the smaller or, in this example, the nonexistent harm arising from income aggregation.

The greater the difference between the spouses' incomes, the more valuable is the benefit from income splitting and the smaller is the harm from income aggregation.\footnote{See supra notes 91-95 and accompanying text.} Thus, a large income disparity between husband and wife triggers a strong financial inducement to file jointly.\footnote{See Gann, supra note 29, at 35 n.122.} Professor Boris Bittker, writing in a world in which disparate incomes prevailed, acknowledged that the income-splitting benefits of joint returns make an offer "that [cannot] ... be refused" and that joint returns, while elective as a technical matter, are "mandatory in fact."\footnote{Bittker, supra note 29, at 1409 n.55. See also Beck, supra note 58, at 372 ("The tax system is designed almost to force married persons to file jointly rather than separately.").} As the disparity in incomes decreases, that is, as the incomes of husbands and wives approach each other, the benefit from income splitting decreases and the harm from aggregation increases, and consequently, the advantage from filing jointly diminishes. At somewhat disparate incomes, the income splitting benefit exceeds the harm from aggregation only
moderately, and the married couple is slightly better off by filing jointly than separately. For example, the couple in which the husband earns $80,000 while the wife earns $40,000 faces a tax liability of $30,366 filing separately versus a liability of $29,729 filing jointly. When the husband and wife have equal incomes, the spouses no longer have any economic incentive to file jointly. As described above, they may file separately without financial penalty. However, as long as incomes are disparate, a financial incentive will induce spouses to elect joint return status.\footnote{See Mapes v. United States, 576 F.2d 896, 898 (Ct. Cl. 1978). See also McCaffery, Fresh Look, supra note 13, at 989 n.17 (noting that the rate schedules make filing separately disadvantageous). But see infra notes 112-16 and accompanying text (explaining the rare circumstances in which spouses may prefer to file separately).}

It will later be shown that this behavioral incentive for couples to file jointly rather than separately essentially locks women into the patterns that exist in the joint rate structure even though those patterns significantly disadvantage women.

Although the vast majority of couples file jointly, some do file separately.\footnote{In 1993 an estimated 95.2% of all returns filed by married taxpayers were joint returns and an estimated 97.5% of all married couples filed jointly. These figures were estimated from IRS statistics on the number of joint returns filed and the number of separate returns filed. In 1993, 48,298,687 returns in which spouses filed jointly were submitted to the IRS. Only 2,437,311 separate returns were filed by married taxpayers. See Internal Revenue Service, U.S. DEP’T OF TREASURY, PUBLICATION 1304, STATISTICS OF INCOME, INDIVIDUAL INCOME TAX RETURNS 1993 (revised 1996). Consequently, the total number of returns filed by married taxpayers can be estimated to be 50,735,398. Of these, 48,298,687 or 95.2% were joint returns. When one spouse files separately, the other may also file separately or not at all depending on whether that other spouse has sufficient income to trigger the filing requirement. An estimate of the number of such couples would be half of the number of separate returns filed in 1993 or half of 2,437,311. This is not a precise estimate, however, because undoubtedly some spouses of separate filers did not file separately or at all on their own behalf. Nevertheless, assuming 1,218,656 couples filed separately, the total number of married couples who filed returns would amount to 49,517,343 and the percentage of couples who chose to file jointly could be estimated as 48,298,687 divided by the total number of couples who filed, or 49,517,343. In this manner the percentage of couples who filed jointly could be estimated at 97.5%.}

Based on the above analysis, it is difficult to understand why any married couple would ever elect the separate filing status. Separate returns have, at times, been advantageous “with respect to such matters as the limit on the capital loss deduction, medical expenses, charitable contributions, and the matching of long-term and short-term capital gains and losses.”\footnote{Murray, supra note 52, at 57. See also Druker v. Commissioner, 697 F.2d 46, 49 n.1 (2d Cir. 1982); Bittker, supra note 29, at 1414 n.73; McIntrye & Oldman, supra note 51, at 1565 n.46; Davis, supra note 18, at 208-09. Separate filing of federal returns may also be advantageous in case of a state tax benefit from filing separately where states require couples to use the same filing status as that used for federal purposes. See Beck, supra note 58, at 374 n.265.}
Filing separately may also be preferable when the couple has generated significant allocable deductions. In such a case, separate filing often allows them to allocate each deduction to the spouse who can most readily derive a tax benefit from the item.\textsuperscript{114} The spouses cannot make such allocations if they elect to file jointly. In these relatively rare instances, the benefit from allocating deductions in a certain manner exceeds the normal advantages of joint filing, and these married couples benefit from filing separately.\textsuperscript{115} These cases are rare, however, as evidenced by IRS data indicating that the vast majority of married taxpayers, close to 100\%, choose to file jointly.\textsuperscript{116}

Table 2, above, also demonstrates another pattern from joint return rates that income splitting and aggregation induce: the marriage penalty and bonus. The marriage penalty is the phenomenon by which a married couple's tax liability is greater than the combined tax liabilities of two single people each earning the same incomes. The couple is essentially penalized for marrying.\textsuperscript{117} By marrying, the taxpayers forgo two separate starts up the progressive rate schedule for unmarried individuals

\textsuperscript{114} For example, if a deduction is allocable to either spouse and the deduction may be used to the extent it exceeds a floor, a percentage of adjusted gross income, the deduction is more valuable if allocated to the lower-income spouse. It may have no value at all if the couple files jointly and generates a large combined adjusted gross income. See, e.g., Beck, supra note 58, at 375 n.265; Robinson & Wenig, supra note 31, at 859 n.289, 846; Zelenak, supra note 29, at 399 n.1. Among deductions subject to such floors are deductions for medical expenses under I.R.C. § 213 (1994) and miscellaneous itemized deductions under I.R.C. § 67 (1994). Deductions not subject to a floor are generally more valuable if allocated to the higher-income taxpayer because they are used to reduce income that is subject to a higher marginal tax rate. See, e.g., STANLEY S. SURIL, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 22 (1978) (referring to this pattern as the "upside-down deduction" because of its regressive effect); JOSEPH A. PECHMAN, FEDERAL TAX POLICY 97 (5th ed. 1987) (the tax benefit associated with a deduction depends on the tax rate). But see Thomas D. Griffith, Theories of Personal Deductions in the Income Tax, 40 HASTINGS L.J. 543, 552-60 (1989) (criticizing the widespread belief that deductions are more valuable to high-bracket taxpayers than to low-bracket taxpayers). The spouse for whom a given deduction is most valuable generally may arrange to entitle him or herself to it by incurring and paying the expense. See STAFF OF Joint Comm. On Taxation, 96th Cong., THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS 3-7 (Comm. Print 1980); Zelenak, supra note 29, at 391 n.245.

\textsuperscript{115} Another reason some spouses file separately is to avoid the regime of joint and several liability. I.R.C. § 6013(d)(5) (1994).

\textsuperscript{116} See supra note 112 and accompanying text.

\textsuperscript{117} For excellent explanations and descriptions of the marriage penalty, see Bittker, supra note 29; Kornhauser, supra note 29; McCaffery, Fresh Look, supra note 13; Zelenak, supra note 29. See also Tax Treatment of Married, Head of Household, and Single Taxpayers: Hearings Before the House Comm. on Ways and Means, 96th Cong. 1 (1980); Economic Problems of Women, supra note 29, at 221-67, 604-09; STAFF OF Joint Comm. On Taxation, 96th Cong., THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS 3-7 (Comm. Print 1980); U.S. DEP'T OF TREASURY, supra note 29, at 102-07, 172-76; Giraldo, supra note 29.
and instead subject their combined incomes to the progressive rates for married couples. More importantly, as Table 2

118 Some commentators have defended the marriage penalty while others have decried it. To understand the debate surrounding whether or not the marriage penalty is justified, an understanding of some basic concepts is required. Under classical tax theory, an ideal tax system would meet the norms of both "couples neutrality" and "marriage neutrality." "Couples neutrality" requires couples with the same total incomes to pay the same amount of tax regardless of the distribution of earnings between the two spouses. This goal is based on the assumption that all married couples share resources and, therefore, that two couples with the same total incomes have equal ability to pay taxes and should in fact pay the same amounts in taxes. But see Zelenak, supra note 29, at 343-44, 347-48 (noting that the pooling justification for "couples neutrality" was developed after income splitting was incorporated into the joint return rate structure simply to rationalize it after the fact). "Marriage neutrality" requires a couple's total tax to remain the same upon marrying or divorcing. In his seminal article on family taxation, Professor Bittker demonstrated that these two goals are incompatible in a progressive tax system. Bittker, supra note 29, at 1395-96, 1429-31. See also Tax Treatment of Single Persons and Married Persons Where Both Spouses are Working: Hearings Before the House Comm. on Ways and Means, 92d Cong. 78-79 (1972) [hereinafter Tax Treatment Hearings] (statement of Edwin S. Cohen, Asst. Secretary for Tax Policy) ("No algebraic equation, no matter how sophisticated, can solve this dilemma. Both ends of a seesaw cannot be up at the same time."); U.S. DEP'T OF TREASURY, supra note 29, at 102-05; Note, The Case for Mandatory Separate Filing by Married Persons, 91 YALE L.J. 563, 565 n.6 (1981) (proving mathematically that progressivity, marriage neutrality, and couples neutrality cannot all be achieved simultaneously). Consequently, a progressive tax system cannot simultaneously achieve both couples and marriage neutrality. In a progressive tax system, policy makers must choose between those two mutually exclusive goals. Traditionally, tax theorists have elevated couples neutrality over marriage neutrality.

Commentators valuing couples neutrality and progressivity over marriage neutrality have defended the marriage penalty, arguing not only that couples with the same total incomes have equal ability to pay tax, but also that married couples enjoy economies of scale where single people do not, and, therefore, that married couples can afford to pay more in tax than their single counterparts. See STAFF OF JOINT COMM. ON TAXATION, 96TH CONG., THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS 24 (Comm. Print 1980). See also PECHMAN, supra note 114, at 105-07; Bittker, supra note 29, at 1422-25 (discussing economies of scale); Klein, supra note 15, at 370; Michael J. McIntyre, Individual Filing in the Personal Income Tax: Prolegomena to Future Discussion, 58 N.C.L. REV. 469 (1980); Oliver Oldman & Ralph Temple, Comparative Analysis of Taxation of Married Persons, 12 STAN. L. REV. 585, 603-04 (1960). However, Professor Oldman has since rejected his earlier views on the usefulness of generalities concerning economies of scale. McIntyre & Oldman, supra note 51, at 1595 n.80.

Among those who value "couples neutrality" over "marriage neutrality" are Michael J. McIntyre, Oliver Oldman, Boris Bittker, and Anne Alstott. See McIntyre & Oldman, supra note 51, at 1590; Bittker, supra note 29, at 1392; Alstott, supra note 30, at 2015, 2026-29, 2032 (defending "couples neutrality" by arguing that potential sharing of income between spouses undermines the argument that each spouse's individual ability to pay tax is determined solely by his or her own income).

More recently, a growing number of commentators have questioned the primacy of "couples neutrality" over "marriage neutrality." Those valuing "marriage neutrality" and progressivity have begun to argue that "couples neutrality" is not an important goal, or at least that it is insignificant in comparison to the costs of the current system and its shocking adverse effects on married women. They argue that not all couples pool their incomes and accordingly, that couples with equal incomes but different income distributions between the spouses do not have equal abilities to pay tax. They have also argued that income pooling, taken into account for married couples, can also exist among nonmarried partners, but is not taken into account for them. Nonmarried individuals who pool resources are precluded from filing jointly. Furthermore, if pooling resources justifies the splitting of incomes between the poolers, then the current system should allow income splitting not only between some spouses but also among their children and among others who cohabit. See Bittker, supra note 29, at 1422 (proposing such a system); McIntyre & Oldman, supra note 51, at 1573 (same as Bittker); Zelenak, supra note 29, at 355. Cf. Martin J. McMahon, Jr., Expanding the Taxable Unit: The Aggregation of the Income of Children and
demonstrates, the marriage penalty is worse for couples in which the husband and wife have similar incomes than for those in

Parents, 56 N.Y.U. L. Rev. 60, 61 (1981) (examining the idea of aggregating all family members' incomes). See also Bittker, supra note 29, at 1428; Gann, supra note 29, at 29; Kahng, supra note 51, at 37 n.99. Cf. Schneider, supra note 50, at 120-21 (arguing that because sharing occurs among people other than spouses, sharing between spouses does not sufficiently justify joint returns). All the income of the children, not only their net unearned income, see I.R.C. § 1(g) (1996), should be aggregated with that of the parents if resource sharing justifies inclusion in the taxable unit. Nevertheless, the current system does not fully place children in their parents' tax unit despite obvious sharing. See Robinson & Wenig, supra note 51, at 808 n.145. Joint returns assume that married couples who pool income are economic units and ought to be taxed the same as other units with the same income. If some couples really do constitute economic units, however, then it is not at all obvious why the option of filing separately should ever be allowed. See Schneider, supra note 50, at 118. Cf. Beck, supra note 58, at 377 (arguing that purported sharing of resources by spouses is not a justification for the joint and several liability that accompanies joint filing because those same spouses have the option of filing separately).

Proponents of "marriage neutrality" also argue that couples with equal total incomes but different income distributions between the spouses are not similarly situated even if they do pool resources. A couple in which the husband earns $100,000 and the wife earns nothing, they assert, is better off than another couple in which each spouse earns $50,000 because the first couple enjoys the untaxed benefits of self-performed services and significant leisure time while these benefits are much scarcer for the second couple. Critics of the marriage penalty often argue that "couples neutrality" treats these two couples alike, couples who are not really similarly situated. The first couple, they argue, ought to be taxed more than the second. If "marriage neutrality" were privileged over "couples neutrality," the first couple would be taxed more than the second.

Among those who criticize the marriage penalty, asserting that marital status ought not impact federal tax liability, are: Harvey E. Brazer, Income Tax Treatment of the Family, in THE ECONOMICS OF TAXATION 223 (Henry J. Aaron & Michael J. Boskin eds., 1980); Brown, supra note 11; Douglas K. Chapman, Marriage Neutrality: An Old Idea Comes of Age, 87 W. Va. L. Rev. 335 (1985); Gann, supra note 29, at 6-7, 25; Philip J. Harmelink, Marital Status Tax Discrimination After Tax Reform: Proposals to Resolve the Penalty/Bonus Issues, 26 WILLAMETTE L. REV. 594 (1990); Kornhauser, supra note 29, at 65; McCaffery, Fresh Look, supra note 13, at 985; Alicia H. Munnell, The Couple Versus the Individual Under the Federal Personal Income Tax, in THE ECONOMICS OF TAXATION 247-78 (Henry J. Aaron & Michael J. Boskin eds., 1980); Robinson & Wenig, supra note 51, at 776 n.10, 787, 852-53; Zelenak, supra note 29, at 542, 559-61 (noting that the public has expressed more outrage over the marriage penalty than it did with respect to the pre-1948 lack of couples neutrality); McCaffery, Fresh Look, supra note 13, at 992. Accordingly, the act of marrying affects a couple's combined tax.

It should be noted that other features in the tax system apart from the joint return rate structure also contribute to marriage penalties. See generally Hulse, supra note 29, at 252 (describing how the standard deduction causes an additional marriage penalty); Maule, supra note 16 (discussing numerous tax provisions that contribute to marriage penalties); Harmelink, supra. For example, one cause of a severe marriage penalty among low-income taxpayers is the earned-income tax credit of I.R.C. § 32 (1994 & Supp. 1995). See Anne L. Alstott, The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform, 108 Harv. L. Rev. 533 (1995). See also Jonathan Barry Forman, Simplification for Low-Income Taxpayers: Some Options, 57 Ohio St. L.J. 145, 154 (1986); McCaffery, Fresh Look, supra note 13, at 995-96; Zelenak, supra note 51, at 398.
which the spouses' incomes differ.\footnote{See, e.g., Beck, supra note 58, at 371; Bittker, supra note 29, at 1430; Cooper, supra note 10, at 68-69; McCaffery, Fresh Look, supra note 13, at 991; Harvey S. Rosen, The Marriage Tax is Down but Not Out, 40 NAT'L TAX J. 567, 570 (1987); Zelenak, supra note 29, at 340; Davis, supra note 18, at 207; Tom Herman, Tax Report: The Marriage Penalty Aroused Renewed Criticism, WALL ST. J., Sept. 11, 1996, at Al. See also Brown, supra note 11, at 49-52; John Brozovsky & A.J. Cataldo, II, A Historical Analysis of the "Marriage Tax Penalty," 21 ACCT. HISTORIANS J. 163, 166 (1994); Gann, supra note 29, at 22.} For example, the couple in which both spouses earn $60,000 experiences a marriage penalty of $1,485. The couple in which the husband earns $80,000 while the wife earns only $40,000 experiences a much smaller marriage penalty. That couple will file jointly to minimize its tax liability and will incur a marriage penalty of only $1,080. A marriage "benefit" often arises for couples with highly disparate incomes.\footnote{See, e.g., Brown, supra note 11, at 49-52; Brozovsky & Cataldo, supra note 119, at 166; Cooper, supra note 10, at 68-69; Gann, supra note 29, at 22; McCaffery, Fresh Look, supra note 13, at 991; Robinson & Wenig, supra note 31, at 783 n.35; Rosen, supra note 119, at 570; Zelenak, supra note 29, at 340-41; Herman, supra note 119, at Al. Cf. Davis, supra note 18, at 205 (describing that at the adoption of income splitting for joint returns in 1948, 80 to 85% of married couples had only one wage earner. Consequently, at that time the marriage bonus arose more frequently than the marriage penalty). That is, combined tax liability declines upon marriage. That is the case for the couple in Table 2 in which the husband earns $120,000 while the wife earns nothing. Because the spouses file jointly to minimize tax liability, the size of the marriage benefit is $3,244. The result is that the benefits from income splitting exceed the harm from aggregation so much for that married couple that the couple pays less tax upon marrying and filing jointly than it would if the spouses had remained single. As described in the Amesian hypothetical given in this Article's introduction, the government, through the operation of the marriage bonus, essentially pays a man to marry if he marries a woman who does not work. He obtains a marriage bonus, rather than penalty, by finding a traditional wife who does not participate in the paid labor force. Table 3, below, summarizes these results.
Marriage Penalizes Similar-Income Couples and Rewards Couples with Highly Disparate Incomes

<table>
<thead>
<tr>
<th>Disparity in Incomes</th>
<th>Spouses' Incomes</th>
<th>Marriage Penalty (Bonus)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equal Incomes</td>
<td>H = $60,000</td>
<td>$1,485</td>
</tr>
<tr>
<td></td>
<td>W = $60,000</td>
<td></td>
</tr>
<tr>
<td>Somewhat Disparate Incomes</td>
<td>H = $80,000</td>
<td>$1,080</td>
</tr>
<tr>
<td></td>
<td>W = $40,000</td>
<td></td>
</tr>
<tr>
<td>Highly Disparate Incomes</td>
<td>H = $120,000</td>
<td>($3,244)</td>
</tr>
<tr>
<td></td>
<td>W = $0</td>
<td></td>
</tr>
</tbody>
</table>

The marriage penalty as it currently exists arose in 1969. In that year, Congress lowered the tax rates applicable to unmarried individuals in response to single taxpayers' complaints that the 1948 adoption of income splitting only for married taxpayers had shifted the income tax burden disproportionately to unmarried individuals. 121 Previously, individual and joint return rates had been related in that the joint return rates yielded a tax for couples that was twice the individual tax on half of the couple's combined

taxable income. Consequently, prior to 1969, a couple in which a man and woman earned equal incomes would generate the same total tax liability, whether the taxpayers were single or whether they filed jointly as a married couple. The 1969 reduction in individual rates for single taxpayers without a concomitant reduction in joint tax rates thereby gave rise to the possibility of a marriage penalty. Two single taxpayers with equal incomes would each enjoy the newly lowered single rates. Upon marrying, however, the old higher rates would apply. For spouses who earned equivalent incomes, the benefits of income splitting would be offset entirely by the burden of aggregation, leading to the highest possible joint return tax liability, one that would exceed the tax imposed on two single taxpayers earning equivalent incomes. Whether filing jointly or under the new married-filing-separately regime, the married couple would be taxed under the old higher rates. Congress' reduction in rates applicable to single taxpayers, therefore, resulted in some cases in an increase in combined tax upon marriage, even when the spouses chose to file jointly.

The 1969 reduction in rates for single taxpayers was not so large, however, that it made taxpayers better off single than married in all cases. For married couples with disparate incomes, who could benefit from income splitting and who could avoid the worst harm from aggregation, the reduction in taxes from filing jointly rather than separately could still exceed the reduction Congress had conferred on single taxpayers in 1969. Consequently, some couples could obtain a larger tax reduction by marrying and by filing jointly than they could under the rate reduction for singles in 1969. Those couples experience a marriage benefit rather than a marriage penalty.

122 See supra notes 57, 86 and accompanying text.
123 See Mapes, 576 F.2d at 900; Gann, supra note 29, at 21-22; McCaffery, Fresh Look, supra note 13, at 991.
124 See supra note 122.
125 See Bittker, supra note 29, at 1430-31; McCaffery, Fresh Look, supra note 13, at 991.
B. Distributional Effects as Between the Higher-Earning and Lower-Earning Spouses: Income Splitting and Aggregation Combine in Joint Filing to Benefit the Higher-Earner but to Harm the Lower-Earning Spouse

One aspect of joint filing that has not been explored in the tax literature until this Article is that the benefit of income splitting and the burden of aggregation are not allocated equitably between spouses when one earns more than the other. Income splitting and aggregation combine to give the higher-earning spouse an income-splitting benefit which is only partially offset by the harm from aggregation. The higher-earning spouse adds half the income of the other spouse to half of his or her own income, and thereby moves into a tax bracket that is lower than the one that would have applied had his or her own income been taxed separately. In this manner the combination of income splitting and aggregation benefits the higher-earning spouse. That higher-earning spouse would pay less tax by filing jointly than he or she would by filing separately.

By contrast, income splitting and aggregation combine to give the lower-earning spouse an aggregation harm that exceeds any income-splitting benefit. Income splitting alone could place the lower-earning spouse in a lower tax bracket, but when applied in combination with aggregation, half of that spouse's lower income would be increased by half of the other's higher income. The combination of income splitting and aggregation acts to push the lower-earning spouse into a higher bracket than would have applied had his or her own income been taxed separately. For the lower-earning spouse, the harm from income aggregation exceeds the benefit that income splitting confers. Consequently, the lower-earning spouse pays more tax by filing jointly than he or she would by filing separately.

As noted above, the greater the disparity in spousal incomes, the greater the incentive to file jointly. Furthermore, the greater the disparity in spousal incomes, the more benefit flows from the lower-earning spouse to the higher-earning spouse upon filing jointly rather than separately. Ironically, a disparity in spousal incomes is almost inevitably followed by a transfer of wealth from the lower-earning to the higher-earning spouse because of the

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126 For a more complete discussion of this pattern, see infra notes 236-385 and accompanying text.
incentive to file jointly. These patterns will be illustrated further in Part IV.C.2, below.

The various patterns emerging from income splitting and aggregation that have been identified and explained in Part III will now be examined in Part IV with respect to their implications for women.

IV. PATTERNS EMERGING FROM THE JOINT RETURN RATE STRUCTURE HAVE SIGNIFICANT IMPLICATIONS FOR WOMEN

A. Income Splitting

1. Automatic Income Splitting Rewards Conventional Marital Roles, Removing any Tax Incentives Wives May Have to Work

As illustrated above, income splitting is most beneficial to couples in which one spouse earns significantly more than the other. The closer the incomes of the two spouses, the less benefit income splitting confers. Therefore, income splitting provides a tax benefit primarily to couples who fit traditional roles in which the husband earns most or all of the income and in which the wife does not work. Even if the wife does work, the income splitting benefit is more significant the lower her earnings are relative to those of her husband. Although the benefit of income splitting is available to couples in which the wife earns significantly more than her husband as well, that pattern is extremely unusual. The benefit of income splitting is minimal for couples in which the spouses earn similar amounts, that is, for couples whose working patterns defy traditional, stereotypical roles in which the husband is gainfully employed and the wife is not. In fact, the benefit is nonexistent if the spouses earn equal incomes. By benefiting disparate-income couples, the income-splitting feature of the joint return rewards working patterns that

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127 See supra notes 91-94 and accompanying text.

conform to sexist stereotypes while failing to reward taxpayers who challenge the stereotype. One may question the propriety of a tax system containing a benefit whose availability and amount is tied to how closely the couple fits a sexist stereotype.

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See Gann, supra note 29, at 35 (stating that the split-income structure is designed to benefit the group of taxpaying couples in which only one spouse works); Jones, supra note 3, at 261 (discussing impact of automatic income splitting on spouses' roles); Zelenak, supra note 29, at 340-41 (noting that the one-earner couple benefits from income splitting). See also McCaffery, Fresh Look, supra note 13, at 987, 992 & n.29 (noting that the tax laws encourage one-earner families); Robinson & Wenig, supra note 51, at 763 n.92 (noting that the tax laws, as reflections of social judgments about life-styles, reward conformity to traditional roles and penalize departures from them); Contract with America Hearings, supra note 51, at 85, reprinted in 66 Tax Notes at 1344 (statement of Professor Alstott). Cf. Mapes v. United States, 576 F.2d 896, 898 (Cl. Ct. 1978) ("the Code adds to the attractiveness of a prospective spouse without taxable income, and detracts from one with it").

The sexist stereotype is one in which the husband is the primary breadwinner and in which the wife is viewed as a discretionary earner. In traditional family working patterns, the husband worked full-time and the wife stayed at home, raising children, doing housework and rarely working outside of the home for economic benefit. The sexist stereotype refers to these traditional gender roles. See Greene, supra note 52, at 85.

130 Cf. Kahng, supra note 51, at 2 (making the same point with regard to the estate tax).

Some might argue to the contrary: that taxing a one-earner couple less than a two-earner couple by benefiting the one-earner couple more is appropriate on the theory that the one-earner couple has fewer resources than a two-earner couple and, therefore, has less ability to pay the tax. This argument overlooks the fact that income splitting benefits the one-earner couple more than the dual-earner couple even when both couples have the same total incomes, and thus, even when the two couples have equivalent resources and presumably equal abilities to pay tax.

Assuming a couple shares, or "pools," its resources, a fair tax system would satisfy three criteria: (1) a single person should pay a greater tax than a one-earner married couple with equal income; (2) a one-earner married couple should pay a greater tax than a two-earner married couple with equal income; and (3) a two-earner married couple should pay a greater combined tax than two single persons with the same combined income. See Oldman & Temple, supra note 118, at 603-04.

Professor Oldman later acknowledged that these criteria are of limited value because they are based on notions of economies of scale in living patterns that are no longer accepted: "The great variety of living arrangements which now characterize our society undermines the economies of scale argument for persons above the subsistence level. Generalities about economies of scale are no longer useful." McIntyre & Oldman, supra note 51, at 1595 n.80. See also Bittker, supra note 29, at 1424-25.

Note that if a couple derives economies of scale through division of labor, that is, by having one spouse take responsibility for the home and children while the other spouse generates financial resources, then under criterion number two, above, that couple should be taxed more than another married couple earning the same total income in which both spouses work. Such a couple can live more cheaply than a two-earner couple by avoiding certain expenses of having both spouses work, such as child care. Furthermore, the one-earner couple is undertaxed because imputed income, the value of self-performed services like housework, is excluded under current law from the income tax base. See McCaffery, Fresh Look, supra note 13, at 1001-05; Sauder, supra note 45, at 1976-77; Zelenak, supra note 29, at 372-73. But see Bittker, supra note 29, at 1992-96 (acknowledging this problem but arguing that the two-earner and one-earner couple should pay equivalent tax, presumably because both couples will share resources completely, thereby having equal ability to pay tax). The benefit of income splitting has just the opposite impact, failing to tax the one-earner couple more than the two-earner couple. It lowers the tax to a great degree on joint filers for couples in which only one spouse works while providing a more minimal benefit for couples in which both spouses work. As a consequence, income splitting violates criterion number two because the one-earner couple will not pay more in tax than the two-earner couple. See supra note 118.
At the time income splitting was adopted, one of its acknowledged goals was to promote the stereotypical, traditional gender roles in which husbands were gainfully employed and wives stayed at home, economically dependent on their husbands.\(^{131}\) In praise of the 1948 income-splitting approach, Stanley Surrey wrote in that year that “[w]ives need not continue to master the details of the retail drug business, electrical equipment business, or construction business, but may turn from their partnership 'duties' to the pursuit of homemaking.”\(^{132}\) Clearly, commentators knew in 1948 that income splitting would function to keep women in the home and, therefore, to keep them economically dependent on their husbands. Relegation of women to “homemaking” pursuits was clearly viewed as a more appropriate role for women in post-war society than staying in the work force, and income-splitting was probably an intentional effort to promote conventional, stereotypical gender roles.\(^{133}\) Economists have asserted that income-splitting does, in fact, promote one-earner couples and that its repeal would probably increase married women’s labor force participation rates significantly.\(^{134}\) By discouraging women from working, income splitting is a feature of the tax code and of U.S. government policy

\(^{131}\) See Jones, supra note 3, at 296.

\(^{132}\) Surrey, supra note 57, at 1111. Prior to 1948, couples in common law states attempted to obtain the benefits of income splitting available to married residents of community property states by establishing husband and wife partnerships. See Jones, supra note 3, at 265, 274-75. Such partnerships, if bona fide for tax purposes, allowed couples to shift income from the husband’s business, normally taxed to him under Lucas v. Earl, to the spouses equally as partners. See Jones, supra note 3, at 259-60, 274-93; Staudt, supra note 43, at 1607 n.152; Zelenak, supra note 29, at 345-46. One requirement for such a plan to succeed was that the wife had to be a bona fide partner. That is, she had to be either a bona fide participant or a bona fide investor in the partnership. Consequently, taxpayers often had to show that wives really participated in the business venture more than nominally. See, e.g., Commissioner v. Gilbertson, 337 U.S. 733, 737-38 (1949); Lusthaus v. Commissioner, 327 U.S. 293, 297 (1946); Commissioner v. Tower, 327 U.S. 280, 290 (1946); I.T. 5845, 1947-1 C.B. 66, 67 (1947). These activities by wives demonstrated that the unavailability of automatic income splitting encouraged couples to move towards the income-splitting result by arranging for both spouses to work, to earn income. The absence of automatic income splitting did indeed encourage women to work in an effort to reduce the family’s tax liability. Cf. S. REP. No. 80-1015, at 17, reprinted in 1948 U.S.C.C.A.N. 1163, 1184.

\(^{133}\) Much has been written of employer and governmental non-tax policies designed to exclude women from the work force in the aftermath of World War II when employment opportunities were needed for returning GI’s. See generally SUSAN M. HARTMANN, THE HOME FRONT AND BEYOND: AMERICAN WOMEN IN THE 1940s, at 15-29, 44-51, 123-41 (1982); Jones, supra note 3, at 263-65.

that has the same effect as the hypothetical Amesian tax laws described at the beginning of this Article. The government encourages married women not to engage in paid labor.

2. Automatic Income Splitting Removes any Tax Incentive to Transfer Ownership of Assets or Earnings to Wives

Another concern for women involves the fact that income splitting is available for tax computation purposes even though control or ownership of the "shifted" earnings remains with the earner.136 Traditionally, tax rules have required that income be taxed to the party who owns it or who controls the earning of that income.136 The theory underlying this principle is that the owner of earnings is the party most financially able to pay tax on them.137 Taxing someone on earnings he or she does not own or control would be unfair because it is contrary to notions of fairness regarding ability to pay. For example, if a high-bracket taxpayer anticipatorily assigns earned income to his low-bracket child, then under the authority of Lucas v. Earl, the income will be taxed to the high-bracket earner, not to the child.

There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it.139

The person who controls whether income will be earned, the earner, is the party who is properly taxed on that income.140

This principle has also been adopted with respect to income generated from property. Whoever owns income-producing

135 See McCaffery, Fresh Look, supra note 13, at 990 n.21; Robinson & Wenig, supra note 31, at 775 n.4; Bea Ann Smith, The Partnership Theory of Marriage: A Borrowed Solution Fails, 68 TEX. L. REV. 689 (1990); Zelenak, supra note 29, at 380 & n.199 ("the tax laws should not reward spouses for sharing that does not exist").

136 See Schneider, supra note 56, at 106 (noting that it is unusual for income to be taxed to someone other than the person who received it). See also Kornhauser, supra note 29, at 74; Staudt, supra note 43, at 1641-42.

137 Cf. Robinson & Wenig, supra note 31, at 777 (noting that the income tax was designed to take ability to pay into account); Zelenak, supra note 29, at 385 (noting that wives should not be taxed on half their husband's earnings despite equitable distribution laws because the husband is the party with control over the earnings during the marriage).

138 281 U.S. 111 (1930).

139 Id. at 114-15.

property is the proper party to be taxed on the income, even if the income interest is severed prior to the generation of that income. Furthermore, a retention of control over income-generating property constitutes ownership for these purposes. Thus, under Helvering v. Clifford, the settlor of a trust attempted to shift income from his own high bracket to his wife's low bracket by creating a trust to hold his income-producing property and by naming his wife as the beneficiary while he retained control of the corpus. The Supreme Court would not allow the grantor to shift income arising from the trust assets because the "short duration of the trust, the fact that ... [his] wife was the beneficiary, and the retention of control over the corpus by ... [him] all ... [led] irresistibly to the conclusion that ... [the grantor] continued to be the owner." Retention of control over the assets constituted ownership of them for tax purposes, and as owner, the grantor was the proper party to be taxed on the unearned income.

In 1954 Congress enacted the grantor trust rules contained in sections 671 - 678 of the Internal Revenue Code. As amended in 1986, those provisions clarify and continue the doctrine enunciated in Clifford. If the grantor retains specified reversionary interests in trust property or certain rights or powers with respect to the trust, including the power to revoke the trust or the power to distribute the income to the grantor or to his or her spouse, then the trust income is taxed to the grantor, even though the income may actually be distributed to a third party or held in trust. The grantor's retention of control over the income-generating property is considered sufficient to render him the owner of the property and, therefore, to subject him to

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141 See id.
142 309 U.S. 331 (1940).
143 The attempted transaction took place long before Congress compressed the low bracket for trusts and estates in I.R.C. § 1(e) (1994).
144 Clifford, 309 U.S. at 335 (emphasis added).
145 See also Corliss v. Bowers, 281 U.S. 376 (1930) (holding that a transfer of income-producing property to a revocable trust did not constitute a transfer for income tax purposes and requiring, therefore, that the income be taxed to the settlor, not to the trust).
147 I.R.C. §§ 671, 673-677.
tax on any earnings.\textsuperscript{148} As of 1948, when Congress adopted income splitting for all joint filers, the principle that the earner or the income owner is, for tax computation purposes, the proper person to be taxed was abandoned solely for married couples who filed jointly.\textsuperscript{149} The adoption of income splitting caused income to be assigned automatically to the lowest available tax bracket between the spouses regardless of which spouse earned the income or had an ownership interest in it.\textsuperscript{150} Once income splitting was adopted, half of one spouse’s earnings was attributed to the other spouse for purposes of computing federal tax liability.\textsuperscript{151} Such attribution occurred even if the nonearning spouse had no present ownership interest in those earnings under state law,\textsuperscript{152} which is the usual case under common law property principles.\textsuperscript{153} Courts have consistently ruled that state law determines which spouse owns the earnings\textsuperscript{154} and, furthermore, that the filing of a joint return does not change that ownership.\textsuperscript{155} Shifting income from

\textsuperscript{148} See I.R.C. § 671.

\textsuperscript{149} See Zelenak, supra note 29, at 355. Since 1948, occasional provisions have been enacted which impose tax on the income owner at the rate applicable to another taxpayer. For example, the Kiddie Tax, I.R.C. § 1(g) (1996), imposes tax on children for certain unearned income at the parent’s top applicable rate. However, the purpose of the Kiddie Tax was to prevent income from being shifted into a lower bracket. The joint return provisions, by contrast, depart from the general rule of taxing the income owner precisely to permit income to be shifted into a lower tax bracket.

\textsuperscript{150} See Jones, supra note 3, at 273. Ironically in Seaborn, which created geographic disparity and which induced Congress’ eventual move to automatic income splitting, the Court allocated income between the spouses for tax computation purposes precisely because state law gave them both present ownership interests in half the earnings of the other spouse. Poe v. Seaborn, 282 U.S. 101, 110-11, 113 (1930).


\textsuperscript{152} See Bittker, supra note 29, at 1395.

\textsuperscript{153} See, e.g., Publication 555, supra note 52, at 1-2 (implicitly acknowledging that common law states do not give the non-earner an ownership interest in the earnings of his or her spouse by limiting income splitting for separate filers to residents of the nine community property jurisdictions). See also supra note 52.

\textsuperscript{154} See, e.g., United States v. Mitchell, 403 U.S. 190, 205 (1971).

\textsuperscript{155} See In re Illingworth, 51 A.F.T.R. 1215 (P-H) (D. Ore. 1956). Although jointly filing spouses would have been jointly and severally liable for any deficiency, the wife was entitled only to that portion of a refund attributable to her own net income. Because no income or taxes were attributable to the wife, the court ordered her to endorse the refund check to her husband’s bankruptcy trustee. The filing of a joint return does not change ownership interests between those filing the joint return. See also In re Wetteroff, 453 F.2d 544, 547 (9th Cir. 1972); Glaubke v. United States, 41 A.F.T.R.2d (P-H) 759 (E.D. Va. 1978); Pettengill v. United States, 253 F. Supp. 321 (N.D. Ill. 1966); Dunn v. Commissioner, 22 T.C.M. (CCH) 915 (1963); In re Estate of Carson, 190 A.2d 407, 409 (N.J. Camden County Ct. 1964); In re Estate of Trecker, 215 N.W.2d 450, 454 (Wis. 1974).
one spouse to another for purposes of minimizing tax liability ought to be inappropriate unless ownership in the "shifted" income is transferred simultaneously. Ownership and/or control remains the test for determining the proper taxpayer among other related taxpayers who pool resources. It should remain the test for determining the proper taxpayer as between spouses. Apart from eliminating the geographic disparity of treatment occasioned by Seaborn, any theoretical justification for separating ownership of earnings from identification of the proper taxpayer in the sole context of spouses remains elusive.

A few lower court Pennsylvania decisions allowing the nonearning wives rather than the husbands' estates to keep the joint return refund reflected the views of those courts that under Pennsylvania property law, the filing of a joint federal tax return evidenced the spouses' intention to hold the refund as tenants by the entireties during their lives. Upon the death of either spouse, the right of survivorship operated to vest total ownership in the surviving spouse rather than in the decedent's estate. See In re Estate of MacNeill, 21 Pa. D. & C.2d 480 (1959); In re Estate of Green, 14 Pa. D. & C.2d 595 (1958). But see In re Estate of Jackson, 33 Pa. D. & C.2d 402 (1964) (holding that, by filing jointly, parties did not intend to hold a tax refund as tenants by the entireties). Nevertheless, Pennsylvania courts take a minority view. All other reported cases dealing with this issue hold that the refund belongs to the spouse whose income and tax payments generated it. In the vast majority of jurisdictions, filing a joint return does not effect a conveyance of any kind between the spouses.

See, e.g., Zelenak, supra note 29, at 380 & n.199 ("the tax laws should not reward spousal sharing that does not exist"); Gann, supra note 29, at 27; Winn & Winn, supra note 52, at 878. Cf. Bittker, supra note 29, at 1402 ("[T]he income-splitting joint return authorized by Congress in 1948, which with only minor changes is still in effect, achieves the tax result that Mr. and Mrs. Earl were seeking [in Lucas v. Earl]. It does so, however, without requiring husband and wife to equalize their ownership interests in this respect, the Earl agreement might be regarded as an improvement over the 1948 statutory reform [because it shifted actual ownership of income rather than attempting to shift income for tax-computation purposes only]." ) (footnote omitted); McCaffery, Fresh Look, supra note 13, at 990 n.21 (noting the incongruity of shifting income for tax purposes when it is not shifted for ownership purposes); Zelenak, supra note 29, at 378-79, 386 (noting that by abolishing joint returns and by overruling Lucas v. Earl, that is, by permitting income to be split only if property is actually transferred to the nonearning spouse, an incentive would arise for husbands to share legal ownership of earnings with their wives).

Control determines which taxpayer's marginal tax rate applies even with regard to the Kiddie Tax, I.R.C. § 1(g) (1996). Under the Kiddie Tax, net unearned income of children under age fourteen is taxed to the children at the parent's top marginal rate. I.R.C. § 1(g)(1). Ownership of the assets generating the unearned income causes the child to be the taxpayer but the applicable tax rate is that which would apply to the parent, reflecting the parent's likely control over the child's unearned income. Under certain conditions I.R.C. § 1(g)(7) permits the parent to elect to include the child's unearned income on the parent's return as if the parent were the taxpayer.

Several tax theorists have argued that the current regime of income splitting has permitted husbands to retain legal title in all their property, while transferring half their property to their wives for beneficial tax computation purposes. Providing the benefit of income splitting to married couples regardless of which spouse has legal ownership of the property eliminates any incentive for actual sharing of the property between spouses. See Gann, supra note 29, at 47 ("[b]y solidifying separate ownership ... the irrelevancy of source of income [as between the spouses for tax purposes] may also have contributed to the economic dependence of women"); Winn & Winn, supra note 52, at 878; Zelenak, supra note 29, at 378. Cf. Kahng, supra note 51, at 3, 34, 50 (arguing that a similar feature within the estate tax removes the incentive for property to be transferred outright to wives).
Furthermore, Congress could have pursued other approaches to alleviate the geographic disparity.\(^{159}\)

Income splitting allows a husband to shift his income to his
wife to lower the total tax attributable to his income even though she receives absolutely no ownership in or control over those earnings. Women’s interests suggest that if the benefits of income splitting are to be conferred for tax computation purposes, then the nonearning spouse should also receive a present property interest in the “shifted” earnings. It was just such a property interest that justified income splitting in the Supreme Court’s view. Conversely, if the wife gets no immediate property interest in her husband’s earnings, as is generally the case in common law jurisdictions, then income splitting should not be permitted.

B Aggregation


Just as income splitting provides the greatest benefits to couples with disparate incomes, couples that fit conventional patterns in which the husband works and the wife does not, income aggregation also rewards the same groups. As discussed earlier, income aggregation harms all couples who file jointly but it harms disparate-income couples the least and equal-income couples the most. Consequently, the phenomenon of aggregation places the heaviest tax burdens on the couples that defy traditional stereotypes—those in which the spouses earn similar incomes. Aggregation imposes a much lighter burden on and, thereby, rewards couples in which one spouse earns significantly more income than the other. Once again the tax system contains a feature that imposes more harm on two-earner couples, those that challenge stereotypical working patterns, and less harm on one-earner couples, those that comply with the traditional roles in which the husband works and the wife does not. The tax system arguably should not contain a feature that burdens couples to the extent they depart from sexist

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161 See supra notes 104-25 and accompanying text.
societies. Tax theorists as well as economists have acknowledged that aggregation has a harmful impact on the spouse who is a "secondary earner," usually the wife, in that, on the margin, it discourages secondary earners from working altogether.

163 See supra note 130 and accompanying text.

164 Women are considered to be "secondary" wage earners much more frequently than men. See JESSIE BERNA RD, WOMEN AND THE PUBLIC INTEREST: AN ESSAY ON POLICY AND PROTEST 191 (1971) ("In one study of 53 such two-career families, the wife's career was viewed as merely a kind of hobby, an avocation rather than a vocation, in a substantial proportion with a traditional orientation."); Carole Pateman, The Patriarchal Welfare State, in DEMOCRACY AND THE WELFARE STATE 231, 244 (Amy Gutmann ed., 1988) ("Women in the workplace are still perceived primarily as wives and mothers, not workers. The view is also widespread that women's wages are a 'supplement' to those of the breadwinner. Women, if it is held, do not need wages in the same way that men do-so they may legitimately be paid less than men."). See also JANE C. HOOD, BECOMING A TWO-JOB FAMILY 188 (1983) (wives in middle- and upper-income families often perceive their work as unnecessary to the family's survival, thus treating themselves as "junior partner[s]"); McCaffery, Fresh Look, supra note 13, at 994 (describing married women as historically having been the marginal or secondary earners in the family).

Furthermore, wives are secondary earners because they usually earn less than their husbands. See Edison-Smith, supra note 56, at 120. Although the wage gap between men and women has been diminishing over the last 30 years in the United States, women on average still earn significantly less than men do. Data from the Bureau of Labor Statistics show that for the fourth quarter of 1995 "[w]omen who usually worked full time had median earnings of $407 per week, 74.3 percent of the $548 median for men." BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USUAL WEEKLY EARNINGS OF WAGE AND SALARY WORKERS: FOURTH QUARTER 1995 (1996). Data from 1994 indicate that the median annual earnings of all full-time workers were $30,854 for men and $22,905 for women. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HOUSEHOLD ECONOMIC STUDIES, INCOME AND POVERTY: 1994 INCOME SUMMARY, tbl.A (1996).

The above data compare earnings of full-time working men and women without regard to their marital status. Data comparing earnings of husbands and wives show an even greater disparity because of the many wives who work in paying positions only part time or not at all. Professor McCaffery reports that, on average, married women earn approximately 46% of what their husbands earn. See McCaffery, Fresh Look, supra note 13, at 994 (citing Nancy E. Dowd, Work and Family: Restructuring the Workplace, 32 ARIZ. L. REV. 451, 445 n.86 (1990)). In 1994, the percentage of wives who earned more than their husbands was only 18.9%. This figure was arrived at by adding together the number of couples in which wives with earnings earned more than their husbands who had earnings ($7,218,000) and the number of couples in which the wife worked while the husband did not (2,958,000) and dividing that sum by the total number of married couples (53,865,000). See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Table F-15 (1996) (providing 7,218,000 and 53,865,000 figures); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P60, Table F-11 (1996) (providing the 2,958,000 and 53,865,000 figures). In 1989, wives earned more than their husbands in only 18% of marriages. See Crispell, supra note 128, at 9 (citing Earnings of Married-Couple Families, supra note 128).

Because wives tend to earn less than their husbands, if one spouse were to leave the labor force voluntarily or to care for a child or elder relative, it would most likely be the wife rather than the husband. Wives are, therefore, properly viewed as secondary earners. This characterization is not intended to express a goal or a desired norm, but rather simply describes the current social reality.

165 See McCaffery, Fresh Look, supra note 13, at 989-96, 1018; McCaffery, Slouching Towards Equality, supra note 13, at 617-18 (arguing that the combined impact on wives of the aggregation effect, social security taxes, and other costs of working is so great that it must affect behavior and discourage paid work); Harvey S. Rosen, Is It Time to Abandon Joint
Because families usually view the wife rather than the husband as a secondary earner, the wife's first dollar of earnings is generally subject to tax at her husband's highest marginal rate. The term "secondary earner" is adopted from Grace Blumberg's groundbreaking work from 1971:

[T]he observation that American working wives are predominantly secondary family earners is not intended to express a social ideal. It merely reflects a contemporary social reality. Women workers generally earn substantially less than their male counterparts. Working wives earn less than their employed husbands. The American wife's working career is likely to be broken by child-bearing and rearing. Unless prompted by economic necessity, her return to work is generally considered discretionary. Even when she is earning a substantial salary, her husband is unlikely to view his employment as discretionary. Thus, the American working wife should properly be understood as a secondary family earner for the purpose of determining the work disincentive effect of various Code provisions.

Although the term "secondary earner" was adopted over twenty-five years ago, many of the social factors combining to make the wife a secondary, or discretionary, worker still prevail. In discouraging secondary earners, or wives, from working, not only does aggregation tend to preclude economic independence for women, but it also promotes traditional gender roles in which wives do unpaid labor and husbands are viewed as productive and powerful, roles which have limited wives' autonomy and which

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166 Blumberg, supra note 10.
167 Id. at 49 (footnotes omitted).
168 See sources cited supra notes 7-13 and accompanying text; sources cited infra notes 238-54 and accompanying text.
have been used to devalue women generally. Table 1, above, illustrates the impact of aggregation on the secondary earner. Statistical evidence demonstrates that husbands, on average, earn significantly more than their wives and, therefore, supports the assumption that the husband is the primary earner and that the wife is the secondary earner. Income aggregation, even when combined with income splitting, pushes the "secondary" earner into a higher tax bracket than would apply in the absence of income aggregation. The wife in the example from Table 1, above, would generate a tax of $8,426 on her first $30,000 of income for an effective tax rate of 28%. This compares extremely unfavorably with the taxes that would have been imposed had she been single or filed separately, $5,527 or $6,002, respectively.

The higher tax costs associated with the secondary earner's income make her less profitable and, furthermore, discourage many married women from working altogether. The claim is not that aggregation prevents working from being worthwhile for all women. Rather, some women, without regard to tax considerations, do not earn enough to justify working outside the home. The costs of working, such as child care, professional attire, etcetera, exceed the incomes of some married women, rendering employment economically unwise. Aggregation increases the costs of employment further for "secondary earners." Consequently, on the margin, even more women

169 See McCaffery, Fresh Look, supra note 13, at 987, 994.
170 See infra notes 164, 238-54 and accompanying text.
171 See Gann, supra note 29, at 41; McCaffery, Fresh Look, supra note 13, at 993, 1041 n.219; Zelenak, supra note 29, at 365-66; Davis, supra note 18, at 210-11.
172 Her effective tax rate would be only 18% if she had been single or 20% if she had filed separately. See Gann, supra note 29, at 42 n.137 (noting that the wife would be more likely to work outside of the home if she could file separately to avoid the aggregation effect).
173 The higher the tax rate on the first dollar the woman earns, the lower her disposable wage and the lower the probability of her participating in the labor market. Furthermore, the greater the tax on her husband's earnings and nonwork income, the lower other after-tax income and the greater the probability of [his] labor-force participation. Leuthold, supra note 154, at 103 (using data from the 1979 Michigan Survey of Income Dynamics). See also Davis, supra note 18, at 212; sources cited supra note 165.
174 See Davis, supra note 18, at 210. See also Dateline NBC: Two for the Money (NBC television broadcast, May 1, 1996) (interviewing Linda Kelly, home economist: "Most second incomes do clear a profit but usually it's not nearly as much as expected. And there are some people who even go in the hole because of a second income. They lose money."

discover that the expenses associated with working outside the home, including the tax cost, exceed actual earnings. In contrast, the primary earner is able to use the lowest tax brackets for his earnings simply by virtue of being the primary earner. Essentially, women who are the "secondary earners" in the family have to earn more than their husbands would have to earn to break-even, to make working financially feasible. 1 75

The following example illustrates how the aggregation effect prevents women on the margin from working. 1 76 Assume that a husband has taxable income of $60,000. His wife earns nothing for her work at home, generating no taxable income. The wife considers taking a job that would result in $30,000 of taxable income. The additional tax the couple pays as a result of the wife's $30,000 of taxable income is $8,426, as shown above in Table 1. Assuming that the wife incurs the following costs in connection with working, her income will fall short by $1,353 of covering just the listed expenses:

- additional income tax attributable to the wife's $30,000 income of $8,426;
- social security taxes of $2,678;177
- additional state income tax attributable to the wife's $30,000 income of $1,500;178

It's when both partners work full time that the costs just explode. ... Uncle Sam ... is very fond of second incomers because his take on their paychecks is so large.").

175 See Davis, supra note 18, at 210.

176 This example is similar to an illustration provided in Bittker, supra note 29, at 1432 & n.123. See also Cann, supra note 29, at 41 n.156; McCaffery, Fresh Look, supra note 13, at 1021-22, 1026-27; Zelenak, supra note 29, at 373-74.

177 The social security tax is currently 6.2% of gross wages. I.R.C. § 3101(a) (1994). In 1996, this tax applied only to the earner's first $62,700 of wages. I.R.C. § 3121(a)(1) (1996); Social Security Act § 236, 42 U.S.C. § 430 (1994). The medicare tax is currently 1.45% of gross taxable wages. I.R.C. § 3101(b) (1994). Since the beginning of 1994, no wage ceiling has existed for the medicare tax. I.R.C. § 5121(a) (1994). Accordingly, for taxpayers earning less than $62,700, the combined social security and medicare tax is 7.65% of gross wages. Assuming her gross income from wages amounts to $35,000, this wife's social security and medicare taxes would amount to $2,678. Professor McCaffery has argued compellingly that the social security tax system, itself, also tends to discourage secondary earners from working. See generally McCaffery, Fresh Look, supra note 13, at 996-1001.

178 This assumes the state of residence imposes a flat 5% income tax. Michigan, for example, imposes a flat 4.4% income tax. See Dep't of Treasury, State of Michigan, 1996 Michigan Income Tax Returns and Homestead Property Tax Credit Claim.
commuting expense (at 31¢ per mile\textsuperscript{179} for an additional 10,000 miles\textsuperscript{180} of driving per year) of $3,100;

- child care (2 children at $200 per week\textsuperscript{181} for 50 weeks per year) of $10,000;\textsuperscript{182}

\textsuperscript{179} The 31¢ per mile standard business mileage rate that was deductible in 1996 for work-related, noncommuting use of one's personal vehicle covers operating and fixed costs including depreciation, maintenance and repairs, tires, gasoline (including all taxes thereon), oil, insurance and registration fees. Rev. Proc. 95-54, 1995-2 C.B. 450, 451-52 (1995). Neither the depreciation nor gasoline expenditure would be tax deductible for the woman in the example because such commuting expenses are not tax deductible. INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, PUBLICATION NO. 917, BUSINESS USE OF A CAR (1995). Nevertheless, these figures provide a rough approximation of the cost of operating one's personal vehicle.

\textsuperscript{180} Additional mileage results from the wife's decision to enter the work force as a result of driving she does to and from work, as a result of trips to and from the day-care center or babysitter's house, and from driving to and from restaurants.

\textsuperscript{181} This example assumes the cost of child care for each child is $100 per week. Tamar Lewin estimates that $500 per week is a typical cost for a full-time, in-house babysitter. See Tamar Lewin, For Some Two-Paycheck Families, the Economics Don't Add Up, N.Y. TIMES, Apr. 21, 1991, at E18. Child-care costs are difficult to estimate because of low-cost options provided by relatives that are available to some working women but not to others. See McCaffery, Fresh Look, supra note 13, at 1021 n.149. In 1993 families in the Northeast paid, on average, $85 per week for child care. See LINNE M. CASPER, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS P70-52, WHAT DOES IT COST TO MIND OUR PRESCHOOLERS? (1994). It has been estimated, however, that child care costs can substantially exceed those levels. Writing in 1991, Zigler and Lang reported that "parents of preschoolers in Washington, D.C. must pay $100 a week or more." EDWARD F. ZIGLER & MARY E. LANG, CHILD CARE CHOICES: BALANCING THE NEEDS OF CHILDREN, FAMILIES, AND SOCIETY 9-10 (1991). Similarly, the "U.S. House of Representatives determined the cost of infant care to be up to $130 per week." Id. at 10. And "infant care [can] cost[,] up to $200 weekly in New York City." Id.

\textsuperscript{182} A credit for child and dependent care expenses is available to some taxpayers under I.R.C. § 21 (1994). This credit is available to married couples who live together only if the couple files jointly. I.R.C. § 21(e)(2) ("If the taxpayer is married at the close of the taxable year, the credit shall be allowed under subsection (a) only if the taxpayer and his spouse file a joint return for the taxable year."). See also I.R.C. § 21(e)(3) (treating legally separated spouses as not married for these purposes) and § 21(e)(4) (treating spouses who live apart from the last six months of the year as unmarried for these purposes). Furthermore, for this couple, assuming two children under age 15, the credit would be limited to $960 because of dollar limitations incorporated in § 21(c) and because the credit is limited to a percentage of those expenses under § 21(a)(1) and (2). The $8,426 tax attributable to the wife would be reduced to $7,466. By factoring in the effect of the credit for child and dependent care expenses, this wife's income will fall short by $393 of covering the expenses listed in the example, and she will still be discouraged from working. The § 21 credit grants only partial relief for child-care costs, and is, therefore, inadequate in alleviating the economic pressure facing wives who work outside the home. See Jonathan Barry Forman, Beyond President Bush's Child Tax Credit Proposal: Towards a Comprehensive System of Tax Credits to Help Low-Income Families with Children, 38 EMMORY L.J. 661, 677-84 (1989); McCaffery, Fresh Look, supra note 13, at 1007, 1009; Zelenak, supra note 29, at 372-73; Ellen R. Zieve, To Work or Not to Work, and What About the Kids?, 3 S. CAL. REV. L. & WOMEN'S STUD. 165, 174-76 (1993). In addition to the § 21 credit for child-care costs, Congress has also provided a limited exclusion for certain employer-provided child care under I.R.C. § 129 (1994). Section 129 excludes the value of a child-care plan from income only if an employer established the plan. Consequently, very few employed women obtain the benefits of § 129. See McCaffery, Fresh Look, supra note 13, at 1008. It is assumed in this example that the wife's potential employer does not provide a qualifying dependent care assistance program, so that exclusion provides her with no tax benefit.
Joint Return Rate Structure

- additional lunch expense ($5 per day or $25 per week for 50 weeks per year) of $1,250;
- housecleaning expense of $1,200;\(^{188}\)
- professional attire at $2,500;
- additional dry-cleaning expenses of $700.\(^{184}\)

Total = $31,353

This list does not include other costs of working, such as higher car insurance premiums for regular commuting, more frequent restaurant patronage due to decreased time available for meal preparation, job training costs, etcetera, all of which contribute to making employment even less viable. A wife earning $30,000 annually using the above assumptions would generate negative annual disposable income. Clearly, her employment in this situation is not financially worthwhile, and she will choose not to take the job. This example illustrates the problem of aggregation. Had the wife paid only $6,002 in federal income tax by filing separately,\(^{186}\) her earnings would have exceeded her total costs by $1,071, and her decision to work would have brought in more money than it cost. Of course, given such small post-expense wages, the wife may still opt not to work outside the home. Nevertheless, this example serves to illustrate how the additional tax due to aggregation would, on the margin,

\(^{188}\) Of course, some women who take paying jobs forgo hiring a housekeeper and do most of the housework themselves. See Louis Harris, Inside America 98-99 (1987); Arlie Hochschild & Anne Machung, The Second Shift: Working Parents and the Revolution at Home 3, 276 (1989); McCaffery, Fresh Look, supra note 13, at 985. Those women can be viewed as bearing the additional housecleaning expense in the form of the drain on their life energy and their time.

\(^{184}\) Apart from the § 21 credit for child and dependent care expenses and the § 129 exclusion for dependent care assistance programs, none of these listed items may be used to reduce tax liability. Such items are considered to be nondeductible personal expenses. Grace Blumberg argues compellingly that such items should not be viewed as personal expenses, but rather as expenses incurred in the production of income and accordingly should be deductible. Blumberg, supra note 10, at 63-80. See also Daniel I. Halperin, Business Deduction for Personal Living Expenses: A Uniform Approach to an Unsolved Problem, 122 U. PA. L. REV. 859 (1974); William A. Klein, Income Taxation and Commuting Expenses: Tax Policy and the Need for Nonsimplistic Analysis of "Simple" Problems, 54 CORNELL L. REV. 871 (1969); Staudt, supra note 43, at 1600-05. Even though these items are not deductible for purposes of computing tax liability, they should be deducted from the wife's gross income in determining whether it is financially worthwhile for her to work. Cf. Mapes v. United States, 576 F.2d 896, 903 (Ct. Cl. 1978) (acknowledging that the family incurs "significant" additional expenses when the second earner takes a job, including "transportation, lunches, and clothing, which are not tax deductible").

\(^{186}\) Her tax of $6,002 is not reduced by the § 21 credit for child and dependent care expenses because that credit is unavailable to married spouses who file separately. I.R.C. § 21(e)(2). See also Publication 555, supra note 52, at 4.
discard some women from working, women who do not earn enough to afford the additional tax. Even women who earn just enough to pay the additional joint tax attributable to their incomes would tend to be discouraged from working because their post-expense wages are low. Aggregation serves to hinder women’s access to employment. Not only does aggregation discourage some women from working altogether but it tends to make working less profitable for wives than for husbands. The problem results because aggregation imposes a higher effective tax rate on the secondary earner than on the primary earner.

Statistical studies amply support the phenomenon that higher taxes on women discourage them from participating in the paid labor force by demonstrating that a married woman’s earnings are more tax sensitive than are those of a married man. "[T]he

186 Anecdotal stories have surfaced describing instances in which women actually decided to leave the work force because the costs of working exceeded their incomes. See Elizabeth Ritchie Johnson, "I Couldn’t Afford My job," REDBOOK, Apr. 1991, at 89-90. See also Stephen E. Frank, Higher Taxes on Wealthy May Reduce Number of Two-Income Households, WALL ST J., Aug. 13, 1993, at B5a (citing economists who predict that higher tax rates would force some women to leave the work force); Lewin, supra note 181, at E18 (discussing the case of a woman who left work after realizing that her salary was not netting the family much money once taxes and work-related expenses were taken into account); All Things Considered, supra note 31 (interviewing Robert Willard, certified financial planner, who described a couple in which the wife was considering leaving the labor force because of her low profitability due to taxes); Dateline NBC: Two for the Money, supra note 174 (interviewing a two-earner family in which the wife’s cost of working exceeded her income, yet she decided to continue working to retain the healthcare benefits available through her job).

187 This pattern suggests the propriety of a deduction or credit for two-earner couples, or a deduction for “personal” expenses that are incurred to enable the second earner to work. See Contract with America Hearings, supra note 31, at 88-89, reprinted in 66 TAX NOTES at 1346 (statement of Professor Alstott); Blumberg, supra note 10, at 59-62; Gann, supra note 29, at 36. For a discussion of some pros and cons of such an approach, see Bittker, supra note 29, at 1433-37.

188 See McCaffrey, Fresh Look, supra note 13, at 1041 n.219; Davis, supra note 18, at 211.

net effect of the higher marginal rate faced by married women is to induce a substitution of either home production or leisure for market production."\(^{190}\) The media has also acknowledged the greater tax sensitivity of wives' earnings compared to those of husbands.\(^{191}\) Furthermore, even the government has acknowledged in legislative history to the Contract with America Tax Relief Act of 1995\(^{192}\) that the aggregation effect found in the current joint return system, which also contributes to the marriage penalty, causes concern because of "the potential work disincentive it causes."\(^{193}\)

Some commentators would argue that the tax attributable to the wife's $30,000 of earnings is not $8,426, but rather is only $6,810, or a third of the joint return tax liability of $20,429 because her $30,000 of income is one third of the couple's combined income.\(^{194}\) Of course, even if that allocation were appropriate, the wife would still be better off by filing separately rather than jointly, in which case her tax liability would be only $6,002. In addition to the wife being worse off by filing jointly due to lack of access to her husband's large tax savings,\(^{195}\) it is improper in analyzing the aggregation effect to divide the $20,429 joint tax liability between the spouses in proportion to their relative net incomes. In this context the issue is the effect of the current tax structure on the wife's decision of whether or not to engage at all in paid labor. Therefore, the proper comparison is to determine whether the couple will have additional disposable income as a result of the wife's decision to enter the work force.\(^{196}\) Stated alternatively, the proper comparison is to determine how much


\(^{191}\) See Martin Feldstein, Tax Rates and Human Behavior, WALL ST. J., May 7, 1993, at A14; Frank, supra note 186, at B5A.


\(^{194}\) See McIntyre, supra note 118, at 484. Professor McIntyre does not explain how to compute the tax attributable to the wife's income. He merely states that "[f]or married couples who are not pooling, the burden of the tax on the community will be a matter of negotiation." Id. Nevertheless, because he implies that income is fungible, that income from each spouse finds its way into part of the lowest tax bracket, I conclude that he would apportion tax liability between the spouses in proportion to their relative incomes.

\(^{195}\) See infra notes 255-570 and accompanying text.

\(^{196}\) See Davis, supra note 18, at 210.
additional tax the couple must pay as a result of the wife's $30,000 of earnings. If only the husband works, the joint return tax liability would have been $12,003. The impact of the wife's job is to increase the family's total tax by $8,426 to $20,429. In deciding whether or not the wife should work, it is this additional $8,426 that must be considered, not $6,810. The $8,426 is her true tax cost for purposes of determining whether or not she will enter the work force.

Professor Michael McIntyre argues compellingly that attributing the wife's, rather than the husband's, income to the highest marginal tax rates is a reflection of flawed human perceptions, and that the tax code does not differentiate between sources of income when assigning the income to various brackets: "[t]he tax system ... treats all marital income alike." He argues that the view of the wife as a secondary earner who must be taxed in the highest applicable brackets is due to human bias, not to bias intrinsic to the tax code. Income from both spouses could be said to be taxed in the lowest bracket because income is fungible. If the husband were the spouse deciding whether or not to work, it would be his $60,000 of income that could be viewed as being taxed in the upper brackets and the wife's income that would be viewed as being taxed in the lowest brackets.

Although insightful, this criticism of the aggregation effect ignores the reality that most wives are, in fact, secondary earners precisely because most wives tend to earn less than their husbands. In many families neither spouse is considered a

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197 McIntyre, supra note 118, at 484.
198 See id.
199 See Mapes v. United States, 576 F.2d 896, 901-02 (Cl. Cl. 1978) (taxpayer's argument in a constitutional challenge to the aggregation effect); Johnson v. United States, 422 F. Supp. 958, 968-69 (N.D. Ind. 1976) (taxpayer's argument in a constitutional challenge to the aggregation effect).
200 Census data from 1994 indicate that median income for married men whose wives were present substantially exceeded the median income for married women whose husbands were present. The median income for married men was $28,577, while the median income for married women was only $11,859. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Series P60, Table P-6 (1996). These median incomes include incomes not only from full-time workers but also the incomes of spouses who work part-time and the incomes from those who do not participate at all in the labor force. See infra notes 238-54 and accompanying text. See also Bankman & Griffith, supra note 189, at 1926-27 (stating that wives have been the marginal workers historically); Gann, supra note 29, at 42 n.137 (asserting that wives stay out of the labor force becoming, in effect, secondary earners in part because husbands are paid more); McCaffery, Fresh Look,
discretionary worker because income is needed from both spouses. However, in most families, if one spouse must leave the work force to assume, for example, child-care responsibilities, it is the lower-earning spouse who will usually do so. Traditional societal values and the failure to tax home production further encourage women to stay at home and out of the work force, reinforcing the notion that wives are, in fact, secondary earners. Even in some of the few cases in which a wife earns more than her husband, the wife might still be viewed as the secondary earner because of social or biological constraints. Consequently, in assessing whether or not a wife will work, it is appropriate to assume that the highest tax brackets apply to her income. While "[t]he tax law's basic rate structure is nominally indifferent to who earns any given amount of income, ... the interface with ... real-world conditions pushes towards a traditional, gendered division of labor," with wives at home doing unpaid labor and husbands gainfully employed. Even wives

supra note 13, at 993-94, 1004-05 (describing societal tendency to marginalize the lesser-earning spouse, usually the wife, and describing wives as being viewed historically as the marginal earners); Kahng, supra note 51, at 22. But see Staudt, supra note 43, at 1610-12 (contesting that all women are secondary earners, and arguing that many women, especially women in low-income families and women of color, have historically had high attachment to the labor force). Wives also tend to be secondary earners because the realities of childbirth require them to leave their jobs at least temporarily, see McCaffery, Fresh Look, supra note 13, at 994, and because of pervasive gender bias in society, see id. at 1057-58.

See, e.g., Staudt, supra note 43, at 1611-15 (arguing that many women, especially women in poor families and women of color, are not marginal workers because their financial contributions to the family are significant, expected, or needed).

In 1994, 39.4% of married women were not in the paid labor force. See Bureau of the Census, U.S. Dept of Commerce, Statistical Abstract of the United States (1995) 406 tbl.638 (hereinafter Statistical Abstract). By contrast, only 22.6% of married men were out of the labor force in 1994. See id. at 405 tbl.636. This fact suggests that of the two spouses, wives are the most likely to be viewed as secondary or discretionary workers. As Professor Bittker noted in predicting the argument McIntyre articulates, "[i]n a society that takes the husband's job for granted and views the wife as the secondary wage earner, ... it is reasonable to describe the existing state of affairs as biased against women." Bittker, supra note 29, at 1433.

See, e.g., Staudt, supra note 43 (providing an analysis of the non-taxation of imputed income and for a feminist defense of taxing housework); McCaffery, Fresh Look, supra note 13, at 1001-05 (discussing how the failure to tax imputed income discourages women from working); Silbaugh, supra note 45, at 4447 (same).

Among my own acquaintances, a wife who earned more than her husband was the spouse to leave the work force upon having a child. Clearly, cultural influences about the proper roles of men and women influenced that couple to treat the wife as the secondary earner despite the fact that she had earned more than her husband.

McCaffery, Fresh Look, supra note 13, at 1059. See also Zelenak, supra note 29, at 366-67 (characterizing McIntyre's approach as formalistic and criticizing it as failing to take social reality into account).
who work despite the aggregation effect are harmed by it because the higher rates that apply to women render their work effort less profitable than that of their husbands. To the extent the aggregation effect discourages women from working, they are harmed economically both in the short-run because they generate no income of their own and in the long-run because they forgo developing the valuable human capital of work experience.

Despite aggregation and its tendency to discourage women from working, wives' labor force participation rates have been increasing over the past six decades. In 1940, 14.7% of married women participated in the labor force. By 1950 that rate had increased to 23.8%. As recently as 1994, 60.6% of married women participated in the labor force. Consequently, 39.4% of married women, a significant portion of them, still did not participate in the work force by 1994 despite trends to the contrary. Accordingly, many of those women must lack economic independence during their marriages. Undoubtedly many factors contribute to wives' reluctance to enter or remain in the labor force, but the aggregation effect, disproportionately high taxation of married women's earnings, is probably one of them. Although women have been entering the work force in larger and larger numbers, it appears that for married women, various factors, including the aggregation effect, currently prevent significant additional work force participation.

Some commentators point to women's increased participation in the work force as evidence that the aggregation effect does not exist or is unimportant. Analysis of a family's additional tax burden when a second spouse enters the work force, as provided

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207 See, e.g., Pechman, supra note 114, at 77 (noting these historical trends); Ruth Sidel, Women and Children Last: The Flight of Poor Women in Affluent America at xv, 60 (1986); Women's Bureau, U.S. Dep't of Labor, Pub. No. 92-1, Women Workers: Outlook to 2005, 2 tbl.1, (1992) (providing and projecting labor force participation rates of men and women over a 30-year time period from 1975 to 2005); Gann, supra note 29, at 33 & nn.114 & 116, 34 & n.119, 35 (providing charts of married women's labor participation rates from the Bureau of Labor Statistics through 1979).


209 See T. Aldrich Finegan, Participation of Married Women in the Labor Force, in Sex, Discrimination, and the Division of Labor 27-29 (Cynthia B. Lloyd ed., 1975) (listing factors that encourage and others that discourage married women from working in the paid work force).

210 See, e.g., McIntyre, supra note 118, at 486-87.
in Table 1 above, definitively demonstrates the existence of the aggregation effect. One can speculate that without such a pattern in the joint return taxation of married couples, even more married women would enter the work force. Professor Pamela Gann has suggested that the effect of aggregation is properly determined by comparing the percentage of women who participate in the labor force under aggregation with the percentage who would participate if aggregation were repealed, rather than by examining historical trends in married women's labor force participation rates.\footnote{Gann, \textit{supra} note 29, at 43. Accord Rosen, \textit{supra} note 165, at 426.} The fact that many women already work despite current tax law's aggregation of spousal incomes merely demonstrates first, that many women are now earning enough to afford the additional tax, second, that many couples experience economic need severe enough to encourage work even when post-tax earnings are minimal,\footnote{See McCaffery, \textit{Fresh Look}, \textit{supra} note 13, at 1017 n.133.} and third, that other factors such as evolving social attitudes\footnote{See Gann, \textit{supra} note 29, at 43; Winn & Winn, \textit{supra} note 52, at 860.} have ameliorated the pressure discouraging women from working. Perhaps, many women enter or remain in the labor force because they need "economic security in the case of divorce."\footnote{Zelenak, \textit{supra} note 29, at 376.} Others probably work despite aggregation because of the psychic benefits a productive professional life can provide. In describing reasons for increased labor force participation rates among affluent wives, Professor McCaffery has stated, "these tendencies are independent of tax considerations, and do not serve to diminish the particular incentives generated by tax laws."\footnote{McCaffery, \textit{Fresh Look}, \textit{supra} note 13, at 1028.} Even though many married women are in the paid work force, significant numbers of others are not, in part perhaps, because of aggregation.\footnote{See, \textit{e.g.}, Zelenak, \textit{supra} note 29, at 369-70 (noting that many married women work either part-time or not at all).} Under aggregation, those women who do work in the paid labor force are rendered less profitable than are primary earners. "Thus, despite the increase in labor force participation, women continue to suffer economic disadvantages at the hands of the tax law."
of the tax system.” Aggregation operates to discourage women on the margin from working once they marry, and in that respect it is another example of the pattern described in the Ames hypothetical above in which government policy discourages wives from paid work.

In the current tax rate system, spouses are financially encouraged to file jointly whenever their incomes differ, that is, whenever one earner is primary and the other is secondary. Nevertheless, through the aggregation effect, the very act of filing jointly further discourages the secondary earner from working, thereby resulting in continued income disparity. As long as incomes are disparate, couples will have an incentive to file jointly. As long as couples file jointly, the aggregation effect will continue to discourage women from working and will perpetuate the disparity in spousal incomes, resulting again in an incentive to file jointly. The current system of joint filing operates against women because they earn less than men and maintains that status quo by discouraging many women from working altogether. In this manner the current rate structure contributes to the perpetuation of inequality between men and women by reinforcing the inequality of spousal incomes. This vicious circle reveals the gendered nature of the tax code and shows how the

217 Davis, supra note 18, at 213 (discussing the aggregation effect).
218 See supra Part III.A.3.
219 Cf. McCaffery, Fresh Look, supra note 13, at 988 (arguing that aspects of the rate structure serve to perpetuate traditional family patterns); id. at 1029-30 (arguing that tax laws contribute to the self-perpetuation of certain gender biases); id. at 1030-32 (illustrating how employer expectations of women employees can become self-fulfilling prophesies due to the lower remuneration the expectations prompted); Nancy Chodorow, The Reproduction of Mothering: Psychoanalytic and the Sociology of Gender (1978) (making the point that in non-tax, psychoanalytic, sociological, and philosophical contexts, such as family dynamics, gender inequalities tend to be perpetuated automatically and are self-reinforcing); Claudia Golden, Understanding the Gender Gap: An Economic History of American Women 214 (1990); Hochschild & Machung, supra note 183, at 254 (same as Chodorow); Mary E. Becker, Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazor, 53 U. CHI. L. REV. 934 (1986); Stephen Coate & Glenn G. Loury, Will Affirmative Action Policies Eliminate Negative Stereotypes?, 83 Am. Econ. Rev. 1220, 1221 (1993) (modeling self-fulfilling prophesies); Mayer C. Freed & Daniel D. Polsby, Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment, 1981 Am. B. Found. Res. J. 585, 634-35 (discussing "national" statistical discrimination that leads to self-fulfilling prophesies, using female job persistence as an example); Reuben Gronau, Sex-related Wage Differentials and Women’s Interrupted Labor Careers—The Chicken or the Egg, 6 J. Lab. Econ. 277, 294 (1988); McCaffery, Slouching Towards Equality, supra note 13, at 615-16, 624 (describing tendency of wage discrimination to be self-perpetuating along gender lines in part because of income aggregation); Carol M. Rose, Women and Property: Gaining and Losing Ground, 78 Va. L. Rev. 421, 443-54 (1992) (asserting that gender discrimination is perpetuated through self-fulfilling prophesies).
rate structure contributes to denying economic independence to women.\textsuperscript{220} Eliminating gender-based wage discrimination alone

\textsuperscript{220} Cf. McCaffery, \textit{Fresh Look}, supra note 15, at 1000 (demonstrating how taxes contribute to the self-perpetuation of single-earner families in the context of the social security system); Davis, supra note 18, at 253 (arguing generally that the tax system helps perpetuate women’s inferiority in society by “subsidiz[ing] patriarchy”) (citation omitted).

Critics might argue that the high U.S. divorce rate is evidence that wives are not economically dependent on their husbands. True economic dependence, they would assert, would tend to preclude or discourage women from divorcing their husbands.

Many responses to this argument demonstrate its weaknesses. First of all, the aggregation effect harms women economically during marriage, not upon divorce. Once spouses divorce they can no longer file jointly, and the wife’s first dollar of earnings are no longer taxed at her husband’s top marginal tax rate. Indeed, commentators have suggested that the divorce rate may be high, in part, because of the marriage penalty. See, e.g., Alan L. Feld, \textit{Divorce, Tax-Style}, 54 TAXES 608, 609 (1976). But see George E. Ray, \textit{Proposed Changes in Federal Taxation of Community Property: Income Tax}, 30 CAL. L. REV. 397, 413 (1942) (arguing that tax consequences are unlikely to impact a couple’s marital status); Robinson & Wenig, supra note 31, at 787 n.59 (noting that it is unclear to what extent the marriage penalty influences couples either to divorce or not to marry); Zelenak, supra note 29, at 364-65 (noting that in most cases whether the marriage penalty has an effect is uncertain). The true impact of the marriage penalty on divorce rates, if any, is the subject of debate and is difficult to determine.

Furthermore, while the aggregation effect economically harms all wives who earn less than their husbands, only those wives who are discouraged from working altogether will be extremely dependent on their husbands. Those wives would be the ones most likely to be precluded from divorcing because of their nonparticipation in the work force. Other wives, those who work because they earn enough to afford the additional tax the aggregation effect imposes, would still likely be able to divorce because they do participate in the labor force. For these women, aggregation operates to tax them at a high effective tax rate. The aggregation effect would not prevent them from divorcing, but it would leave them with fewer assets after taxes so that they would be poorer upon divorce than would be the case in the absence of aggregation. See, e.g., Beck, supra note 58, at 384 (noting the insecure economic position of divorced women in the United States).

Factors unrelated to a woman’s economic status often contribute to the high divorce rate. For example, social factors such as physical and emotional abuse contribute to the high U.S. divorce rate. Women often divorce for these reasons even when they are economically dependent. Therefore, the premise that a high divorce rate signifies that women have economic independence is flawed. Many women divorce despite their lack of financial resources and despite the consequent poverty they tend to experience. See, e.g., Lenore J. Weitzman, \textit{The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America} 325-56 (1985) (hereinafter \textit{Weitzman, The Divorce Revolution}) (asserting that in 1985 women on average experienced a 73% decline in their standards of living the year after divorce, while men enjoyed a 42% improvement in their standards of living); Beck, supra note 58, at 384; McCaffery, \textit{Fresh Look}, supra note 15, at 1051-52 (referring to economic disaster upon divorce); Robert E. McGraw et al., \textit{A Case Study in Divorce Law Reform and Its Aftermath}, 20 J. FAM. L. 443 (1981-82); James B. McLendon, \textit{Separate but Unequal: The Economic Disaster of Divorce for Women and Children}, 21 FAM. L.Q. 551, 404 (1987); Karen Seal, \textit{A Decade of No-Fault Divorce: What It Has Meant Financially for Women in California}, FAM. ADVOC., Spring 1979, at 10; Cynthia Starnes, \textit{Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault}, 60 U. CHI. L. REV. 67, 70-73, 78-85 (1993); Lenore J. Weitzman, \textit{The Economics of Divorce: Social and Economic Consequences of Property, Alimony, and Child Support Awards}, 28 UCLA L. REV. 1181 (1981) (hereinafter \textit{Weitzman, The Economics of Divorce}); Joan C. Williams, \textit{Married Women and Property}, 1 VA. J. SOCIOL. POL’Y & L. 383 (1994) (discussing how family law contributes to women’s poverty upon divorce); Heather Ruth Wishik, \textit{Economics of Divorce: An Exploratory Study}, 20 FAM. L.Q. 79 (1986). In addition, divorces sought by men contribute to the high divorce rate. Those divorces suggest nothing about whether or not wives are economically dependent. Thus, the high divorce rate may coexist with large numbers of wives being economically dependent on their husbands.
will not solve the problem of women's economic inferiority because the current tax system operates on income patterns that exist, in part, for nondiscriminatory reasons. These income patterns induce joint filing which, in turn, continues to discourage many women from working and thereby perpetuates disparity in spouses' incomes. 221

By discouraging married women from working, not only does the aggregation effect "deter[] [married women] from entering the labor force and the mainstream of social and political life," 222 but it also harms unmarried women. "To the extent that this incentive to remain at home reinforces traditional, patriarchal stereotypes about the female role in family and society, the tax filing system has a negative impact on single and divorced women [as well]." 223 In this manner the tax filing system "reflects a societal policy of keeping married women in the home, and thus constitutes a significant barrier to the full recognition of women as equal members of society." 224 By discouraging the paid labor of married women, the aggregation effect sends the message to society that women should not work. 225 This pattern not only harms women, but also creates inefficiencies for society at large by discouraging married women from taking jobs for

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Another response to the argument that the high divorce rate demonstrates women's economic independence is that certain states' divorce laws enable women without assets of their own during marriage to divorce by giving them some rights to the assets their husbands have accumulated. These property division and alimony rules come into play only upon divorce and do not give the wife access to her husband's assets during marriage. See Murray, supra note 52, at 25. Thus, the high divorce rate does not prove that wives are economically independent during marriage. While a couple remains married, the tax system, through the aggregation effect, contributes to keeping wives financially dependent on their husbands. In this manner, the tax system can be said to be contributing in intact marriages to the concentration of power in men's hands.

Through the aggregation effect joint filing harms wives financially. That the aggregation effect can harm wives' economic well-being does not mean that it is so severe that it completely prevents women from divorcing. Even if the financial harm to wives from income aggregation does not reach the level of total economic devastation, and even if divorce remains available to her, the tax system should not favor one spouse over the other on a systematic basis.

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221 See Zelenak, supra note 29, at 363.
222 Davis, supra note 18, at 210.
223 Id. at 198.

224 Id. at 213 (footnotes omitted). See also Bittker, supra note 29, at 1433; Wendy C. Gerzog, The Marriage Penalty: The Working Couple's Dilemma, 47 Fordham L. Rev. 27, 36-37 (1978). This point, with regard to the effect of aggregation, may also be made with respect to the impact of income splitting. See supra note 132.
225 See Davis, supra note 18, at 214 (arguing that aggregation tacitly teaches messages that reinforce job discrimination and sexual stereotypes).
which they may be well qualified, perhaps more so than those currently undertaking those jobs.\textsuperscript{226} By creating an artificial barrier to employment, the aggregation effect contributes to the costly misallocation of labor force resources, misallocations that have been estimated to be in the billions of dollars.\textsuperscript{227}

C. Income Splitting and Aggregation Combined

1. Joint Return Rates Penalize Marriage When Spouses Defy Conventional Marital Roles and Benefit Marriage When Spouses Conform to Traditional Roles

Because income splitting and aggregation each independently reward families in which earnings are concentrated in one spouse rather than distributed between them evenly, their combined effect, not surprisingly, is to reward disparate-income couples greatly and to penalize similar-income couples significantly.\textsuperscript{228} Consistent with this intuition, a number of tax scholars have noted that the marriage penalty diminishes as the spouses' incomes diverge.\textsuperscript{229} A couple fitting the stereotypical pattern in which the husband works and the wife does not will have a minimal marriage penalty, or even a marriage benefit, if the spouses file jointly. However, the more the couple strays from this traditional living pattern, that is, the more equivalent the spouses' incomes, the more severe their marriage penalty.\textsuperscript{230} In this manner the operation of the marriage penalty and bonus

\textsuperscript{226} See McCaffery, Fresh Look, supra note 13, at 1042, 1051; Davis, supra note 18, at 212. For analyses of the efficiency consequences of the aggregation effect, see Gann, supra note 29, and McCaffery, Fresh Look, supra note 13.

\textsuperscript{227} See BERNARD, supra note 164, at 160-62; Winn & Winn, supra note 52, at 859. The failure to tax household capital and labor results in excessive allocation of those resources to the home. According to economist, Professor Boskin, this misallocation cost society between $24 billion and $45 billion in 1972. Michael J. Boskin, Efficiency Aspects of the Differential Tax Treatment of Market and Household Economic Activity, 4 J. PUB. ECON. 1, 11-12 (1975).

\textsuperscript{228} See supra note 129 and accompanying text.

\textsuperscript{229} See supra notes 119-20 and accompanying text. See also supra Table 3. Other features of the tax system, such as the earned income tax credit and certain passive activity loss limitations, function to exacerbate the marriage penalty that is already present because of the rate structure. See generally Alstott, supra note 118 (describing how the earned income tax credit contributes to a marriage penalty for low-income taxpayers); Harmelink, supra note 118, at 593-94 passim; Hulse, supra note 29, at 252 (describing how the standard deduction causes a marriage penalty). This Article will focus only on the contribution of the joint return rate structure to the marriage penalty and bonus.

\textsuperscript{230} See supra notes 119-20 and accompanying text.
seem to “reinforce traditional gender roles within the family.”

Arguably, the tax system should not penalize taxpayers in proportion to how much they depart from a sexist stereotype or benefit them because they fit the stereotype. Because of income splitting and aggregation, disparate income couples have the most to gain by filing jointly, often obtaining a marriage bonus. For the same reasons, equal income couples have the most to lose, suffering significant marriage penalties as a result of the great economic harm conferred on them by aggregation and the nonexistent benefit from income splitting.

The pattern in which the marriage penalty becomes more severe as the spouses’ incomes converge applies only if the couple files jointly, which the spouses will do until incomes are exactly equal. Notice that if the couple had not been induced to file jointly, and instead had been able to file separately, a different pattern would emerge, one which might encourage both spouses to work. The couple in which both spouses earned $60,000 would have experienced a marriage penalty of $1,485 had they filed separately. The couple in which the husband earned $80,000 and the wife earned $40,000 would have had a larger marriage penalty of $1,717. And the couple in which only the husband worked, earning $120,000, would have had an even greater marriage penalty of $2,992. Under separate filing, the more divergent the spouses’ incomes, that is, the more they fit sexist stereotypes, the greater the marriage penalty. By contrast, couples with equivalent incomes, those who challenge

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21 Contract with America Hearings, supra note 31, at 85, reprinted in 66 TAX NOTES at 1344 (statement of Professor Alstott). See also supra note 129.

22 See supra notes 222-25. However, even if the marriage penalty encourages traditional gender roles, this may not necessarily be harmful. Rather, the marriage benefit obtained by the family in which the wife raises children and cleans the house, forgoing paid labor, may be viewed as financial compensation for her efforts in the home. It has been acknowledged, however, that this tax benefit accorded to the family may not benefit the wife individually. See Alstott, supra note 30, at 2029-30, 2050-51.

23 Cf. Gann, supra note 29, at 42 n.137 (describing the aggregation effect and noting that if the wife could file separately, she would be more likely to work outside of the home).

24 See supra Table 3. Cf. Hulse, supra note 29, at 253 (proposing a system where married couples could opt either to file jointly or as if they were single and noting that combined tax liability increases under the single rates the more divergent the spouses’ incomes).

conventional roles, would experience the smallest marriage penalty. If the benefits of income splitting were not embedded in the rate structure for couples who file jointly, then separate filing would emerge and would provide an incentive for couples to avoid traditional roles. By avoiding the stereotypical working patterns and by accepting similar financial responsibilities for the family, the spouses could minimize their marriage penalty. Vis-à-vis current patterns, women would be encouraged to promote their own economic independence by working and would have first-hand access to greater resources, larger post-tax earnings. Furthermore, the tax system would provide a benefit whose availability and amount would be tied to how closely the couple promotes economic independence for both spouses. The fact that the marriage penalty worsens when both spouses work is another feature of the U.S. tax system that the Ames example illustrates. Through the tax system, the government rewards divergent spousal incomes, consequently discouraging the secondary earner from working.

2. Filing Jointly Benefits Husbands and Harms Wives Economically

Another joint return pattern with severe implications for women results from the combined impact of income splitting and income aggregation. This pattern has not been described or addressed in the tax literature until now. When a couple living in one of the forty-two common-law jurisdictions files jointly rather than separately, income splitting and aggregation together act to reduce the tax attributable to the higher earner and to increase the tax attributable to the lower earner.~ Thus, the benefits and burdens of joint filing are not distributed evenly between the spouses when one earns more than the other, as is the usual case.237

~This pattern is not present for couples living in community property states because of the different manner in which their separate return liabilities are computed. Community property spouses are subject to income splitting under Poe v. Seaborn even if they file separately. See supra note 74.

237 Note that if the spouses earned the same amount of taxable income, then the benefits and burdens of joint filing would be distributed between them evenly. However, if they earned the same amounts, there would be no economic benefit to filing jointly. They would be no worse off by filing separately. Whenever spouses should be filing jointly to save in taxes, the benefits of joint filing will inure to the higher-earning spouse, usually the husband, and the burdens will inure to the lower-earning spouse, usually the wife. The tax attributable to the husband would be less than the amount he would have owed had he
One economic reality in society is that men tend to earn more than women. Although the wage gap between men and women has been diminishing over the last thirty years in the United States, women on average still earn significantly less than men do. Data from the Bureau of Labor Statistics show that for the fourth quarter of 1995 “[w]omen who usually worked full time had median earnings of $407 per week, 74.3 percent of the $548 median for men.”\(^2\) Even for men and women in managerial and professional specialty occupations and for college graduates with advanced degrees, men who usually worked full time earned significantly more than women who usually worked full time. Men in those occupations earned $825 per week while such women earned $604 per week. “Among college graduates with advanced degrees ... the highest 10 percent of male workers earned $1,916 or more [per week], while the highest 10 percent of their female counter-parts made [only] $1,403 or more.”\(^2\)

Data from the Bureau of the Census also demonstrate that men entering the full-time work force earned significantly more than full-time female entrants. From 1991 through 1993 those men earned an average of $459 per week, while their female counterparts earned only $306 per week.\(^2\) Assuming fifty weeks of work per year, the difference of $153 per week amounted to $7,650 less income for women than for otherwise similarly situated men. This disparity constituted half of the women’s annual income. Women entering the full-time work force were earning only two-thirds of what full-time male entrants to the work force were making. Data from 1994 indicate that the median annual earnings of all full-time workers were $30,854 for men and $22,205 for women.\(^2\)

All of the above-referenced data compare earnings of full-
time\textsuperscript{242} working men and women without regard to their marital status. Because men tend to earn more than women, it should surprise no one that husbands also tend to earn more than their wives. In fact, data comparing earnings of husbands and wives show an even greater disparity than that present between men and women generally\textsuperscript{243} because of the many wives who work part-time\textsuperscript{244} or not at all.\textsuperscript{245} Census data from 1994 indicate that median income for married men whose wives were present substantially exceeded the median income for married women whose husbands were present. The median income for married men was $28,377, while the median income for married women was only $11,859.\textsuperscript{246} These figures include incomes not only from full-time workers but also the incomes of spouses who work part-time workers if they reported that they usually worked thirty-five or more hours per week. See Bureau of Labor Statistics, supra note 164. \textsuperscript{245} See Francine D. Blau & Lawrence M. Kahn, The Gender Earnings Gap: Learning from International Comparisons, Papers & Proc. 104th Annual Meeting Am. Econ. Ass'n in 82 Am. Econ. Rev. 533, 534 (1992) (among married workers, the ratio of female to male earnings in the United States is under 0.60); Dowd, supra note 164, at 453 & n.137. \textsuperscript{246} See Hochschild & Machung, supra note 183, at 2 (noting that one-third of mothers who work have part-time jobs). Part-time jobs pay considerably less than full-time jobs both in terms of benefit eligibility and wages. See Chris Tilly, Short Hours, Short Shift: Causes and Consequences of Part-Time Work 3-12 (1990); Martha Chamallas, Women and Part-Time Work: The Case for Pay Equity and Equal Access, 64 N.C. L. Rev. 709, 711, 715-16 (1986) (noting that part-time work is underpaid); McCaffery, Fresh Look, supra note 13, at 985. In 1992, only 59.2\% of all married women were in the waged labor force. See Statistical Abstract, supra note 202, at 405 tbl.636. In that same year married women, on average, contributed approximately 32\% of their household's income. See Lawrence Mishel & Jared Bernstein, The State of Working America 1994-95 at 61 (1994). In 1980 wives' median contribution to total family earnings was only 26.7\%. See Women's Bureau, U.S. Dep't of Labor, Bulletin 298, Time of Change: 1983 Handbook on Women Workers, 18 tbl.1-12, 19 tbl.1-13 (1983). Husbands tend to earn significantly more than their wives. Professor McCaffery reports that "married working women earn[ed], on average, [only] forty-six percent of what their husbands did." McCaffery, Fresh Look, supra note 13, at 994 (citing Dowd, supra note 164, at 445 n.86). If only the spouses contributed to household income, this 46\% corresponded with wives earning 31.5\% of the household income. This information is derived by solving the two equations below: Total income = W's income + H's income. Wife's income = 0.46 x H's income. Total income = 0.46 x H's income + H's income. Total income = 1.46 x H's income. Total income = (1.46) x (W's income/0.46). (0.46/1.46) x Total income = W's income. 0.315 x Total income = W's income. The wife's income is 31.5\% of the couple's total income.

Census data from 1994 indicate that many more women than men work part-time or not at all. Full-time male workers numbered 51,580,000 while full-time female workers numbered only 34,155,000. Assuming a population with at least as many women as men, at least 17,000,000 more women than men worked either part-time or not at all. See Bureau of the Census, U.S. Dep't of Commerce, Household Economic Studies, Income and Poverty: 1994 Income Summary, tbl.A (1996).
time and the incomes from those who do not participate at all in the labor force.\footnote{247} Spouses whose earnings are represented by these median figures would have a compelling financial incentive to file jointly rather than separately because of the great income disparity. Furthermore, of the two spouses, the wife is much more likely than the husband to be the lower-earning spouse.

Despite thirty years of narrowing, the gender wage gap for full-time workers continues today.\footnote{248} A variety of factors contributes to this phenomenon: jobs traditionally performed by women typically pay less than those traditionally performed by men;\footnote{249}
women tend to be concentrated in low-paying, non-unionized positions in the service industry;^{250} jobs in which women are concentrated typically offer little opportunity for advancement;^{251} women are more likely than men to take time out of career development to raise children;^{252} if financial constraints limit higher education to only one of the children in the family, that opportunity is typically given to the son, not the daughter, and the daughter's earning potential consequently remains more limited;^{253} and, of course, gender discrimination continues to some extent with respect to wages for men and women performing the same job.^{254

See generally sources cited supra note 249.

See Hunter, supra note 248, at 155 (gender segregation reconstitutes itself after women enter the labor force, resulting in women continuing to be clustered in relatively low-paying positions); GOLDIN, supra note 219, at 75; JACOBS, supra note 249; Blau & Kahn, supra note 243, at 537-38; Rose, supra note 219, at 436. See generally sources cited supra note 249.

See generally sources cited supra note 249.


Even if the wife continues to work once she has children, she may be relegated to a low-paying job because her "childcare responsibilities [may preclude higher-paying jobs that require] unpredictable hours or travel." Alstott, supra note 30, at 2025. See also Gillian K. Hadfield, Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap, 82 GEO. L.J. 89, 89 (1993) (noting that "a major, if not the major, determinant of the gender gap in compensation" is the fact that women remain primarily responsible for the care of children and of the home).


See Sidel, supra note 207, at 66; Law, supra note 9, at 1249, 1294-510; McCaffery, Slouching Towards Equality, supra note 13, at 600. See generally GOLDIN, supra note 219, at 85-118. See also supra notes 248-53 and accompanying text.
When one spouse earns more than the other, as is usually the case among married couples, then joint filing does not allocate the benefit of income splitting and the burden of aggregation equitably between the two spouses. Because husbands tend to earn more than wives, the pattern in which joint filing reduces the tax attributable to the higher earner and increases the tax attributable to the lower earner usually inures to the benefit of husbands and to the detriment of wives. Therefore, the higher wage earner, usually the husband, is better off by filing jointly compared to filing separately, while the lower earner, usually the wife, is worse off as a result of filing jointly. Although a net economic gain results to the couple as a unit from joint filing, that benefit is enjoyed primarily by husbands, and the economic harm is suffered disproportionately by wives. Income splitting and aggregation combine to give the higher-earning spouse an income-splitting benefit which is only partially offset by the harm from aggregation. In the usual case in which the husband earns more than the wife, the husband adds half of his wife's smaller income to half of his own larger income, and thereby moves into a tax bracket that is lower than the one that would have applied to him had his income been taxed separately. In this manner, the

255 See Richard C.E. Beck, The Innocent Spouse Rules, 15 Fam. Advoc., Fall 1992, at 30, 32 (stating that divorcing wives should be cautious in filing jointly because any tax savings tends to benefit the higher-earning husbands more than their wives). Cf. McCaffery, Fresh Look, supra note 15, at 993-94 (stating that women suffer from the related phenomenon of the marriage penalty more than men because the aggregation effect has a tendency to discourage wives from working).

256 See supra notes 238-54 and accompanying text.

257 It should be noted that if the wife were the higher earner, the tax attributable to her income would drop and that attributable to the lower-earning husband would increase by filing jointly. Thus, the pattern exists with regard to income disparities between the spouses and is technically independent of gender. However, because husbands generally earn more than their wives, that pattern tends to benefit men and to harm women. As of 1989, wives earned more than their husbands in only 18% of marriages. See Crispell, supra note 128, at 9 (citing EARNINGS OF MARRIED-COUPLE FAMILIES, supra note 128). In 1994, 18.9% of wives earned more than their husbands. See supra note 164 for a derivation of this figure. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, Tables F-11 and F-15 (1996).

258 See Edison-Smith, supra note 56, at 120.

259 See supra notes 106-11 and accompanying text.

260 See supra notes 238-54 and accompanying text. It is not proposed in this article that wives should earn less or more than their husbands. Rather, this Article takes as a social fact that wives generally earn less than their husbands for a variety of reasons and explores how the current tax system impacts these higher- and lower-earning spouses.

261 See supra notes 255-58 and accompanying text.
combination of income splitting and aggregation is beneficial for the husband. By contrast, income splitting and aggregation combine to give the lower-earning spouse, usually the wife, an income-splitting benefit which is more than offset by the harm she experiences from aggregation. When she files jointly, the wife adds half of her husband's larger income to half of her own, and she moves into a higher tax bracket vis-à-vis the bracket that would have applied had she filed separately. Joint filing causes the wife's income to generate more tax than under separate filing, and also causes the husband's income to generate less tax. Furthermore, whenever spouses' incomes differ, the benefit to the husband resulting from joint filing exceeds the burden to the wife so that, as a unit, the couple is induced to file jointly rather than separately.

Table 2, above, illustrates this pattern, demonstrating that the tax burden attributable to the higher earner is lessened by filing jointly rather than separately and that of the lower earner is increased by filing jointly. The couple in which the husband earned $80,000 and the wife earned $40,000 generates a joint return liability of $29,729. Under separate filing, the husband would incur a tax of $21,564 and the wife would generate $8,802 in tax. The amount by which each spouse benefits or suffers by filing jointly rather than separately depends on the theory used to apportion the joint return liability between them. A variety of methods may be used to apportion that joint tax liability. In fact, no rule has been imposed requiring married couples to apportion their joint tax liability in a specific manner.\textsuperscript{32} Different approaches are appropriate for different analytical purposes or comparisons.

One approach would be simply to divide the total tax liability in half, attributing half, or $14,864, to each spouse under the

\textsuperscript{32} Couples who file jointly may divide their tax liability between them in any manner they choose. No rule exists mandating one approach over another because jointly filing spouses are jointly and severally liable for any unpaid tax. See I.R.C. § 6013(d)(3) (1994). From the perspective of the IRS, the apportionment method that spouses use to divide their joint tax liability between them is irrelevant because the IRS can proceed against either or both spouses for the entire amount of any unpaid tax liability. See, e.g., In re Richmond, 456 F.2d 458, 462 (5d Cir. 1972). Because couples can divide their joint return tax in any manner they choose, the true incidence of the tax between them is difficult to determine. See generally JOSEPH A. PECHMAN, TAX REFORM: THE RICH AND THE POOR 19-24 (2d ed. 1989) (discussing the incidence of taxes generally). Empirical research should be conducted to determine how spouses, in fact, apportion their joint return liabilities.
theory that the spouses share all expenses equally. This approach, hereinafter referred to as 50-50 apportionment, is not rational in theory because the amount of tax each spouse generates should depend on the amount of income each earns. Nevertheless, many couples who do not pool resources probably divide their tax liabilities in half. Under another approach, hereinafter referred to as relative-net-income apportionment, the tax burden would be attributed to the spouses in proportion to their relative net incomes. Thus, the tax attributable to the husband would bear the same proportion to the total tax bill that

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265 In Van Vleck v. Commissioner, 31 B.T.A. 433, 433 (1934), aff'd, 80 F.2d 217, 217 (2d Cir. 1935), spouses voluntarily divided their 1930 tax bill evenly between them even though only the wife had net income for the year since the husband had experienced a net loss in 1930. Van Vleck illustrates that spouses sometimes split their joint tax liability in half even when one earns more than the other. Similarly, in Chappell v. Chappell, 253 So. 2d 281, 282, 285 (Fla. Dist. Ct. App. 1971), a husband believed he should be able to divide a 1965 tax deficiency in half, to be borne half by him and half by his ex-wife even though he had earnings for that year and she had none.

When, under the rule of joint and several liability, the Commissioner collects a joint return deficiency from one spouse, then that spouse may seek contribution from the other spouse in state court. In one spouse's action for contribution against the other, some state courts have held that the spouse paying a joint return federal income tax deficiency is entitled to be reimbursed for half the other spouse regardless of the spouses' relative incomes. See Rude v. Commissioner, 48 T.C. 165 (1967) (discussing whether a wife could deduct as a nonbusiness bad debt the amount that her husband owed her pursuant to an earlier right of contribution judgment from a California state court); Rocha v. Rocha, 297 P.2d 505 (Cal. Dist. Ct. App. 1956) (under both law and an agreement between the parties); Bormaster v. Bormaster, 274 F.2d 757 (Kan. 1954); Strange v. Rubin, 456 S.W.2d 859 (Wash. 1960); and discussion infra note 375. Some spouses have been reported to divide other living expenses evenly even when one earns more than the other. See Beck, supra note 58, at 380 (discussing findings of a survey by Sheer Hite, THE HITE REPORT—WOMEN AND LOVE: A CULTURAL REVOLUTION IN PROGRESS 445-47 (1987)); Kornhauser, supra note 29, at 82 n.54 (describing findings in her own survey in which a couple described splitting some expenses evenly even though the husband earned more than the wife). Consequently, it is not inconceivable that spouses might divide their joint tax liability evenly although one had more income than the other.

264 See Edward J. McCaffery, Cognitive Theory and Tax, 41 UCLA L. Rev. 1861 (1994) sets forth the proposition that errors of cognition often influence people to make "irrational" decisions in all areas of life including tax. "If cognitive errors characterize people's thinking about tax, then such errors will in turn pervade all of those actions for which the people's ideas about tax are a predicate. These include such important acts as . . . making tax-sensitive decisions regarding work, savings, withholding, and the like." Id. at 1867-68. The present Article posits that cognitive errors may also impact how husbands and wives apportion their joint tax liabilities.

265 Before Congress adopted the rule of joint and several liability, when federal courts had occasion to apportion liability to determine which spouse should pay a tax deficiency, they consistently used this second method, ruling that joint tax liability should be divided between the spouses on the basis of their respective net incomes. See Commissioner v. Rabenold, 106 F.2d 639, 640 (2d Cir. 1940); Cole v. Commissioner, 81 F.2d 465, 467, 489 (9th Cir. 1935); Seder v. Commissioner, 28 B.T.A. 874, 877 (1933). See also Miller v. Miller, 310 N.Y.S.2d 18, 21 (N.Y. Civ. Ct. 1970) (state contribution action in which state court divided a federal tax liability between the spouses on the basis of their respective net incomes).
his income bears to total income. In this case, the joint tax attributable to the husband would be two-thirds of the total since his income comprises two-thirds of the couple’s total income. Using this method, $19,819 of the joint return tax would be attributable to the husband and $9,910 would be attributable to the wife. A third approach, hereinafter referred to as secondary-earner apportionment, would be to attribute tax first to the husband under the theory that, earning more, he is the primary breadwinner. The tax attributable to him would be the tax liability computed as if he were the only working spouse. A couple in which the husband earns $80,000 and in which the wife earns no income would generate a joint tax liability of $17,603. Under this third technique, $17,603 of the $29,729 tax liability would be attributable to the husband. The remainder, $12,126, would not have arisen had the wife chosen not to work, and, therefore, would be attributed to her. These results are summarized in the following table.

**TABLE 4**

**Husband Earning $80,000; Wife Earning $40,000**

<table>
<thead>
<tr>
<th>Apportionment method</th>
<th>Joint Return Liability</th>
<th>Separate Return Liability</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>H’s share</td>
<td>W’s share</td>
</tr>
<tr>
<td>50-50 split</td>
<td>$14,864</td>
<td>$14,864</td>
</tr>
<tr>
<td>Relative-net-income method</td>
<td>$19,819</td>
<td>$9,910</td>
</tr>
<tr>
<td>Secondary-earner method</td>
<td>$17,603</td>
<td>$12,126</td>
</tr>
</tbody>
</table>

Regardless of which of these methods is chosen to apportion joint tax liability between the spouses, joint filing, as opposed to separate filing, reduces the husband’s tax burden and increases that of the wife. A separate return for the husband would have
resulted in a tax liability for him of $21,564, while joint filing resulted in tax attributable to him of either $14,864, $19,819, or $17,603, depending on the method utilized to apportion the joint tax. Regardless of which apportionment method is the most appropriate, the husband benefits financially from the decision to file jointly. Conversely, the wife is harmed from that decision regardless of the method used to apportion the joint tax liability between the spouses. Her tax liability would have been only $8,802 if she had filed separately in contrast to liability attributable to her of either $14,864, $9,910, or $12,126 by filing jointly. This decrease in the husband’s tax liability and the increase in the wife’s tax liability results from the combined operation of income-splitting and aggregation. By filing jointly, rather than separately, the husband benefits. Under the relative-net-income approach, he benefits by $1,745. While a portion of his gain comes at the expense of the U.S. Treasury, the other $1,108 comes at the expense of his lower-earning wife. Accordingly, the wife essentially transfers $1,108 to her higher-earning husband by agreeing to file jointly.

The reason the wife’s tax liability increases under the 50-50 apportionment approach is that half of the total liability is being apportioned to her even though she has generated much less than half of the tax by earning less than half of the income. Under the second method, in which the joint tax liability is apportioned between the spouses on the basis of relative incomes, joint filing increases the wife’s tax because income splitting and aggregation operate together to push her into a higher bracket than would have applied had she filed separately. Under the third technique for apportioning the joint tax between the spouses, the husband’s earnings are treated as the first dollars earned and are taxed under the theory that his wife’s job is discretionary. As a result, the tax attributable to him is the joint tax resulting if he were the only spouse generating income. Under this method, the husband is better off filing jointly than separately because his income exclusively, not that of the wife, is

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266 If the wife has no taxable income of her own, either earned or unearned, this pattern of the wife paying more by filing jointly may not hold true because the couple may apportion all the joint tax liability to the husband. In that case, the wife would incur no tax regardless of the filing status chosen.

267 See supra notes 262-65 and accompanying text.
allocated to the lowest tax brackets. By the time the wife’s income is placed in tax brackets, the lowest brackets have been completely filled. Her first dollar of income is taxed at her husband’s highest marginal rate rather than being taxed at the lowest marginal rate had she filed separately. Her effective tax rate substantially exceeds what it would have been had she been able to use a portion of the lowest tax brackets.

Note that under this pattern in which the wife pays more and the husband pays less by filing jointly, the increase in the wife’s tax is very severe for her on a percentage basis because of her lower income, while the reduction in tax to the husband is a relatively modest benefit to him on a percentage basis because of his greater income. Under relative-net-income apportionment, the joint tax liability attributable to the wife is $9,910 and that attributable to the husband is $19,819. The percentage increase in the wife’s tax as a result of filing jointly rather than separately is 13%, while the percentage decrease in the husband’s tax from joint filing is only 8%. The harm to the wife is more exacting from her perspective than the benefit to the husband is favorable from his point of view. Using the other apportionment methods, if the joint tax attributable to the wife is $12,126 and that attributable to the husband is $17,603 under secondary-earner apportionment, then the percentage increase in the wife’s tax as a result of joint filing is 38% while the percentage decrease in the husband’s tax is only 18%. Alternatively, if the joint tax attributable to the wife is $14,864 and that attributable to the husband is $14,864 under 50-50 apportionment, then the percentage increase in the wife’s tax as a result of joint filing is a staggering 69% while the percentage decrease in the husband’s tax is only 31%. In each case, the increase in the wife’s tax

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268 The percentage increase in the wife’s tax from filing jointly is computed by subtracting her separate tax liability from her portion of the joint tax liability and then by dividing by her separate tax liability. ($9,910 - $8,802) / $8,802 = 13%.

269 The percentage decrease in the husband’s tax from filing jointly is computed by subtracting his portion of the joint tax liability from his separate liability and then by dividing by his separate liability. ($21,564 - $19,819) / $21,564 = 8%.

270 ($12,126 - $8,802) / $8,802.

271 ($21,564 - $17,603) / $21,564.

272 ($14,864 - $8,802) / $8,802.

273 ($21,564 - $14,864) / $21,564.
liability from filing jointly is substantially harmful to her while the benefit to the husband is only relatively modest to him.

Furthermore, the greater the disparity in incomes, the more benefit is transferred from the lower-earning wife to the higher-earning husband by filing jointly rather than separately. This pattern is true not only in relative terms, as described above, but also in absolute terms. That is, the amount the wife transfers to her husband in dollars by filing jointly rather than separately increases the less she earns in relation to him. For example, assuming the husband and wife had respective earnings of $100,000 and $20,000, rather than the $80,000 and $40,000 shown above in Table 4, total earnings would remain the same but relative earnings would diverge even more. Under this scenario, the joint return liability would have remained $29,729. Under the 50-50 apportionment method, each spouse's share of joint return liability would have amounted to $14,864. Under the relative-net-income apportionment method, the husband's share of the joint return liability would have been $24,774, and the wife's share would have been $4,955. Under the secondary-earner apportionment method, the husband's share of the joint liability would have been $23,529, and the wife's share would have been $6,200. By contrast, had these spouses filed separately, the husband's separate tax liability would have been $28,764, while that of the wife would have been only $3,202. These results are summarized in Table 5, below.²⁷⁴

²⁷⁴ The figures in Table 5 are derived from §§ I(a) and (d) of the Internal Revenue Code and are not adjusted for inflation. I.R.C. §§ 1(a) and (d) (1994).
### TABLE 5

**Husband Earning $100,000; Wife Earning $20,000**

<table>
<thead>
<tr>
<th>Apportionment Method</th>
<th>Joint Return Liability</th>
<th>Separate Return Liability</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>H's share</td>
<td>W's share</td>
</tr>
<tr>
<td>50-50 split</td>
<td>$14,864</td>
<td>$14,864</td>
</tr>
<tr>
<td>Relative-net-income method</td>
<td>$24,774</td>
<td>$4,955</td>
</tr>
<tr>
<td>Secondary-earner method</td>
<td>$23,529</td>
<td>$6,200</td>
</tr>
</tbody>
</table>

Under relative-net-income apportionment, this wife has lost $1,753 by filing jointly rather than separately, while her husband has gained $3,991. While a portion of his gain comes at the expense of the U.S. Treasury, the other $1,753 comes at the expense of his lower-earning wife. In this case, the wife has essentially transferred $1,753 to her higher-earning husband. Note that the spouses’ incomes are much more disparate in this case, $100,000/$20,000, than in the $80,000/$40,000 example above from Table 4. In the $80,000/$40,000 example, relative-net-income apportionment resulted in a transfer of only $1,108 from the lower-earning wife to her husband. In fact, under both the relative-net-income and the 50-50 apportionment methods, the transfer from wife to husband is greater for the $100,000/$20,000 couple than it is for the $80,000/$40,000 couple. The fact that rates are structured to encourage joint filing when one spouse earns more than the other, and the fact that joint rates effectively cause a transfer from the lower- to the higher-earning spouse

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275 Under the 50-50 apportionment method, for the husband and wife earning $100,000 and $20,000, respectively, joint filing would result in a transfer of $11,663 from the wife to the husband. That is, she pays that much more by filing jointly than separately. Had the spouses earned instead $80,000 and $40,000, the transfer from the wife to her husband would have been only $6,063.
results in transfers of wealth from the "poorer" to the "richer" spouse precisely because the poor one earns less than the other. This incentive structure is contrary to notions of ability to pay. It is even more ironic and regressive that the amount of the transfer should increase in severity for the lower-earning spouse in absolute dollar terms the less she earns in relation to her husband.

The transfer from the lower-earning to the higher-earning spouse does not increase as incomes diverge under the secondary-earner apportionment method, however. Under that method, for spouses earning $80,000 and $40,000, respectively, the lower-earning wife would transfer $3,324 to her husband because she would pay that much more by filing jointly than separately. However, if their incomes were further apart, $100,000 and $20,000, for example, the wife would transfer only $2,999 to her husband. Although the amount transferred from the lower-earning wife to the higher-earning husband declines the less she earns in relation to him under secondary-earner apportionment, this is probably not important because most spouses who divide their joint return tax liabilities probably do not do so using that method. No court, either state or federal, has ever required spouses to divide their joint tax liabilities in that manner. Furthermore, not one respondent in an informal survey thought of dividing the joint return tax using that method. For purposes of dividing joint return tax liabilities, the vast majority of

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276 The reason the amount transferred from the wife to her husband decreases as their incomes diverge under secondary-earner apportionment is that under that apportionment method, the wife's income exclusively, and none of her husband's income, is assigned to the top applicable rate bracket(s). In the case of couples with combined incomes of $120,000 the wife's income would be assigned to the bracket applicable to that level of income, the 31% bracket. If she earned $20,000, her portion of the joint return tax would be $20,000 x .31 or $6,200. If the earned $40,000 so that spousal incomes were closer together, her income would use all of the 31% bracket applicable to this couple, and a portion of their 28% bracket as well. $30,850 of her $40,000 would be taxed at 31% and would generate $9,564 in tax. The other $9,150 of her income would be taxed at 28% and would produce $2,562 in tax. Her portion of the joint return tax would amount to a total of $12,126. The wife's portion of the joint return tax is actually greater under secondary-earner apportionment the closer together the spouses' incomes. Consequently, the closer those incomes, the more she transfers to her husband under secondary apportionment. It is still true that the wife transfers money to her higher-earning husband under this apportionment method because of the decision to file jointly. Under secondary apportionment, however, the amount transferred from wife to husband does not increase as her income and ability to transfer that money decreases.

277 See infra notes 375-78 and accompanying text.

278 See infra note 374.
respondents would have chosen either the 50-50 method or the relative-net-income method. The secondary earner apportionment method is appropriate in determining whether a second spouse will enter or remain in the labor force. However, in determining how much tax each spouse bears, that is, in considering how spouses divide their joint return tax liabilities, that method is inappropriate because spouses are unlikely to divide their tax liabilities in that manner. They are more likely to use either the 50-50 or relative-net-income methods, both of which cause a transfer from the lower-income wife to her higher-income husband upon filing jointly and both of which result in larger transfers, the smaller her income is compared to that of her husband and the less her ability is to make such transfers.

The amounts transferred from wife to husband because of the decision to file jointly are compiled below in Table 6.

### TABLE 6

**Amount Wife Transfers to Husband by Agreeing to File Jointly**

<table>
<thead>
<tr>
<th>Apportionment method</th>
<th>Amount transferred from Wife to Husband because of decision to file jointly rather than separately</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>H = $80,000  W = $40,000</td>
</tr>
<tr>
<td>50-50 method</td>
<td>$6,063</td>
</tr>
<tr>
<td>Relative-net-income method</td>
<td>$1,108</td>
</tr>
<tr>
<td>Secondary-earner method</td>
<td>$3,325</td>
</tr>
<tr>
<td></td>
<td>H = $100,000  W = $20,000</td>
</tr>
<tr>
<td>50-50 method</td>
<td>$11,663</td>
</tr>
<tr>
<td>Relative-net-income method</td>
<td>$1,753</td>
</tr>
<tr>
<td>Secondary-earner method</td>
<td>$2,999</td>
</tr>
</tbody>
</table>

Under the most probable methods for dividing joint return liabilities, the greater the disparity in spouses' incomes, the greater the financial injury to the lower-earning wife and the larger the economic benefit to the higher-earning husband.
Under 50-50 and relative-net-income apportionment, the amount transferred from wife to husband increases the more disparate the spouses' incomes because of income splitting and aggregation. More income disparity causes more harm to the wife from aggregation and grants her less benefit from income splitting. Income splitting and aggregation combine to give the higher earner a huge benefit, one that increases along with the divergence of incomes. They combine to harm the lower earner, the amount of that harm also being a function of the income disparity.

Because wives tend to earn less than their husbands, these patterns tend to redound to the benefit of husbands and to harm wives. Upon marrying, most couples file jointly because of the economic pressure built into the rates to do so. As to the lower-earning spouse, the transition from filing as an unmarried individual to filing a joint return usually increases tax liability. In the case of the $80,000/$40,000 couple, the wife paid tax of $8,327 as a single taxpayer.\textsuperscript{279} Under relative-net-income apportionment, the apportionment method most favorable to the wife, her tax increases to $9,910 by filing jointly.\textsuperscript{280} Her tax rose significantly upon marrying. In this manner, the operation of government tax policies in a society in which husbands earn more than their wives results in a reduction of women's after-tax income when they marry by increasing the amount of tax that they pay. When a man marries and starts filing jointly, his tax liability usually drops because he is likely to be the higher-earning spouse. In the example in which the husband earned $80,000 and the wife earned $40,000, the man's tax was $20,322 when he was single.\textsuperscript{281} By marrying and filing jointly, his tax dropped under relative-net-income apportionment, the method least beneficial to him, to $19,819.\textsuperscript{282} The federal tax rates operate in the social context to reduce men's taxes when they marry and, therefore, to increase their after-tax earnings. By filing jointly, wives in essence transfer money to their husbands for every year in which they remain married to them, even though they earn less than those.

\textsuperscript{279} See supra Table 2.  
\textsuperscript{280} See supra Table 4.  
\textsuperscript{281} See supra Table 2.  
\textsuperscript{282} See supra Table 4.
husbands. These patterns are identical to those described in the introductory Ames hypothetical.283

How can the notion that the wife is worse off economically by filing jointly be reconciled with the fact that the couple will file jointly to minimize total taxes? The analysis above demonstrates how tax attributable to the wife increases if she files jointly rather than separately. However, as a unit, the couple is better off filing jointly where total liability is $29,729, rather than separately where total liability increases to $30,366. Critics might argue that wives in common-law states are not worse off by filing jointly than separately. They would assert that the lower-earning wife is really better off filing jointly because the family as a whole pays less in tax, and more resources are consequently available for the benefit of all the family members, including the wife.284 While it is true that the couple pays less money to the government, this observation does not alter the fact that the savings from joint filing is due entirely to the reduction in tax attributable to the husband's income, a reduction that exceeds the increase in tax attributable to the wife's income. While the couple is better off by filing jointly as a unit, the only way the wife can be viewed as having benefited individually from the decision to file jointly is if she has equal access to the substantial tax savings that her husband enjoys.285 The assumption that any extra resources from filing jointly would, in fact, be available to the wife is far from certain. Spouses are required neither to share their resources nor even to live together to be eligible to file jointly.286

Whether or not the wife has access to the tax that her husband saves by filing jointly depends on whether or not she has access to his post-tax earnings because his tax savings is one component of those post-tax earnings. Many factors coalesce to suggest that the wife does not have real access to her husband's post-tax earnings. First, the property laws of common-law states fail to guarantee a

283 See supra notes 25 and accompanying text.

284 See McIntyre, supra note 118, at 485 n.31.

285 See Alstott, supra note 30, at 2029-30, 2050-51 (acknowledging that intra-family dynamics impact which family members benefit from a reduction in taxes); Beck, supra note 58, at 376 (noting that wives may receive no benefit from the tax savings due to income splitting unless tax reductions their husbands obtain are assumed to benefit the wives).

286 See Beck, supra note 58, at 378. See also I.R.C. § 6013(a) (1994) (listing situations in which husbands and wives are barred from filing jointly but failing to mention living apart or keeping assets and earnings segregated).
wife access to her husband’s earnings during the marriage.\textsuperscript{287} Second, although the wife would have access to her husband’s tax savings if they were to pool their resources voluntarily, empirical data suggest that many couples do not pool resources and that if pooling ever were prevalent, it is becoming less so.\textsuperscript{288} As a result, the wife may not have access to her husband’s tax savings through voluntary sharing. Third, sociological data indicate that spouses who do “share” resources do not do so in a meaningful way, and that the higher-earning spouse generally controls how such resources will be used.\textsuperscript{289} Consequently, even if couples claim to share resources, the lower-earning wife will generally not achieve meaningful access to her husband’s tax savings and will, indeed, be worse off by filing jointly than separately. Even when husbands do voluntarily share resources in a meaningful way so that wives benefit individually from filing jointly, power is still concentrated in the husband’s hands, and messages reinforcing traditional male and female identities are conveyed to society.\textsuperscript{290}

Federal tax law reflects the fact that common-law states do not guarantee wives access to their husband’s post-tax earnings. Under federal law, if a wife had a present ownership interest in her husband’s earnings, then, like married residents of community property states, federal tax law would permit them to split their incomes even when filing separately.\textsuperscript{291} However, federal tax law precludes income splitting for separately filing couples who live in common-law jurisdictions\textsuperscript{292} precisely because common-law states do not give the nonearning spouse a present

\textsuperscript{287} See infra notes 291-329 and accompanying text.

\textsuperscript{288} See infra notes 330-44 and accompanying text.

\textsuperscript{289} See infra notes 345-56 and accompanying text.

\textsuperscript{290} See infra notes 368-69 and accompanying text.

\textsuperscript{291} See Poe v. Seaborn, 282 U.S. 101 (1930); Galliher v. Commissioner, 62 T.C. 760 (1974), aff’d, 512 F.2d 1404 (5th Cir. 1975); Williams v. Commissioner, 38 T.C.M. (CCH) 718 (1979); Fehland v. Commissioner, 54 T.C.M. (CCH) 1312 (1975); Coffman v. Commissioner, 33 T.C.M. (CCH) 1416 (1974); Quinn v. Commissioner, 31 T.C.M. (CCH) 453 (1972); Ramos v. Commissioner, 28 T.C.M. (CCH) 781 (1969); Publication 555, supra note 52, at 3-4. See also United States v. Mitchell, 403 U.S. 190, 194-97 (1971); Beck, supra note 255, at 30, 32 (noting that community property residents must split their incomes even if they file separately); Murray, supra note 52, at 21, 53, 61; Quick & DuCanto, supra note 57, at 78.

ownership interest in the other's earnings. In the forty-two common law jurisdictions in which wives are worse off filing jointly than separately, federal law does not permit income splitting to separately filing spouses because state law does not give one spouse a present ownership interest in the other's earnings. This very lack of a present property interest in their husbands' earnings precludes these wives from the right to share in their husbands' joint return tax savings during the marriage.

State property laws in the forty-two common-law jurisdictions confirm the federal tax treatment of separately filing spouses. In forty-one common law jurisdictions a wife has no legal right to any part of her husband's post-tax earnings during the marriage, and, therefore, no legal right to access the savings he

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28 See supra note 52 and accompanying text.

294 The forty-two common law jurisdictions consist of the forty-one non-community property states and the District of Columbia, see Greene, supra note 52, at 71, 77; Cheadle, supra note 52, at 1280 n.63; Emily Osborn, Comment, The Treatment of Unearned Separate Property at Divorce in Common Law Property Jurisdictions, 1990 Wis. L. Rev. 903, 903 n.1; Susan Klebanoff, Comment, To Love and Obey 'til Graduation Day—The Professional Degree in Light of the Uniform Marital Property Act, 34 A.M. U. L. REV. 839, 841 n.13 (1985).

295 An examination of whether wives living in community property states have access to their husbands' tax savings under state marital property law is unnecessary for purposes of this analysis. Wives in those states are normally no worse off by filing jointly than they would be by filing separately. The income splitting required of separately filing spouses who live in community property states means that wives would pay as much as if they pay as much as if they had filed jointly and had divided the resulting liability using the 50-50 apportionment method because Seaborn requires them to pay tax on half their own income and half that of their husbands. Therefore, apart from the issue of joint and several liability, these wives would be no worse off financially had they filed jointly. See supra note 101. By contrast, as discussed in the accompanying text, wives who file jointly in common law states are worse off financially than if they had filed separately because under separate filing they could have enjoyed the benefit of the low tax bracket that would have applied to their own, individual lower incomes. They would not have been subjected to higher rates as a result of their husbands' higher incomes. To benefit from filing jointly, these wives would require access to the savings their husbands enjoy.

296 See supra note 52.

297 State law establishes the spouse's property rights in after-tax earnings. The filing of a joint return does not alter those property rights. See In re Wetteroff, 453 F.2d 544 (8th Cir. 1972); Glaubke v. United States, 41 A.F.T.R.2d (P-H) 759 (E.D. Va. 1978); Pettengill v. United States, 255 F. Supp. 321 (N.D. Ill. 1966); In re Illingworth, 51 A.F.T.R. (P-H) 1215 (D. Ore. 1956); Dunn v. Commissioner, 25 T.C.M. (CCH) 915 (1968); In re Estate of Carson, 199 A.2d 407 (N.J. Camden County Ct. 1964); In re Estate of Trecker, 215 N.W.2d 450 (Wis. 1974); Beck, supra note 58, at 334, 394 & n.383. In these cases, when a joint return generated a refund and only the husband had income and deductions for the year, the husband, the husband's estate, or the husband's bankruptcy trustee, but never the wife, was entitled to the federal income tax refund, a portion of the husband's after-tax earnings.

298 See supra note 52 and accompanying text.
enjoys by filing jointly.\(^{299}\) The wife’s lack of legal right to her husband’s savings during marriage is a significant matter.\(^{300}\) The nonearning spouse may obtain rights in the other’s saved earnings only when the marriage terminates, either by death or upon divorce.\(^{301}\) During marriage, common law states confer on the nonearning wife only an inchoate dower right or, more recently, the right to elect a statutory share in the husband’s property upon his death.\(^{302}\) As noted above, common-law states do not give the wife a present ownership interest in any part of her husband’s earnings. Nor does common law permit her indirect access to her husband’s earnings by making him liable for most debts she incurs.\(^{303}\) Consequently, a wife living in a common-law jurisdiction may in fact be harmed by filing jointly due to her lack of legal access to her husband’s tax savings or to any other part of his post-tax earnings.

Not only does state law deny women a present ownership interest in their husbands’ tax savings, but it also fails to prevent the husband from misspending or wasting those savings or from

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\(^{299}\) Only in Pennsylvania have lower courts occasionally determined that filing a joint federal income tax return changed spouses’ property interests in the tax refund, a portion of after-tax earnings. Those courts held that under Pennsylvania property law, filing a joint return evidenced an intention by the spouses to hold the resulting refund as tenants by the entireties. Consequently, wives who had not earned any income were entitled to joint tax refunds rather than to leave them with the executors of their husbands’ estates. See In re Estate of MacNeill, 21 Pa. D. & C.2d 480 (1959); In re Estate of Green, 14 Pa. D. & C.2d 595 (1958). Only under Pennsylvania law has filing a joint return been interpreted as giving the nonearning spouse a property interest in a portion of the other’s after-tax earnings, and then it was only in the tax refund portion of those after-tax earnings. The wives’ property interests did not extend to the husband’s other after-tax earnings. Furthermore, not all Pennsylvania courts agree that filing a joint return necessarily evidences an intention to convey the tax refund to both spouses as a tenancy by the entireties. See In re Estate of Jackson, 33 Pa. D. & C.2d 402 (1964) (the parties actions, including segregating resources and dividing the joint return tax between them, demonstrated that they did not intend by filing jointly to create a tenancy by the entireties in the refund). In no other common law jurisdiction does a spouse gain any legal property right to any part of the other’s after-tax earnings by virtue of filing a joint return.

\(^{300}\) Cf. Bittker, supra note 29, at 1394 (acknowledging in another context that spouses’ respective property rights are an important matter).


\(^{302}\) See Greene, supra note 52, at 77 & n.29, 87. See also id. at 107-09 (discussing common-law elective share statutes); Osborn, supra note 294, at 907; Ross, supra note 301, at 115 n.25.

\(^{303}\) See Greene, supra note 52, at 97 (“Except for necessities purchased on credit, the Married Women’s Property Acts generally relieve the husband and his separate property for his wife’s debts”) (citing CHESTER G. VERNIER, AMERICAN FAMILY LAWS: A COMPARATIVE STUDY OF THE FAMILY LAW OF THE FORTY-EIGHT AMERICAN STATES, ALASKA, THE DISTRICT OF COLUMBIA, AND HAWAII (TO JAN. 1, 1935) 47, 49 (1935)); Ross, supra note 301, at 112, 117-18.
using them for his own benefit. Because only the husband has a present property right in his earnings, he may use them however he wants. He may use his earnings to acquire property in his own name. The wife has no legal remedy in an intact marriage if he uses the funds for his own benefit or even if he gives them away. In this manner the husband's tax savings from filing jointly can be placed beyond the wife's reach as a practical matter. In common-law jurisdictions, the earner has the sole right to determine how his earnings will be used. He has the sole power to manage and control his earnings, and no restrictions for the wife's benefit limit that power. Thus, under common law a wife does not get the benefit of her husband's joint tax savings. In fact, she subsidizes his joint return savings by paying more tax herself.

Only by divorcing is it possible for the wife to gain access to her husband's tax savings and other property. All common law

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304 See Ross, supra note 301, at 114-15.

305 See Zelenak, supra note 29, at 379 n.195. Cf. Ross, supra note 301, at 115-17 (discussing how a spouse in a common law state can use only his own assets, including his own earnings which are usually titled in his own name, to establish creditworthiness. The nonearning spouse generally cannot rely on earnings titled in the other's name to establish her own credit since she has no present right during the marriage to those earnings). If the couple divorces, however, earlier waste by one spouse may be taken into account under the equitable distribution laws of some states to reduce his or her share of the property division. See Lewis Becker, Conduct of a Spouse that Dissipates Property Available for Equitable Property Distribution: A Suggested Analysis, 52 OHIO ST. LJ. 95, 97-98 (1991); Zelenak, supra note 29, at 385.

It is far from clear, however, what constitutes dissipation, beyond the easy case of gifts to a lover. Conceivably dissipation doctrine could some day develop to the point where both spouses would truly share control over property subject to equitable distribution, so that they should be taxed as co-owners, but that day has not arrived.

Zelenak, supra note 29, at 385-86 (footnote omitted).

306 See Greene, supra note 52, at 90 ("The common-law system as modified by the Married Women's Property Acts provides that each spouse shall manage the property they [sic] own at the time of marriage and all property which the spouse is responsible for acquiring during marriage."). Thus, the husband has sole power to manage and control his earnings. See Kornhauser, supra note 29, at 74, 76-77; Ross, supra note 301, at 127.

307 By contrast, in the community property state of California, for example, each spouse is bound by a fiduciary duty to the marital community not to waste or misuse community property. CAL. FAM. CODE § 1100(e) (West 1996) and CAL. FAM. CODE § 721 (West 1996); Elizabeth De Armond, It Takes Two: Remodeling the Management and Control Provisions of Community Property Law, 30 GONZ. L. REV. 235, 271 n.193 (1995). Other community property states also impose duties, either by statute or under case law, on the managing spouse not to misuse or waste the community property although the duties in those other states do not rise to the level of fiduciary duties. See id. at 271-72 & n.194.

308 See infra notes 371-78 and accompanying text.
jurisdictions have adopted equitable distribution regimes that permit property division upon divorce without regard to title.\textsuperscript{309} Under these provisions, judges have the discretion to divide the marital property, including any accumulated earnings, in an equitable fashion.\textsuperscript{310} Consequently, upon divorce a wife may indeed acquire part of her husband’s tax savings from prior years if the couple has property to divide.

Nevertheless, equitable distribution upon divorce is an inadequate mechanism for ensuring that wives will share in the financial benefits of joint filing. First of all, equitable distribution laws are triggered only if a couple divorces.\textsuperscript{311} During

\textsuperscript{309} See Robinson & Wenig, supra note 31, at 812 n.170; Osborn, supra note 294, at 505; Ross, supra note 301, at 115 n.25. See generally Cheadle, supra note 52, at 1282-305; Osborn, supra note 294, at 909-30 for descriptions of the various types of equitable distribution statutes. Of the forty-two common-law jurisdictions, including the District of Columbia, only Mississippi has failed to enact specific legislation authorizing equitable distribution of marital property upon divorce. See Osborn, supra note 294, at 505 n.27. However, Mississippi has adopted equitable distribution judicially. See, e.g., Magee v. Magee, 661 So. 2d 1117 (Miss. 1995); White v. White, 557 So. 2d 480, 483 (Miss. 1989) (listing factors to be considered in making the equitable distribution); Jones v. Jones, 532 So. 2d 574 (Miss. 1988); Watts v. Watts, 466 So. 2d 889 (Miss. 1985).


\textsuperscript{310} See Ross, supra note 301, at 115 n.25; Mary A. Throne, Note, Pension Awards in Divorce and Bankruptcy, 88 Colum. L. Rev. 194, 197 (1988).

\textsuperscript{311} See Greene, supra note 52, at 87, 102 (noting that wives would be better off with a present, vested one half interest in the marital property than with an inchoate right which a divorce court may bestow on her); Murray, supra note 52, at 25; Cheadle, supra note 52, at
the marriage the wife continues to lack a legal guarantee to her husband's tax savings.\textsuperscript{12} Equitable distribution is also insufficient to guarantee wives a personal benefit from the joint return tax savings both because judges have tremendous discretion in fashioning a division of property\textsuperscript{13} and because equitable distribution does not guarantee equal distribution.\textsuperscript{14} Far-reaching judicial discretion in determining property distribution means that wives often receive less than they should.\textsuperscript{15} “Some recent research has indicated that judges have misused the extensive discretion available under modern divorce statutes.”\textsuperscript{16} “[O]ur largely male judiciary has forfeited its traditional claim to extensive discretion by its sorry performance. The data for New Haven and elsewhere is [sic] clear: a discretion-laden system has resulted in uniformly unfair awards to, and decreased standards of living for, women and children.”\textsuperscript{17} Judges’ wide latitude in determining a distribution of property fails to protect wives because it does not ensure for them a right to half of the marital assets.\textsuperscript{18} This discretion has frequently resulted in judges awarding the majority of the marital property to

\textsuperscript{12} See Zelenak, \textit{supra} note 29, at 379 n.195; Cheadle, \textit{supra} note 52, at 1512; Kahng, \textit{supra} note 51, at 21 n.62.

\textsuperscript{13} See Gann, \textit{supra} note 29, at 48 (the “uncertainty of [judicial discretion] ... is unsatisfactory to the economically dependent spouse, who has no automatic right to a part of the property”) (footnote omitted); Greene, \textit{supra} note 52, at 98; Silbaugh, \textit{supra} note 43, at 57, 59; Cheadle, \textit{supra} note 52, \textit{passim}; Osborn, \textit{supra} note 294, \textit{passim}.

\textsuperscript{14} See e.g., Mahaffey v. Mahaffey, 401 So. 2d 1372, 1374 (Fla. Dist. Ct. App. 1981); Cherry v. Cherry, 421 N.E.2d 1293, 1298-99 (Ohio 1981); Scott v. Scott, 218 P.2d 373, 376 (Okl. 1950); Cheadle, \textit{supra} note 52, at 1290, 1298 & n.163, 1303 n.188; Osborn, \textit{supra} note 294, at 935.


\textsuperscript{16} Osborn, \textit{supra} note 294, at 937 n.139.

\textsuperscript{17} McLindon, \textit{supra} note 220, at 404.

\textsuperscript{18} “What person will enter a business or professional partnership or joint venture if the only liquidation rule is that a court will have a discretion to make any order it thinks fit in regard to all the money and property?”—Ian F.C. Baxter, \textit{Family Law Reform in Ontario}, 25 U. \textit{TORONTO L.J.} 236, 261 (1975) (discussing how judicial discretion in determining property distribution upon divorce provides inadequate protection for wives).
husbands\textsuperscript{319} under the view that only the husband contributed economically to the family during marriage. This view, of course, fails to account for wives' very real economic but nonfinancial contributions to the family: child rearing and household management.\textsuperscript{320} The domestic services that a wife renders often make it more difficult for her to contribute financially,\textsuperscript{321} and furthermore, her services "contribute[] indirectly to the [family's economic] acquisitions by making it possible for the ... [husband] to be employed."\textsuperscript{322} Consequently, upon divorce wives should generally be entitled to half of the property generated by either spouse during the marriage.\textsuperscript{323} Judicial discretion permitting unequal property divisions often fails to provide the wife with an adequate result, precluding her from reaching her husband's earlier tax savings. Even when state law requires judges to consider a wife's nonfinancial contribution to the family in

\textsuperscript{319} See Greene, supra note 52, at 104 n.189 (acknowledging that wives are normally awarded less than half of the marital property). But see id. at 102 (stating elsewhere that there seems "to be a recent movement in the common-law states toward a more equal division of the property") (footnote omitted).

\textsuperscript{320} See De Armond, supra note 307, at 240-41; Silbaugh, supra note 45 (asserting that housework and child care have been treated in the disciplines of both sociology and economics as producing economic value); Cheadle, supra note 52, at 1310-11; Osborn, supra note 294, at 907, 914, 931 n.118; Ross, supra note 301, at 115, 135 n.127; Throne, supra note 310, at 197.

\textsuperscript{321} See Greene, supra note 52, at 85; De Armond, supra note 307, at 240; Cheadle, supra note 52, at 1310-11.

\textsuperscript{322} Greene, supra note 52, at 85. See id. at 83 ("Even if she did not contribute directly to the acquisition of property, her services enabled or hastened her husband's ability to acquire property.") (footnote omitted); De Armond, supra note 307, at 240-41; Throne, supra note 310, at 196-97. See also Joan Acker, Class, Gender, and the Relations of Distribution, 13 Signs 473, 474 (1988) (arguing that without women's unpaid labor, the capitalist system could not function as beneficially for men); Cheadle, supra note 52, at 1271 & n.11; Sylvia A. Law, Equality: The Power and Limits of the Law, 95 Yale L.J. 1769, 1771 (1986) (reviewing Zillah R. Eisenstein, Feminism and Sexual Equality (1984)) ("our liberal society depends upon the unpaid work performed by women in the home.").

\textsuperscript{323} This is the rationale underlying the community property system. See Wood v. Wood, 465 N.Y.S.2d 475, 477 (N.Y. Sup. Ct. 1983); Greene, supra note 52, at 73, 82 ("This communal approach recognizes that the contributions of both spouses are meaningful and that each spouse should share in the financial gains of the marriage."); Jones, supra note 3, at 271, quoting Senator John L. McClellan of Arkansas discussing community property laws ("The law says, and most husbands will agree, that a wife's mental and physical labor at home is a 50 percent contribution and she should be properly paid."); Cheadle, supra note 52, at 1271; Klebanoff, supra note 294, at 843, 845 n.37; Osborn, supra note 294, at 907. According to Martha Fineman, in most marriages women should be entitled to more than half of the family assets because women contribute more than half of the total economic production, working both at home and in the labor force, MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 4 (1991), and because despite joint custody arrangements, women typically assume more care for the children after divorce. Id. at 4-5.
determining an equitable distribution,\textsuperscript{524} those judges consider it as only one of many factors in dividing the property,\textsuperscript{525} and they consistently undervalue the wife's contributions.\textsuperscript{526} As has been noted, case law often interprets "equitable" as not meaning "equal."\textsuperscript{527} As a result, the equitable distribution laws do not guarantee a lower-earning wife access to her husband's joint return tax savings upon divorce. During the marriage, as noted above, those laws do not apply at all. In some cases, equitable distribution laws are waived by prenuptial agreements and consequently do not apply even upon divorce.\textsuperscript{528}

State property and divorce laws are inadequate to ensure the wife any part of her husband's tax savings.\textsuperscript{529} Nevertheless, if

\textsuperscript{524} Most states now recognize spouses' nonmonetary contributions in determining equitable distribution upon divorce. See Timothy B. Walker & Linda D. Elrod, \textit{Family Law in the Fifty States: An Overview}, 26 Fam. L.Q. 519, 360-61 tbl.6 (1993). See also Cheadle, supra note 52, at 1311 n.223; Greene, supra note 52, at 103; Osborn, supra note 294, at 914.

\textsuperscript{525} See Greene, supra note 52, at 108; Silbaugh, supra note 43, at 58-59; Cheadle, supra note 52, at 1289-90 (Indiana law), 1305 (Massachusetts law), 1305 (Ohio law).

\textsuperscript{526} See Greene supra note 52, at 97 (stating that if the wife does not get the right to half of the marital property, her contribution to the marital unit will be "under-recognized"); 105 (stating that in considering the wife's nonmonetary contributions as a factor in equitable distribution "the possibility exists that the court in the exercise of its discretion will fail to give the factor proper weight"); Silbaugh, supra note 43, at 57-59; Cheadle, supra note 52, at 1298 (discussing trial courts' undervaluation of the wife's contributions in the home in decisions which were reversed on appeal), 1299 n.164 (discussing an Oklahoma court decision that valued a wife's homemaking activities lower than her husband's labors on the farm).

\textsuperscript{527} See supra note 314.

\textsuperscript{528} See Kahng, supra note 51, at 20.

\textsuperscript{529} Accord Kahng, supra note 51, at 51. Some critics might argue that a wife has access to her husband's tax savings because state law obligates the husband to support his wife. See, e.g., Bittker, supra note 29, at 1420-22; Greene, supra note 52, at 77; Kornhauser, supra note 59, at 98-99. Of course, such a support obligation would exist even if the husband had filed separately and, therefore, enjoyed no tax savings. Furthermore, the husband's support obligation is unlikely to increase because of the tax savings he would enjoy from filing jointly. Support obligations are so illusory in application, that a $1,000 tax savings, for example, would be unlikely to increase his support obligation at all. Moreover, modern courts tend not to interfere or to enforce the husband's obligation to support his wife except in extreme cases, like a husband refusing to pay his wife's hospital bill. See, e.g., Cranford v. Cranford, 772 S.W.2d 48 (Tenn. Ct. App. 1989) (court increased husband's alimony payments on the basis of his obligation to support wife who suffered debilitating multiple sclerosis). The support obligation was a creature of common-law, especially before the advent of the Married Women's Property Acts. Before wives could own property of their own, they needed, and the law provided them with, support from their husbands. See, e.g., Greene, supra note 52, at 77; Throne, supra note 310, at 195. Once wives could own their own property under the Married Women's Property Acts, see Greene, supra note 52, at 79 n.43; Ross, supra note 301, at 114 n.20, the support obligation under common law, although not ceasing altogether, see Cheadle, supra note 52, at 1275 n.31, gradually became less important, as is evidenced by the recent decline in the importance of alimony, see Osborn, supra note 294, at 908, 915, a payment traditionally based on the concept of spousal support. See Cheadle, supra note 52, at 1274 & n.26, 1283, 1295 n.142, 1298 & nn.160-61. Alimony has also lost importance under no-fault property division regimes. See
spouses voluntarily pool their resources, the wife will have access to her husband’s tax savings. Despite an historical absence of empirical research, couples have traditionally been assumed to pool their resources. However, data from recent studies question the validity of that assumption. Many instances may arise in which spouses who file jointly probably would not share resources, including situations in which the spouses are estranged, plan to divorce, marry late in life after accumulating significant assets, or have segregated their resources to provide for children from previous marriages. Empirical data show that, in fact, couples do not uniformly pool their resources. Not

Starnes, supra note 220, at 85, 97. Because the support obligation has become so illusory, it is extremely unlikely that a wife could invoke it to acquire any part of her husband’s joint return tax savings, let alone a significant part of it. Furthermore, “[t]he support obligation[] ... [is] not directly enforceable between the parties when married. The support obligation may be enforceable during a marriage only by third-party creditors who may sue one spouse for certain very narrow categories of debts [, necessities like food and shelter,] undertaken by the other.” (footnote omitted). Silbaugh, supra note 43, at 34. See also McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953) (holding that because husband and wife were not separated or living apart, the wife could not maintain an action against her husband for maintenance). Consequently, a wife could not prevail in a suit against her husband to obtain part of her husband’s tax savings by using a support obligation theory.

See Bittker, supra note 29, passim (presuming equal sharing); Jones, supra note 3, at 274 (stating that little, if any, empirical evidence supports the assumption that spouses share their incomes equally); Kornhauser, supra note 29, at 80 (describing this belief but contesting it); Schneider, supra note 50, at 110-11 (subscribing to this belief but citing no empirical support).

See Blumstein & Schwartz, supra note 252; Rosanna Hertz, More Equal Than Others: Women and Men in Dual-Career Marriages (1986); Hertz, supra note 265; Jan Pahl, Money and Marriage (1989); Kornhauser, supra note 29. See also Beck, supra note 58, at 322 (questioning the prevalence of sharing during marriage); Edison-Smith, supra note 56, at 122-23.

See Prager, supra note 52, at 120 (describing some reasons why spouses may prefer to keep their assets separate).

See Blumstein & Schwartz, supra note 252, at 101 fig.9 (surveying whether or not couples believe in pooling money and finding that the belief is not universal: 69% of wives and 75% of husbands believed in pooling); Hertz, supra note 331, at 90-91 (finding in her survey that only 48% of the couples surveyed claimed to pool their assets); Hertz, supra note 263, at 431-49; Pahl, supra note 331, at 186 tbl.5.3 (only 56% of couples claimed to share); Kornhauser, supra note 29, at 86 (discussing the results of her own empirical surveys: 30% of couples in one survey and 44.4% in the other survey claimed that at least some wages were not kept in joint accounts); id. at 81 (“[P]ooling is less monolithic in reality than it is in theory”); Meredith Edwards, Individual Equity and Social Policy, in Women, Social Science and Public Policy 95, 98-100 (Jacqueline Goodnow & Carole Patemen eds., 1985) (household members do not share income equally and, in fact, the standard of living of some wives may be lower than those of their husbands); Gann, supra note 29, at 26 (data “does not generally substantiate the assumption that married persons equally share their income[s],” (citing Harold M. Groves, Federal Tax Treatment of the Family 106 (1963))); Lily Kahng, Fictions in Tax, in Taxing America 25-44 (Karen B. Brown & Mary Louise Felows eds., 1996) (questioning the assumption that spouses share their incomes and characterizing it as a fiction); Kornhauser, supra note 29, at 80 (the premise “that married couples share resources ... is largely unsupported by empirical evidence”). (footnote omitted); Daniel J. Lathrope, State-Defined Marital Status: Its Future as an Operative Tax Factor, 17 U.C. Davis L. Rev. 257, 259 (1983); McIntyre & Oldman, supra note 51, at 1594.
n.76; Oldman & Temple, supra note 118, at 597 (acknowledging that even spouses who supposedly share do not necessarily have "complete access to [each] ... other's income"); Silbaugh, supra note 43, at 49 (questioning the notion that husbands share their financial resources with their wives); Staudt, supra note 43, at 1592-94 (noting unequal sharing of income within the family); Diana Wong, The Limits of Using the Household as the Unit of Analysis, in HOUSEHOLDS AND THE WORLD-ECONOMY 55-63 (Joan Smith et al. eds., 1984) (discussing studies of households in various countries and concluding that household members do not share resources equally and often do not even live similar class styles); Davis, supra note 18, at 216-18; Note, supra note 118, at 372-73; Kahng, supra note 51, at 18-19 (married couples do not uniformly pool resources or make all their decisions about earning, consumption and saving jointly); Accord OBN, supra note 249, at 31 (suggesting that 'many social 'goods,' such as time for paid work or for leisure, physical security, and access to financial resources, typically are unevenly distributed within families'); Viviana A. Zelizer, The Social Meaning of Money: "Special Monies," 95 Am. J. Soc. 342, 352 (1989); Kahng, supra note 51, at 19. But see Anne L. Alstott, The Earned Income Tax Credit and Some Fundamental Institutional Dilemmas of Tax-Transfer Integration, 47 Nat'l Tax J. 609, 611 (1994) (arguing that the family unit is the best choice for measuring income, asserting that one person's income alone does not reflect the other available resources or the financial responsibilities that accompany living in a household); McIntyre, supra note 118, at 470 (agreeing); Richard A. Epstein, The Gender Gap in Compensation: Some Reflections on the Gender Gap in Employment, 82 Geo. L.J. 75, 78-79 (1993) (arguing that the family operates as one economic unit, positing that women share in the gains that men have generated through the division of take-home pay); McIntyre, supra note 118, at 469-70 (while noting that marital pooling is not universal, that couples probably pool some or all of their incomes); Douglas Y. Thorson, An Analysis of the Sources of Continued Controversy Over the Tax Treatment of Family Income, 18 Nat'l Tax J. 115, 116 & n.11 (1965) (asserting that spousal pooling is not universal, that couples probably pool some or all of their incomes); see supra note 353. Professor Zelenak concludes that spouses nominally pool their resources, but he does not examine empirical studies concerned with spouses' relative consumption patterns. Id. (suggesting that allocation of deductions between spouses is difficult "precisely because there is a great deal of marital pooling"). Id. at 381. See infra notes 345-61 and accompanying text.

354 See BLUMSTEIN & SCHWARTZ, supra note 252; Beck, supra note 58, at 380; Kornhauser, supra note 29, at 81, 91; Ross, supra note 301, at 134. But cf. Cheadle, supra note 52, at 1308 (asserting, without referring to any empirical support, that "sharing principles have become more and more predominant in functioning marriages" and arguing that this justifies the movement in common-law states towards equitable distribution statutes). Of course, greater acceptance in those states of the idea of sharing within marriages does not guarantee that spouses actually share on their own. In fact, the need for equitable distribution statutes suggests a possible inadequacy of sharing between spouses.

355 See BLUMSTEIN & SCHWARTZ, supra note 252, at 109; Kornhauser, supra note 29, at 91.
group, fulfillment as cultural values has also contributed to the shift away from spousal pooling of earnings.  

If husbands freely shared resources with their wives, then presumably they would not resist sharing legal title in property with their wives. However, husbands have frequently failed to transfer title of income-producing assets to their spouses, even when a significant tax advantage would have resulted: the splitting of unearned income when spouses file separately. Historically, wealthy married taxpayers have been unwilling to transfer the legal title of their property to a spouse, even though doing so would have often reduced income taxes by shifting the income the property generated to the spouse’s lower tax bracket. Furthermore, prior to Congress’ 1948 adoption of

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336 See Kornhauser, supra note 29, at 77-79 (family members who want some level of “emotional [or] ... financial independence,” id. at 78, often keep all or some of their assets separately, even in traditional families); BLUMSTEIN & SCHWARTZ, supra note 252, at 47. Others who note the contemporary emphasis on self-fulfillment and individuality include Elizabeth S. Scott, Rational Decisionmaking About Marriage and Divorce, 76 VA. L. REV. 9, 23-24 (1990) and Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 Mich. L. REV. 1803, 1856-57 (1985). For a description of the movement towards the importance of the individual and away from the family, see generally MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 292-93 (1989) (citing ALAIN BÉNABENT, La liberté individuelle et le mariage, 1973 REVUE TRIMESTRIELLE DU DROIT CIVIL 440, 495). But see Susan Westerberg Prager, Sharing Principles and the Future of Marital Property Law, 25 UCLA L. REV. 1, 6 (1977) (arguing that emphasis on individualism is overstated, noting the interdependency of family members).

337 Some might argue that spouses do share title, using joint tenancies on a widespread basis to hold property and to avoid probate when the first spouse dies, and that holding property in that manner constitutes complete sharing. In response to this observation, it should be recognized that joint tenancies, while established during life, effectively transfer the unfettered enjoyment of the property to the nonearning spouse only upon the earner’s death. Until the earner dies, the nonearning spouse cannot encumber the asset in its entirety. See De Armond, supra note 307, at 238, 247 (“to bind the whole property all co-tenants must agree”); Ross, supra note 301, at 117. Under a joint tenancy, the nonearning wife would finally get the benefit of the husband’s tax savings only after he dies, and only if she survives him. The use of joint tenancies says nothing about whether there is any real sharing of that money during life. It also ignores the time value of money. If the tax savings were held in a relatively safe form so that inflation outpaced their growth, then the shrinking effect on the dollar would reduce the benefit of those tax savings to the surviving wife by the time she acquires them without restriction.

Another response to the argument that spouses often hold assets in joint tenancy is that because of dominance in the relationship, legal rights do not always reflect the social reality of who enjoys the property. See infra notes 345-61 and accompanying text. For example, if the husband deposits his tax savings from filing jointly into a bank account held jointly with his wife, he may have no qualms about withdrawing that amount for his own use. On the other hand, the wife, although completely within her legal rights to withdraw money for her own use, may tend not do so as freely if the husband is the primary earner or dominant in some other way.

338 See Division of Tax Research, U.S. Dep’t of Treasury, The Tax Treatment of Family Income, in Hearings on Revenue Revisions Before the House Comm. on Ways and Means, 80th Cong. 846, 860 (1947) (noting that this was "evident from the fact that spouses reporting substantial incomes on separate noncommunity-property returns frequently report(ed)
automatic income splitting for joint filers, and despite the income-splitting benefits husbands could have obtained, many husbands lobbied successfully against state proposals to adopt community property regimes, proposals that would have provided the significant federal tax advantage of income splitting. Such regimes would have given wives a one-half ownership interest in all the earnings acquired during marriage. Apparently, keeping title away from their wives was more important to many men than were the tax savings they could have achieved by transferring title in half the property to their wives, either through direct transfers of income-generating property or through the adoption of a community property regime. This desire on the part of many husbands to keep assets titled in their own names belies the notion that husbands intended to share resources equally. Perhaps certain husbands are amenable to sharing only when it is on their own terms, not when state legislatures determine the conditions of the sharing, such as providing the wives with an ownership interest in half of their husbands' earnings. Reports of a recent tendency among couples also suggest that couples divide expenses and keep track of their respective economic contributions, declining to pool their resources. Some couples reportedly request their return preparers to divide any joint tax underpayment so that each spouse pays only his or her own share. This practice suggests that among these couples, very little pooling occurs.

 unequal separate incomes”). See also Beck, supra note 58, at 379-80; Bittker, supra note 29, at 1394; Kornhauser, supra note 29, at 96; Kahng, supra note 51, at 20 n.60. 399 See Jones, supra note 3, at 269-71; Kornhauser, supra note 29, at 102. Cf. De Armond, supra note 307, at 270 (noting that people may be “reluctant to share control over property they feel they have earned individually, and not as members of a group” in explaining community property provisions that vest exclusive management and control of some community property in only one spouse); Joseph W. McKnight, Texas Community Property Law—Its Course of Development and Reform, 8 CAL. W. L. REV. 117, 130 (1971) (noting with respect to a 1913 proposal in Texas to give both spouses management and control over community property that "most men objected that it would give wives too much control over property generated by the husband’s efforts"). 340 Ellen E. Schultz, How to Split the Tax Bill with Your Spouse, WALL ST. J., Mar. 31, 1993, at C1. 341 One commentator has consistently claimed that widespread sharing does occur within marriage. See McIntyre, supra note 118, at 469; McIntyre & Oldman, supra note 51, at 1578; Michael McIntyre, Taxation of the Family: Economic Mutuality and the Need for Joint Filing, CAN. TAX’N, Winter 1979, at 13, 13-15. However, McIntyre does not point to empirical data to support his position. See Louise Dulude, Taxation of the Spouse: A Comparison of Canadian, American, British, French and Swedish Law, 68 OSOOGRE HALL L.J. 67, 88 (1985); Jones, supra note 3, at 274; Kornhauser, supra note 29, at 80; Zelenak, supra note 29, at 353 n.68. Furthermore, McIntyre’s supposition that husbands and wives share
Even when couples report that they share income, some may not be truthful. **Because the dominant cultural myth regarding income is that people share their income, people state that they share or believe in sharing even when they do not.** As a result, studies may overstate the true incidence of pooling.

Couples in empirical surveys who believe that they pool resources, and who report doing so, do not necessarily share. Couples may report that they pool because they have one set of bank accounts or because both spouses share money management chores such as balancing the checkbook. However, spouses' relative freedom to use the resources for their own benefit may differ substantially, indicating that control, and therefore money, is not really shared. A spouse claiming to resources because they each know of all the expenditures made by the other is belied by the existence of successful innocent spouse cases under I.R.C. § 6013(e) (1994). Those cases demonstrate that spouses frequently do not know about expenditures the other makes. Such innocent spouses frequently know nothing about the other spouse's finances and do not share in any spending decisions. See Robinson & Wenig, supra note 31, at 808 n.144.

542 See PAHL, supra note 331, at 83-84 (noting that couples who claimed to share everything when interviewed together, sometimes changed their stories when interviewed separately); Kornhauser, supra note 29, at 85 n.55, 105 and sources cited therein.

543 Kornhauser, supra note 29, at 106. See id. at 81 ("[s]pouting vague generalities about sharing is easy, especially when such sentiments are approved morally by tradition") (footnote omitted); Beck, supra note 58, at 381 (noting that because respondents probably regard pooling as a commitment to marriage and would, therefore, view it as desirable, they may sometimes state that they pool when, in fact, they do not). See also HOCCHILD & MACHUNG, supra note 183, at 20.

544 See Kornhauser, supra note 29, at 105; Zelenak, supra note 29, at 349-50 (acknowledging that pooling might occur less than attitudes suggest).

Professor Zelenak has argued that attitudes about resource pooling are more important than the extent of actual sharing because to be acceptable to the public, the income tax treatment of marriage should be grounded in and consistent with widely held views about the nature of marriage, rather than actual practice. Zelenak, supra note 29, at 349-50. However, Professor Zelenak makes this assertion in the context of deciding whether the proper tax unit should be the individual or the couple. He does so with respect to whether "couples neutrality" or "marriage neutrality" should prevail. Attitudes about pooling should not be elevated in importance above the prevalence of actual pooling with regard to whether the wife shares in the husband's joint return tax savings. Such distributional issues are resolved only by determining which person enjoys the economic benefit, and that determination may not be made without examining the prevalence of actual sharing, regardless of prevailing attitudes. If attitudes favor pooling, but behavior contradicts those attitudes, then wives generally will be harmed by filing jointly. They will not share in the husbands' tax savings.

545 See PAHL, supra note 331, at 57; Kornhauser, supra note 29, at 81-82, 83 n.55; Wong, supra note 333, at 56-63 (discussing studies of households in various countries and concluding that household members do not share resources equally and often do not even live similar class styles); Zelizer, supra note 333 (families operate as hierarchical groups in which one person controls the allocation and use of money). Cf. Ross, supra note 301, at 154-55 (noting that even when spouses have the legal obligation to pay the other's liabilities, they do not necessarily believe they must do so or that they must share resources in other
pool resources may not even know of the existence of some assets. Consequently, the reported incidence of true sharing may be overstated.

Even when couples do pool nominally, the power, status, and freedom to decide how money is used nonetheless tend to be allocated to the higher earner, usually the husband. This pattern is reflected in the findings of numerous sociological studies that nominal pooling of income does not mean that control over that income is shared. "If one person dominates

ways): Kahng, supra note 51, at 13 (noting that wives' economic dependence on their husbands contributes to their lack of control over financial decisions).

See Kornhauser, supra note 29, at 82.

See id. at 81-82, 105; Zelenak, supra note 29, at 349-50 (acknowledging that true pooling might exist less than attitudes suggest).

See Beck, supra note 58, at 380-81 (women report having to ask permission from their husbands to make purchases unless they earn significant amounts themselves); De Armond, supra note 307, at 251-54; Jones, supra note 3, at 274 (noting that the earner generally controls how earnings will be used); Zelenak, supra note 29, at 355; Kahng, supra note 51, at 26 (same as Jones).

See BERGMANN, supra note 248, at 211-12 (men as primary wage earners have retained control over consumption patterns); BLUMSTEIN & SCHWARTZ, supra note 252, at 53-56; PAHL, supra note 331, at 146-51 (women married to wealthy men often lack resources for leisure activities although their husbands do not), 143 (women married to wealthy men may lack sufficient funds for necessities); Christine Delphy & Diana Leonard, Class Analysis, Gender Analysis and the Family, in GENDER AND STRATIFICATION 57-73 (Rosemary Crompton & Michael Mann eds., 1986) (unequal food distribution within the family undermines the assumption of equal sharing of resources and power); Jan Pahl, The Allocation of Money and the Structuring of Inequality Within Marriage, 31 SOC. REV. 237, 251-58 (1983) [hereinafter Pahl, Structuring of Inequality]; Jan Pahl, The Allocation of Money Within the Household, in THE STATE, THE LAW, AND THE FAMILY: CRITICAL PERSPECTIVES 36 (Michael D.A. Freeman ed., 1984) (hereinafter Pahl, Within the Household); Diana Strassmann, Not a Free Market: The Rhetoric of Disciplinary Authority in Economics, in BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS 54, 58-59 (Marianne A. Ferber & Julie A. Nelson eds., 1993) (noting that economists often assume incorrectly that the husband shares power and resources so as to further the best interest of each individual within the household). Accord CHRISTINE OPPONG, MIDDLE CLASS AFRICAN MARRIAGE: A FAMILY STUDY OF GHANAIAN SENIOR CIVIL SERVANTS 86-88, 138 (1981); Carole B. Burgoyne, Money in Marriage: How Patterns of Allocation Both Reflect and Conceal Power, 38 SOC. REV. 654 (1990); Heidi I. Hartmann, The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework, 6 SIGNS 566, 566-76 (1981) (arguing that men more often than women control how income will be used and for whose benefit); Kornhauser, supra note 29, at 80, 90-91 ((studies show "that individual incomes are not simply pooled and then spent to meet household needs in some unified fashion. They are spent at least in part according to the earner's own preference") (quoting Beatrice Lorge Rogers, The Internal Dynamics of Households: A Critical Factor in Development Policy, in INTRA-HOUSEHOLD RESOURCE ALLOCATION: ISSUES AND METHODS FOR DEVELOPMENT POLICY AND PLANNING 1 (Beatrice Lorge Rogers & Nina P. Schlossman eds., 1990))); Kristin A. Moore & Isabel V. Sawhill, Implications of Women's Employment for Home and Family Life, in SOCIOLOGICAL PERSPECTIVES ON WOMEN WORKING: THEORIES AND FACTS IN PERSPECTIVE 201 (Ann H. Stromberg & Shirley Harkess eds., 1978); Staudt, supra note 43, at 1594 n.91 (citing numerous studies which show that access to and control of resources is often tied to the gender hierarchy, often with the man controlling how money is used); Michael Young, Distribution of Income Within the Family, 3 BRIT. J. SOC. 305, 305 (1952) (historically men disproportionately benefit from family resources: "the bread-winners are often the meat-eaters"); id. at 314 (describing the practice whereby husbands provide only limited access to their resources through an allowance system rather than by providing
the decision-making process, true sharing cannot exist."\textsuperscript{350} "The lack of sharing may be subtle, discernible for example only through a pattern of deference by the wife to the husband's decisions."\textsuperscript{351} For social and psychological reasons, many wives report feeling guilty if they spend money they have not earned themselves, even if they use it to purchase necessities.\textsuperscript{352} Consequently, they often forgo using that money, and even if they have literal access, they do not really enjoy the money as a practical matter. If control is not shared, then true pooling is absent.\textsuperscript{353}

Surveys of women support the notion that when control is not shared, meaningful access to resources remains with the earner. Non-working women in those surveys claimed that if they started earning money, they would keep it separately, even though their husbands had always "shared" resources.\textsuperscript{354} "Surely, when sixty-six percent of married women say 'it's ethical to hide a portion of their spending money in a secret stash,' the freedom that non-earner women feel to spend 'shared' income must be called into question."\textsuperscript{355} Apparently these women did not regard themselves indiscriminate access); Kahng, \textit{supra} note 51, at 21, 26 n.73 (citing evidence that the earner retains control over the family's resources and that even in community property states where spouses are given equal management and control over community property earnings, the earner spouse often exerts \textit{de facto} control over his earnings as the wife has little ability to prevent her husband from dissipating the couple's assets); \textit{William A. Reppy, Jr. & Cynthia A. Samuel, Community Property in the United States} 14-3 (3d ed. 1991) (same). See generally \textit{Robert O. Blood & Donald M. Wolfe, Husbands and Wives: The Dynamics of Married Living} (1960); Stephen J. Bahr, \textit{Effects on Power and Division of Labor in the Family}, in \textit{Working Mothers} 167 (Lois W. Hoffman & F. Ivan Nye eds., 1974); Randall Collins, \textit{A Conflict Theory of Social Stratification}, 19 \textit{SOC. PROBS.} 3, 13, 16 (1971) (describing sexual stratification in the workplace and in the home). But see \textit{Michael J. McIntyre, Tax Justice for Family Members After New York State Tax Reform}, 51 \textit{ALB. L. REV.} 789, 792 n.17 (1987) (claiming that the data in Jan Pahl, \textit{Patterns of Money Management Within Marriage}, 9 J. SOC. POL. 313 (1980) are unrepresentative). Professor McIntyre cites data supportive of sharing that was gathered in the 1950's and early 1960's. The possibility of sharing between spouses in those years does not prove that spouses continue to share four decades later.

\textsuperscript{350} Kornhauser, \textit{supra} note 29, at 88. See also Beck, \textit{supra} note 58, at 380 (noting that the determination of which spouse has control over spending decisions is relevant to knowing whether those spouses share resources).

\textsuperscript{351} Kornhauser, \textit{supra} note 29, at 106 (footnote omitted). See also \textit{Hochschild & Machung, supra} note 165, at 20.

\textsuperscript{352} See \textit{Hite, supra} note 263, at 433; Kornhauser, \textit{supra} note 29, at 88, 90 n.82.

\textsuperscript{353} See Kornhauser, \textit{supra} note 29, at 97, 105; Zelenak, \textit{supra} note 29, at 350 (acknowledging that dominance by one spouse is relevant to whether purported sharing is real).

\textsuperscript{354} See Burgoyne, \textit{supra} note 349, at 649. See also Kornhauser, \textit{supra} note 29, at 106 (stating that women would do this in recognition that stated sharing is not real sharing).

\textsuperscript{355} Kornhauser, \textit{supra} note 29 at 106 (citing \textit{Honesty Not Best Marital Policy?}, TIMES-PICAYUNE (New Orleans), Nov. 18, 1992, at E-3 (discussing a MccALL's magazine survey)).
as having true access to the resources their husbands “shared” with them. While some men may claim to share resources equally with their wives, some may be more willing to adopt an attitude of “sharing” when they control how much will be shared and for what purposes, and less willing to shift ownership to the wife so that she may make these decisions. People may acclaim the idea of sharing only when they are the ones controlling the sharing, that is, when meaningful sharing is absent. In the absence of true pooling, the wife will tend not to use any part of the husband’s tax savings, even when she has access to it as a legal matter or through her husband’s generosity.

Only when wives have significant earnings of their own, or when their husbands’ earnings are low, do they tend to have more control over how money is spent, and thus, more meaningful access to their husbands’ tax savings. Wives tend not to have control over how resources are used when they have relatively low earnings or when their husbands have relatively large earnings. A couple in which the husband’s earnings substantially exceed those of his wife is, therefore, less likely to practice true sharing than another couple with closer incomes. Furthermore, when one spouse earns substantially more than the other, the joint return benefit to the lower-earning spouse from income splitting is smallest and her harm from aggregation is largest.

556 See supra notes 337-39 and accompanying text.

557 See BLUMSTEIN & SCHWARTZ, supra note 252 at 55; HERTZ, supra note 331, at 95-97 (noting that separate accounts became more prevalent once the wife starts earning more money); Collins, supra note 349, at 16; Jan Pahl, Household Spending, Personal Spending and the Control of Money in Marriage, 24 SOC. 119, 123-24 (1990).

558 See BLUMSTEIN & SCHWARTZ, supra note 252, at 252-54; De Armond, supra note 307, at 252-25; Louise B. Dulude, Joint Taxation of Spouses—A Feminist View, CAN. TAX'N, Winter 1979, at 8 (noting that the greater the income, the less sharing); Zelenak, supra note 29, at 343 (the earner controls how the earnings will be used). See also BLUMSTEIN & SCHWARTZ, supra note 252, at 53 fig.1 (same); Pahl, supra note 331, at 49-56, 69 (pointing out that wives have less access to the family money and that this is even more true the more the husband earns); Beck, supra note 58, at 381 n.296; Kornhauser, supra note 29, at 83, 89 (“the amount of money one partner earned relative to the other determined relative power and control over resources”) (footnote omitted); Pahl, Structuring of Inequality, supra note 349, at 251-58 (pointing out that wives have less access to the family money and that this is more true the more the husband earns); Pahl, Within the Household, supra note 349, at 41-45 (the more the husband earns, the less the wife’s control over money); Staudt, supra note 43, at 1595 (“[m]ost studies, however, indicate that the level of economic control corresponds to the level of each family member’s market wage. Individuals who bring in a greater portion of income generally have more control over resources.”) (footnote omitted). Cf BLUMSTEIN & SCHWARTZ, supra note 252, at 56 (intra-family power disparities are related to relative income levels); Kahng, supra note 51, at 13 (stating, in the context of whether a woman will withhold the gift tax split gift election, that a woman without assets of her own is more likely to lack power in the relationship).
Consequently, joint, rather than separate, filing provides the largest benefit to the husband and the largest detriment to the wife when the spouses have disparate incomes. This joint filing pattern is most harmful to wives in the very cases in which the wives would be least likely to have meaningful access to their husbands' joint return tax savings. For couples in which the spouses have disparate incomes, not only must wives pay significantly more by filing jointly than they would by filing separately, but their husbands are less likely to practice true sharing, so the harm to the wives is not mitigated because they do not acquire meaningful access to their husbands' tax savings.

Husbands often control not only how their own earnings are used but also how those of their wives are used. Critics may, therefore, argue that even if the tax system were modified to allow wives to share in the tax savings from joint filing, their husbands will be the true beneficiaries of those savings in any event because

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369 See supra Tables 4-6, notes 274-78, notes 348-58 and accompanying text.
360 See supra notes 345-59 and accompanying text.
361 In low-income families the wife is more likely to manage the resources, thereby obtaining access to the husband's tax savings. However, in those low-income families, women's access to those savings does not necessarily permit them to use the savings for their own benefit. Such families generally lack the resources to cover basic necessities like rent or food. See Pahl, *Structuring of Inequality*, supra note 349, at 251-52. Any use of the husband's tax savings would most likely benefit the whole family, not the wife only. The wife would not likely be able to use the savings for her own leisure or to establish savings of her own. Cf. *Women's Bureau, U.S. Dep't of Labor, Working Women Count!: A Report to the Nation* 24 (1994) (discussing the pressures encountered by some two-income families); Pahl, *Within the Household*, supra note 349, at 36-48; Staudt, supra note 43, at 1596 (asserting that "[b]ecause money is scarce in low-income households, ... [managing money in these families] cannot be seen as a source of power"). Of course, in such low-income families, the ability to derive a lower total tax burden by filing jointly may not inure to the sole benefit of the husband either.

362 See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. Cal. Rev. L. & Women's Stud. 133, 154 (1992) (Women tend to pay for child care out of their own wages. Treating this cost as a woman's own personal expense, rather than as an expense of both spouses, causes the wife to pay for child care and to subsidize the husband's luxuries and savings.); Martha W. Griffiths, *Can We Still Afford Occupational Segregation? Some Remarks*, in *Women and the Workplace* 7, 9 (Martha Blaxall & Barbara Reagan eds., 1976) (noting that the wife's salary is used to subsidize her husband's luxuries); Kornhauser, supra note 29, at 83; Staudt, supra note 43, at 1595-96 (describing how married women in the waged labor force tend to use their entire salaries for family necessities, while men often reserve their income for leisure activities—activities chosen by those men); id. at 1595 ("Studies indicate that often married women working in the home are given only enough resources to pay for the family's necessities such as food, clothing, and utility bills" but not enough to finance their own personal spending, and presumably not enough to accumulate savings in their own names (citing Pahl, *Structuring of Inequality*, supra note 349, at 244-52)); Ann Whitehead, *I'm Hungry Mum*: The Politics of Domestic Budgeting, in *Of Marriage and the Market: Women's Subordination in International Perspective* 88, 106-07 (Kate Young et al. eds., 1981); Young, supra note 349, at 313-19 (discussing, in a historical context, the practice of husbands giving their wives "allowances").
the husbands control how all resources will be used.\textsuperscript{363} Alternatively, even if the wife files separately to avoid paying more tax, the tax she saves individually could be subject to her husband's control. This observation might be used to support retaining the status quo. Although the observation is probably correct in many cases, women would likely be better off filing separately in any event because they may be able to segregate some money, their own tax savings, in an effort to secure some modicum of economic independence.\textsuperscript{364} Furthermore, the current system is more likely to be ineffective in permitting wives to share in the tax savings from filing jointly than a modified system would be. The possibility that a modified system might not function perfectly for all wives is not a justification for maintaining an even worse regime.

If women do not have meaningful access to their husbands' tax savings from joint filing, then joint filing, in fact, leaves those wives poorer than would separate filing. Even when wives do have access to their husbands' tax savings through voluntary sharing, the tax savings are still the husbands' tax savings. Sharing men's resources through men's generosity is second best to women owning resources on their own as a matter of right.\textsuperscript{365} Husbands

\textsuperscript{363} See Staudt, supra note 45, at 1614 (noting that while mandatory separate returns would lower women's taxes, men might get the economic benefit of that tax savings because of their greater control over resources). Cf. Alstott, supra note 30, at 2029-30 (noting that wives' greater labor force participation may translate into economic benefit to husbands rather than to wives because of family dynamics that "divest [the wife] of effective control over the additional incomes").

\textsuperscript{364} See supra notes 354-56 and accompanying text.

\textsuperscript{365} See supra notes 357-58 and accompanying text.

Even in the context of divorce where common-law property states sometimes give a wife greater access to her "husband's" property, discretion is often left to a judge to divide the property fairly between the spouses. However, the "uncertainty of this method is unsatisfactory to the economically dependent spouse, who has no automatic right to a part of the property." Gann, supra note 29, at 48 (emphasis added). See supra notes 313-28 and accompanying text.
who voluntarily share their resources with their wives still enjoy the power and control that accompanies the concentration of assets in their hands. Numerous sociological studies suggest that money profoundly impacts the power relationships between husbands and wives.\textsuperscript{366} The fact that women generally have access to wealth primarily through their husbands’ generosity concentrates control and power in the hands of those husbands. “[S]uperior earnings are rewarded with dominant control.”\textsuperscript{367} This pattern, which exists because of cultural practices and because of the gendered wage gap, is further exacerbated by the fact that joint filing relative to separate filing directs even more money to husbands and even less to wives.

Even if spouses do share resources in a meaningful way, so that the wife may avoid being harmed by filing jointly and may effectively share in her husband’s tax savings, the fact that wives must rely on their husbands’ generosity to enjoy the tax savings has a harmful pedagogical effect.\textsuperscript{868} The tax law sends harmful messages about men’s and women’s roles and identities by allowing women to benefit only through their husbands’ benevolence. The tax law establishes a pattern whereby wives

\textsuperscript{366} See Blumstein & Schwartz, supra note 252, at 17-18, 55, 83 (examining 12,000 questionnaire responses and 500 in-depth interviews on the subject of couples and their money, work and sex); Marcia Millman, Warm Hearts and Cold Cash: The Intimate Dynamics of Families and Money 5 (1991) (“Money is a primary source of power in relationships.”).

\textsuperscript{367} De Armond, supra note 307, at 253. See also Blumstein & Schwartz, supra note 252, at 109 (“In traditional marriages, interdependence is usually achieved at the cost of the wife’s autonomy and her participation on an equal basis in decision-making.”); Pahl, supra note 351, at 109 (studying English couples); Burgoyne, supra note 549, at 655 (arguing that the spouses’ perceived ownership interests in earnings is important in influencing their respective levels of power and access to “shared” money); Pahl, supra note 357, at 124 (study of English couples).

\textsuperscript{868} Cf. Susan H. Bitensky, Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis, 86 NW. U. L. REV. 550, 635-37 (1992) (discussing in the context of a constitutional right to education, the beneficial pedagogical effect that law has in instructing the public about desired norms); id. at 635 (“[L]aw ... disseminates [values and priorities] ... back to the populace to become part of conscious conventional wisdom”) (footnote omitted); De Armond, supra note 307, at 257 (suggesting that the messages in law have some power to transform society and arguing that “law is a belief system that helps define the role of the individual in society and relations with others, [and that] ... it can promote fulfilling, healthy roles for people and encourage them to relate in particular ways, and not in others.”); id. at 258 (suggesting that law should change negative aspects of social reality, not exacerbate them); McCaffery, Slouching Towards Equality, supra note 13, at 656 (implying in the context of the symbolic danger of taxing men more than women that the symbolic function of law is important and that law sends messages to society); Zelenak, supra note 29, at 365 & n.121 (implying that law, specifically the joint return, may be objectionable on the basis of inappropriate messages that it sends to the public). But see Alstott, supra note 30, at 2031 (discounting the impact on society of symbolism in law).
must consistently request money from their husbands, money to which they should have had access by right. The law portrays the husband as a provider, a generous contributor, a chief financial officer, and an authority figure, and it portrays the wife as a beggar, a burden, a consumer, a drain on the "husband’s" resources, and a dependent. This pattern in the tax law perpetuates marriage as an institution in which men economically dominate women.\textsuperscript{369} The tax law arguably should not be allowed to perpetuate or contribute to such stereotypes.

The voluntary sharing of resources within the marital unit is not a sufficient solution to the pattern whereby husbands are better off and wives are worse off by filing jointly rather than separately. The tax law should neither rely on spousal sharing nor be structured to require that spouses share resources to enable wives to enjoy some of the financial benefit from filing jointly. In the absence of sharing, the joint return rate structure operates to force wives to transfer funds to their higher-earning husbands. The tax code, therefore, relies on marital sharing of assets in an attempt to achieve a just result, in an effort to allow both spouses to benefit from filing jointly. The Code relies on this sharing of resources despite the possibility that marital relationships are more stable when each partner retains some level of economic independence.\textsuperscript{370}

An equitable method for apportioning joint return tax liabilities between husband and wife, one that differs from those described above, is to split the joint tax liability in proportion to the spouses’ respective liabilities had they filed separately. Using the example in which the husband and wife earn $80,000 and $40,000 respectively, this approach would allocate $21,112 of the $29,729 joint tax to the husband and $8,617 to his wife.\textsuperscript{371} Note

\textsuperscript{369} Cf. Kahng, \textit{supra} note 51, at 2 (discussing how the estate and gift tax systems also perpetuate marriage as an institution privileging husbands over wives).

\textsuperscript{370} See, e.g., Kornhauser, \textit{supra} note 29, at 108.

\textsuperscript{371} These amounts are computed as follows:

\[ \text{\$21,564 (husband’s MFS liability) \times \$29,729 (MFJ tax) + \$30,366 (Total MFS liability) = \$21,112 (husband’s portion of joint tax).} \]

\[ \text{\$8,802 (wife’s MFS liability) \times \$29,729 (MFJ tax) + \$30,366 (Total MFS liability) = \$8,617 (wife’s portion of the joint tax).} \]
that under this apportionment method, both spouses are better off than they would have been had they filed separately. 572 Consequently, this method is the most desirable. 573 Nevertheless, it is inappropriate to apportion joint return tax liability in this manner in analyzing which spouse benefits by filing jointly rather than separately because when a couple pays its joint return tax liability, it is unlikely that each spouse contributes to the payment based on his or her respective separate return liabilities. First, no tax rules apply in this context to instruct the couple to

572 In fact, the government has adopted this apportionment method for use in a variety of contexts but notably not to instruct joint filers how to divide their joint tax liabilities fairly. Respective separate return liabilities are used to apportion joint tax liability between the spouses in three contexts. First, this method is found in the rules for determining the amount the IRS will refund from a joint return to one spouse when the other is not entitled to any refund because, for example, he has an outstanding separate return tax liability from a previous year. See Rev. Rul. 80-7, 1980-1 C.B. 296. See also Rev. Rul. 80-6, 1980-1 C.B. 296; Rev. Rul. 80-8, 1980-1 C.B. 298.

[T]he overpayment is creditable or payable only to the spouse who actually made payments in excess of his or her own separate liability, but only to the extent aggregate payments of both spouses exceed their aggregate liability. In other words, the separate overpayments are credited only to the proper payor, but the refund is limited so as not to create a deficiency.

Beck, supra note 58, at 394 n.584. This approach is consistent with I.R.C. § 6013(d)(3) (1994), the rule of joint and several liability. Second, the method is also present in the rules for determining how much of a joint return income tax liability is deductible for estate tax purposes. See Treas. Reg. § 20.2053-6(f) (1958). Third, the method is used to determine whether estimated tax payments for the current year have been underpaid when a joint return was filed in the preceding year and separate returns are filed in the current taxable year. See Treas. Reg. § 1.6654-2(e) (as amended in 1985). The same method is also used for allocating joint estimated tax payments between a husband and wife in the event they file separate income tax returns and cannot agree on an allocation. See Treas. Reg. § 1.6015(b)-1(b) (as amended in 1976).

573 If Congress ever repeals the rule of joint and several liability, it should adopt in its place an apportionment method which divides the joint tax liability on the basis of the spouses' respective tax liabilities they had filed separately, and it should instruct taxpayers that this method is the fairest manner for dividing their joint return tax liability. Accord Beck, supra note 58, at 389 n.341, 393-95. Apportioning joint return liabilities on the basis of respective separate return liabilities is more appropriate than doing so on the basis of respective net incomes because the former method permits the lower-earning spouse to share in the financial income-splitting benefit of joint filing. The two methods yield different results because apportioning joint return liability on the basis of respective separate return liabilities allows the lower-earning spouse access to lower marginal rates. A low-income taxpayer who files separately would be subject to lower marginal tax rates compared to a high-income taxpayer who files separately. Dividing the joint return liability according to respective separate return liabilities will give effect to the spouses' two different effective tax rates (ETRs). By contrast, apportioning the joint return tax on the basis of respective net incomes causes the combined incomes to be subject to tax at one, combined ETR, the ETR applicable in the joint return rates. This average ETR is higher than the wife's separate ETR and lower than the husband's separate ETR. Hence, the latter apportionment method taxes the wife's income more and the husband's income less than would separate filing. Apportioning joint return liability on the basis of respective separate return liabilities prevents the averaging of the two ETRs, maintaining a difference in the ETRs applicable to the two different spouses.
apportion its joint return tax in this manner. Second, the vast majority of the population is unlikely to consider apportioning joint tax liability in this manner.\textsuperscript{374} Thus, spouses who segregate their resources and divide each expenditure, including the joint return tax bill, most likely contribute equally or in proportion to their respective net incomes, rather than in proportion to what their respective tax liabilities would have been if computed using separate return rates.

Furthermore, when given the opportunity to apportion joint return liability, the courts have consistently failed to do so on the basis of respective separate return liabilities. In state contribution actions where federal joint return tax liabilities were apportioned between spouses, not one reported state court decision stated that the joint return tax should be divided according to the spouses’ respective separate return liabilities. See Beck, supra note 58, at 394 (discussing how this apportionment method is used in other contexts). In the context of discussing how wives pay the price statistically for the benefit of income splitting, he states that the benefit accrues entirely to husbands. “It should be noted that the wife’s taxes would be identical whether she files jointly or separately; all the saving is on the husband’s side of the return.” Id. at 376. This statement would not be correct if the couple apports joint return liability on the basis of their respective separate return liabilities. Most spouses probably do bear the joint return liability using a 50-50 split or in proportion to their respective net incomes. Professor Beck’s statement reflects this probable reality, inferring that the tax savings from income splitting are enjoyed 100\% by husbands. Of course, joint return liability ought to be divided by spouses so that each spouse attains a fair share of the joint return tax savings. Professor Beck agrees. Id. at 389 n.341, 393-95. See also Alstott, supra note 30, at 2028-29 (in the context of the ability for each spouse to pay tax, equating spouses’ abilities to pay tax with apportionment of the joint return liability on the basis of their respective incomes rather than on the basis of their respective separate return liabilities).

It should be noted that some individuals, probably only tax accountants, do apportion joint return liability between spouses in a manner that approximates the correct method, according to respective separate return liabilities. They have been reported to divide that liability on the basis of the spouses’ respective liabilities had they been single. Under this method, both spouses benefit economically from filing jointly rather than separately. See Schultz, supra note 340, at 31 (noting that some couples are more frequently asking their return preparers to determine how to divide underpayments between the spouses, indicating both that most individuals do not know how to do this fairly on their own and that they do not share resources). Empirical research should be conducted to determine how most spouses divide their joint return tax liabilities in practice.

\textsuperscript{374} In an informal survey of 32 attorneys conducted by this author, 63\% of respondents reported that the fairest way to divide joint return tax would be according to the spouses’ respective net incomes. Twelve percent thought that it would be fairest to apportion the joint tax either according to the spouses’ respective net incomes or on a 50-50 basis. Only 25\% thought of splitting the liability in proportion to the respective separate return tax liabilities. If most attorneys, individuals who tend to be educated in general tax principles, do not think to split the joint return tax in proportion to separate tax liabilities, then the average couple is very unlikely to think of splitting the joint tax in that manner. Of course, limitations on the usefulness of such a survey include the fact that respondents were simply asked their opinion. Had respondents actually been working on their own tax returns and deciding whether to file jointly or separately, they might have discovered that apportionment on the basis of separate return liabilities rendered a different result than apportionment on the basis of respective net incomes. Even Professor Beck, an expert on joint return law, has occasionally slipped in this regard. Professor Beck knows about the possibility of apportioning joint return liability according to spouses’ respective separate return liabilities. See Beck, supra note 58, at 394 (discussing how this apportionment method is used in other contexts).
When, under the rule of joint and several liability, the Commissioner collects a joint return tax deficiency from one spouse even though his or her income or deductions did not contribute to the deficiency, then that spouse may bring a right-of-contribution action in state court against the other spouse. See Estate of McClure v. United States, 288 F.2d 190, 192 (Ct. Cl. 1961). State law determines the plaintiff spouse’s rights. See Alloro v. Commissioner, 67 T.C. 215, 216 (1977) (division of tax deficiency is a matter to be resolved under State laws.). In Murchison v. Murchison, 53 Cal. Rptr. 285, 288 (Cal. Dist. Ct. App. 1963), the court ruled that a spouse who had paid the entire federal joint return tax deficiency was entitled to contribution for the other spouse’s share. That decision did not address the issue of how each spouse’s fair share should be determined.

In the context of joint return tax liability, state courts have determined fair-share apportionment using a variety of methods, but no decision has reported apportioning the joint return tax on the basis of respective separate return liabilities. But see Beck, supra note 58, at 396 (stating that state courts apportion joint return liability on the basis of respective separate return liabilities, but providing no evidence and erroneously citing cases that did not so hold). Rather, state courts have apportioned joint return tax liability in the following manners: (1) according to the spouses’ respective net incomes, see Chappell v. Chappell, 253 So. 2d 281, 285, 287 (Fla. Dist. Ct. App. 1971) (party divided tax obligation in half and had it not been for policy against withholding alimony, court seemingly would have allowed contribution on the basis of respective earned incomes); Miller v. Miller, 310 N.Y.S.2d 18, 21 (N.Y. Civ. Ct. 1970); (2) half to the husband and half to the wife, see Rude v. Commissioner, 48 T.C. 165, 171-75 (1967) (discussing whether wife could deduct as a non-business bad debt the amount her husband owed her pursuant to an earlier right of contribution judgment from a California state court); Rocha v. Rocha, 297 P.2d 505, 507 (Cal. Dist. Ct. App. 1956) (under both law and an agreement between the parties); Bormaster v. Bormaster, 274 P.2d 757 (Kan. 1954); Hanson v. Hanson, 350 P.2d 855, 860-61 (Wash. 1960); and (3) according to a property settlement agreement or stipulation between the ex-spouses, see Gillman v. O’Connell, 574 N.Y.S.2d 573, 575 (App. Div. 1991) (agreement provided that any tax deficiency arising from the marriage would be apportioned to the spouse whose income or deductions generated the deficiencies); Gooden v. Wright, No. 14823, 1991 WL 57230, at *2 (Ohio Ct. App. Apr. 18, 1991) (agreement provided that any tax deficiency would be paid entirely by the ex-husband); Strange v. Rubin, 456 S.W.2d 416 (Tex. Civ. App. 1970) (pursuant to a stipulation between the parties that half of the deficiency was attributable to each spouse).

It should be noted that Rocha, Hanson, and Rude, three of the four decisions in which liability was attributed to the spouses on a 50-50 basis, involved couples who had been living in community property jurisdictions. Dividing the joint return liability in half would have corresponded with apportionment on the basis of respective separate return liabilities if the deficiencies in those cases resulted from unreported community income. Such income is properly taxed half to each spouse. Nevertheless, none of the three opinions explained the reasons for the deficiencies in question.

The states in those three cases for the tax years in question treated earnings from separate property as separate, not community, earnings. Rocha and Rude both involved California residents and the tax years 1949 and 1950 in the case of Rocha, and 1951 in the case of Rude. California law at that time, as now, designated income from separate property as separate income. CAL. FAM. CODE ANN. §§ 5107-5108 (West 1997); George v. Ransom, 15 Cal. 322 (1860) (holding that law providing that such income was, itself, community property violated the California constitution). Hanson involved residents of Washington state and the 1956 tax year. In that year, as now, Washington state law provided that income from separate property would, itself, also be separate property. 1879 Wash. Laws § 1, at 77; WASH. REV. CODE ANN. §§ 26.16.010—020 (West 1997). Thus, had income arisen from one spouse’s separate property in any of those three cases, that income should have been taxed solely to the owner-spouse pursuant to community property law and the principles enunciated in Helvering v. Horst, 511 U.S. 112, 116-18 (1940), that the owner of income-producing property is the proper taxpayer. A deficiency due to a failure to report such separate earnings would be attributable entirely to the spouse owning the separate property. In that instance, a 50-50 allocation would not correspond to apportionment on the basis of respective separate return liabilities.

Had a deficiency resulted from one spouse’s improper deduction or an understated gain on the sale of separate property, then that deficiency should not be borne half by each
apportioned joint return liability between the spouses by dividing it in half, by dividing it on the basis of respective net incomes, or in accordance with a property settlement agreement between the ex-spouses. Moreover, prior to Congress' enactment of joint and several liability, federal courts sometimes had occasion to determine how to apportion joint tax liability between spouses. None of the federal courts addressing that issue apportioned the joint tax on the basis of what the spouse's individual tax liabilities would have been had they filed separately. Rather, those courts ruled that joint tax liability should be apportioned on the basis of the spouses' respective net incomes. If courts have apportioned separately filing spouse. In that instance, a 50:50 allocation would not correspond to apportionment on the basis of respective separate return liabilities. Given the absence of information documenting the reason for the deficiencies in Rocha, Hanson, and Rude, it is impossible to know whether or not the 50:50 allocation corresponds to apportionment on the basis of respective separate tax liabilities. None of these courts provided any indication in their opinions that they had put much thought into the apportionment issue. Furthermore, none of the decisions ever referred to apportionment on the basis of respective separate return liabilities. Had courts intended to apportion on that basis it seems reasonable to expect that they would have said so. It, therefore, seems unlikely that the three courts had intended to apportion the deficiencies on that basis.

In general, state courts have not apportioned joint return liabilities in a manner that permits both spouses to share in the financial benefits of joint filing. Instead, they seem to apportion those liabilities in manners that benefit the higher-earning spouse and that harm the lower-earning spouse. See Commissioner v. Rabenold, 108 F.2d 639, 640 (2d Cir. 1940); Cole v. Commissioner, 81 F.2d 485, 487, 489 (9th Cir. 1935); Seder v. Commissioner, 38 B.T.A. 874, 877 (1938).

It should be noted that during the tax years involved in those cases: (1) separate returns were called individual returns; and (2) income splitting had not yet been incorporated into the joint return tax rates. Joint tax liability was computed simply by applying the individual rates to the spouses' aggregate net incomes. See Bittker, supra note 29, at 1460. Consequently, the aggregation effect would cause joint filing to result in a higher total tax liability, and income splitting would not apply to offset that harm. Joint return liability tended to exceed the sum of the spouses' individual liabilities.

Assuming joint return liability was apportioned at that time on the basis of the spouses' respective net incomes, the higher-earning spouse, usually the husband, would have paid only a somewhat greater tax by filing jointly than the amount he would have owed had he filed individually. By contrast, the wife would have paid a much greater tax, on a percentage basis, by filing jointly than by filing individually. Apportioning joint return liability on the basis of respective net incomes tended to be more harmful to women than to men. Assuming the joint return liability was apportioned on the basis of the spouses' respective individual tax liabilities, the higher-earning spouse would pay a greater tax by filing jointly than if he had filed individually, and the lower-earning spouse would pay an equally greater tax, in percentage terms, by filing jointly than the amount she would have owed had she filed individually. Consequently, apportioning joint return liability on the basis of respective individual liabilities tended to impose the aggregation burden from joint filing on both spouses fairly. The example below illustrates these principles.

Assume a progressive individual tax rate as follows:

<table>
<thead>
<tr>
<th>Net Income ($)</th>
<th>Marginal Tax Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 10,000</td>
<td>10%</td>
</tr>
<tr>
<td>10,001 - 20,000</td>
<td>20%</td>
</tr>
<tr>
<td>20,001 - 50,000</td>
<td>30%</td>
</tr>
</tbody>
</table>
joint return liabilities in a manner that prejudices the lower-earning spouse, usually the wife, then it should be expected that taxpayers will make the same errors. Without instruction, few couples would be likely to divide their joint return liabilities in this manner.

With regard to couples who segregate resources, until

Assume the husband earns a net income of $20,000 and that the wife has net earnings of $10,000. If the spouses file individual returns, the husband's tax liability will be $3,000, or 10% of his first $10,000 plus 20% of his last $10,000. The wife's individual liability would be $1,000, or 10% of her income of $10,000. Their combined individual tax liabilities would amount to $4,000.

Assuming the couple files jointly, income aggregation would operate to produce a joint tax liability of $6,000. The couple's total income of $30,000 would be subject to all three marginal rates: 10% on the first $10,000; 20% on the second $10,000; and 30% on the last $10,000. The couple is better off filing individually than jointly.

The $6,000 joint liability could be apportioned in many ways. The courts in Cole, Rab mould, and Seder all chose to do so on the basis of respective net incomes. Because one-third of total net income was attributable to the wife, one-third of the $6,000 joint tax, or $2,000, would be apportioned to her. Two-thirds of net income was the husband's. Therefore, two-thirds of the $6,000 joint tax, or $4,000 would be apportioned to him. By filing jointly rather than individually the wife's taxes have, under this apportionment method, increased by 100% from $1,000 to $2,000. By contrast, this method causes the husband's taxes to increase by only 33% from $3,000 to $4,000. Using the courts' chosen apportionment method, the burden from aggregation is borne disproportionately by the lower-earning spouse, generally the wife.

Had the courts thought of apportioning the joint tax on the basis of respective individual liabilities, the spouses would have borne the aggregation burden equitably. Because three-fourths of the combined individual liability, $5,000 of the total $4,000, was attributable to the husband, three-fourths of the $6,000 joint liability or $4,500 would be apportioned to him. One-fourth of the total individual tax liability, $1,000 of the total $4,000, was attributable to the wife, and, therefore, one-fourth of the $6,000 joint liability, or $1,500, would be apportioned to her. Under this second apportionment regime, the husband and the wife would each pay 50% more than what they would have owed had they filed individually. This apportionment method would have allocated the burden of aggregation more appropriately.

By choosing to apportion joint return liability on the basis of respective net incomes rather than according to the spouses' respective liabilities had they chosen not to file jointly, the Ninth and Second Circuits and the court known for its expertise in tax matters, the Board of Tax Appeals, all failed to spread the burdens of joint filing fairly between the spouses. This error was analogous to apportioning joint tax liability today on some basis other than respective separate tax liabilities and has the same effect of favoring the higher-earning spouse and harming the other. Even federal courts have apportioned joint return liability improperly.

It should be noted that husbands prepare the joint tax return more often than wives do. See Jerome Borison, Alice Through a Very Dark and Confusing Looking Glass: Getting Equity from the Tax Court in Innocent Spouse Cases, 30 Fam. L.Q. 123, 126 (1996). This practice may make it even less likely that joint return liability would be divided between the spouses in a manner that would benefit wives.

See supra notes 374-77 and accompanying text. Cf. Alstott, supra note 30, at 2020 (acknowledging in another context that taxpayers often fail to understand tax incentives, thus, lending support to the possibility that couples may not understand how to apportion their joint return liability appropriately); McCaffery, supra note 264 (discussing the concept that cognitive error often causes taxpayers to make faulty decisions regarding their taxes and with respect to tax policy in general).
Congress repeals the rule of joint and several liability and until spouses are instructed that the fairest manner of dividing their joint tax liability is on the basis of their respective separate return liabilities, apportioning joint return tax on that basis will continue to be inappropriate when analyzing who benefits and who is harmed from joint rather than separate filing. Because spouses who segregate resources are unlikely to divide the joint return tax liability in a manner that provides a tax savings to each spouse, joint rather than separate filing is likely to inure to the benefit of the higher earner and to harm the lower earner. In this area, lack of explicit instructions from the Internal Revenue Service and taxpayers' imperfect understanding regarding apportionment appear to combine, permitting couples to apportion their joint return liabilities improperly and in a manner which tends to benefit husbands and to harm wives. Thus, by filing jointly rather than separately, the tax the wife bears most likely increases.

As long as two spouses have disparate incomes, which is the usual case, the couple will generally file jointly, generating a tax benefit for the higher earner, usually the husband, and a tax detriment for the lower earner, usually the wife. It is ironic that for couples in which one spouse earns significantly more than the other an incentive would exist to file in a manner that would increase the burden on the lower-earning spouse while easing the burden on the higher-earning spouse. This seems contrary to

579 For couples who share resources, any payment of tax is essentially a payment in proportion to the spouses' respective net incomes rather than a payment by each in proportion to their respective separate tax liabilities. Accordingly, for purposes of determining whether one or both spouses benefit from filing jointly rather than separately, it is inappropriate to apportion joint return liability on the basis of respective separate return liabilities. Of course if a couple pools resources, then that apportionment benefiting the high earner and harming the lower earner is mitigated, in effect, by the low earner's access to the high earner's large tax savings. Problems regarding the concentration of power in husbands' hands remain, however. See supra notes 345-53 and accompanying text.

580 See supra notes 374-78 and accompanying text.

581 In spite of a reference to which spouse may take credit on a separate return for previously paid joint estimated tax payments, INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, 1996 1040 FORMS AND INSTRUCTIONS §4, and the information that one joint filer is entitled to part of the refund even if the other spouse owes money to the government, id. at 30, the 1040 FORMS AND INSTRUCTIONS contain no guidance for taxpayers as to how to divide their joint return liabilities fairly when they owe additional tax upon filing. Id. at 30-31.

582 Cf. Davis, supra note 18, at 233 (stating that the tax system helps perpetuate women's inferiority in society by "subsidiz[ing] patriarchy"); supra note 219 (discussing how gender
notions of fairness, and is certainly regressive, especially if the spouses do not pool or share their resources. In situations in which spouses do not share resources, joint filing is likely to cause a transfer of wealth from the poorer wife to the richer husband. Furthermore, the greater the income disparity, the larger will be the transfer from the "poorer" to the "richer" spouse and the less likely it will be that true sharing will occur between the spouses so as to mitigate the effect of that transfer. Through the mechanisms of income splitting and aggregation, the "poorer" wife essentially pays part of her "richer" husband's tax burden by letting him shift part of his tax liability into her lowest bracket and then by having her own income taxed in a higher tax bracket. Income splitting and aggregation force her not only to give away part or all of her lowest bracket but to give it away to someone who earns more than she does.

383 Cf. EVELYN NAKANO GLENN, ISSAI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE 192 (1986) (women "perform a disproportionate share of work in the household, while men receive disproportionate advantages in the form of services and access to income"); Staudt, supra note 44, at 1584 n.54 (arguing that women's responsibility for housework has the effect of transferring wealth from women to men. "[T]he assumption [accompanying the ethic of care] ... that women should provide free caretaking services for the family, enabling independence for the family while remaining dependent, herself ... is problematic.").

384 See supra notes 357-61 and accompanying text.

385 Comparing the impact on spouses of filing jointly with the impact of filing separately is equivalent to examining the marriage bonus that existed before Congress lowered "single" tax rates in 1969. The current MFS rates are structured in relation to joint return rates the same way single rates were related to them before 1969. Prior to 1969, the joint return rates produced tax equal to two times the single tax on half the income in question. Similarly, today the joint rates generate tax equal to twice the MFS tax on half the income in question. See supra notes 56 and 85.

Prior to 1969, the rate structure never produced a marriage penalty because the harm from aggregation never exceeded the benefit from income splitting. In fact, a marriage benefit would always result unless spouses earned exactly equal incomes in which case marriage would produce neither a benefit nor a penalty. In this latter instance, the benefit of income splitting would exactly offset the burden of aggregation. This is equivalent to the situation today in which spouses are indifferent between filing jointly and separately when they earn equal incomes. The larger the pre-1969 disparity in spousal incomes, the greater the benefit from marrying. Similarly, the larger the disparity in spousal incomes today, the greater the incentive to file jointly rather than separately.

The examination this Article makes of separate and joint filing for today's married couples is analogous to an analysis of the pre-1969 marriage benefit. Before 1969, getting married nearly always resulted in lower combined taxes. Currently, filing jointly nearly always results in lower combined taxes than does filing separately. The current patterns between filing separately and jointly are in all important respects identical to the old patterns between filing as single and filing jointly.

The present analysis, however, transcends the pre-1969 studies of the marriage bonus. This Article examines not only how filing jointly rather than separately reduces total tax. It also probes how that decision impacts each spouse individually. The husband pays less
D. The Harm the Rate Structure Inflicts on Women Is Not Justified by the Fact that Many Women Enjoy the "Luxury" of Not Having to Work in the Paid Labor Force

The various gender problems associated with joint filing, including: (1) the aggregation effect which subjects wives' earnings to tax rates that are higher than those applying to husbands; (2) taxing wives more and husbands less than under separate filing; and (3) patterns penalizing similar-income couples but benefiting one-earner couples, could all be viewed as being offset by the fact that many married women enjoy the luxury of not having to work in the paid work force, a luxury which fewer men, by contrast, are afforded. Currently 39.3% of married women are not in the work force, while only 22.6% of married men are not in the work force. More wives than husbands enjoy the luxury of being supported financially by someone else's work. Perhaps this benefit ought to be viewed as offsetting the unfair gendered effects of joint filing. Of course, that benefit is not confined to married women, given that more than one-fifth of married men are not in the labor force. Furthermore, most of the women who are not counted as being in the labor force are in fact working at housecleaning and child rearing, work which is unpaid. Therefore, the "luxury" a wife enjoys of being supported by another person may be viewed, in substance, as value she earned by contributing to the work of the family.

Because of the decision to file jointly, while the wife actually pays more than she would by filing separately. This pattern was also true prior to 1969: an overall bonus resulted from marrying but, as between the spouses, marriage reduced the husband's tax but increased that of the wife. Examinations of the pre-1969 marriage bonus tended not to inquire into questions of how that bonus was distributed between the spouses. This Article asks just that question under today's rate structure and concludes that wives actually fund the benefit husbands obtain by filing jointly.

While previous articles demonstrated the pre-1969 marriage bonus, this Article takes a different focus, describing the distributional effects of that bonus as between the spouses. Today, when the financial interests of spouses are not always or obviously aligned, examining how the benefit from filing jointly rather than separately is distributed between the spouses is particularly appropriate. A benefit accruing to one spouse can no longer be assumed to aid the other or to compensate her for the detriment she bears in generating it.

These figures were derived by taking the complement of the percentages of married men and women who were in the labor force in 1994, the most recent year for which data is available. See Statistical Abstract, supra note 202, at 405 tbl.636.

See, e.g., Fineman, supra note 323, at 4 (noting partnership theory and suggesting ways in which it could be modified and improved); Gann, supra note 29, at 48; Klebanoff, supra note 294, at 848 n.25; Kornhauser, supra note 29, at 75, 77 n.41; Joan M. Krauskopf, Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital, 28 U. Kan. L. Rev. 579 (1980) (advocating partnership theory); Reva B. Siegel, Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880, 103 Yale L.J. 1073 (1994); Reva B. Siegel, The Modernization of Marital Status Law:
the average wife should not be viewed as enjoying any benefit that she did not earn. Consequently, it is questionable that the disadvantages of joint filing are justified by the “luxury” she enjoys of being supported by another, the luxury of not having to work or to earn a living.

Even for non-working wives who neither do housework nor raise children, this “luxury” of not having to work obviously precludes economic independence during marriage. Power and autonomy as between marriage partners tend, therefore, to be concentrated in the hands of working husbands and not in the hands of stay-at-home wives. The wife’s cost for the benefit of not having to work is the loss of power and autonomy and maybe even status within the marriage. Women bear additional costs by not working in that they forgo developing skills that could be employed gainfully outside of the home. They also fail generally to accumulate their own “private savings reflected in … [their] own separate property.” Policymakers should not, therefore, assert that the “luxury” of not having to work justifies or outweighs the harmful gendered effects of joint return taxation. Other costs, significant ones, are already imposed for the so-called “benefit” of not having to work.

Furthermore, the harmful effects of joint filing exist for married women even if the wife does support herself, working full-time but earning less than her husband. In that instance, the

888 See supra note 367. See also BLUMSTEIN & SCHWARTZ, supra note 252, at 55, 83 (examining 12,000 questionnaire responses and conducting 300 in-depth interviews on the subject of couples and their money, work, and sex); MILLMAN, supra note 366, at 5 (“Money is a primary source of power in relationships.”); Burgoine, supra note 349, at 655 (perceived ownership of earnings by earner is important); De Armond, supra note 307, at 253 (“[S]uperior earnings are rewarded with dominant control.”).

889 Id. Cf Staudt, supra note 43, at 1632 (in discussing the risk of commodifying women by taxing housework, Professor Staudt acknowledges that “even if Congress does enable some women to avoid the market, it is not at all clear that women benefit from staying out of the waged labor force.”).

890 See Davis, supra note 18, at 214.
costs of joint filing exist even though the wife does not enjoy the “luxury” of being supported by someone else. In such a case, the gendered impact of joint filing cannot be defended on the ground that the wife does not have the burden of supporting herself.

The view that the discretionary nature of some married women's work force participation is a benefit for them is not, in fact, a benefit without significant costs. In fact, the belief that married women's work-force participation is discretionary harms women by marginalizing them, contributing to notions of some that women do not have much of value to contribute. It further perpetuates protectionist views of women, that they are better off not being self-supporting, that they should be protected by and economically dependent on their husbands. Some women may enjoy the “luxury” of not having to work, but this so-called benefit is not really a benefit at all for women on a societal level. Therefore, the possibility that wives do not have the same burden to work as men should not be invoked to defend or justify the unfair gendered effects of joint filing.

E. Women Cannot Realistically File Separately to Avoid the Problems the Joint Rate Structure Imposes

Although women can avoid the problems of joint filing by filing separately, doing so is not a realistic option in most

302 Any "invisible" practice, including women's discretionary work force participation, marginalizes the actor. Cf. Becker, supra note 302, at 166 (by failing to speak about the household labor of women, we ignore and devalue it); Finley, A Break in the Silence, supra note 9, at 52 (noting that “[m]ost torts books and tort cases are silent about why unpaid but crucially productive and important services such as household management and childrearing are consistently undervalued or overlooked in a system which gauges damages to the market economy.”); Staudt, supra note 45, at 1627 (because household labor is unpaid, the women performing it are undervalued, marginalized, and treated as invisible in the legal system). Similarly, if women are not seen as necessary to the economic well-being of the family, they may also be marginalized in legal, social, and economic institutions. Professor McCaffery describes exactly this pattern in both Fresh Look and Slouching Towards Equality. Employers may rationally, because of perceptions and past experience, avoid hiring women for positions requiring responsibility and long-term commitment. They may assume, given women's lower average job persistence compared to that of men, that women are not sufficiently dedicated to work because of family responsibilities or because of the chance they will leave if they have children. Of course, as Professor McCaffery points out, lower levels of persistence in women have resulted from and have reinforced both wage discrimination and the segregation of women in low-paying jobs with limited responsibilities. See McCaffery, Fresh Look, supra note 13, at 1031; McCaffery, Slouching Towards Equality, supra note 13, at 609-11, 616.

305 See Gann, supra note 29, at 47; Davis, supra note 18, at 214.

304 I.R.C. § 6013(d)(3) (1994), requiring income aggregation, applies only when a joint return is filed. No analogous provision exists regarding separate returns. See Johnson v.
situations because of the financial incentive most couples experience to file jointly.\textsuperscript{395} The only way a wife can avoid being taxed at higher rates and thereby avoid being discouraged from working altogether, as well as prevent a transfer of her wealth to her higher-income husband, is to insist on filing separately. However, if she does so, the couple’s overall tax bill will be higher, perhaps significantly higher, primarily because of the unavailability of income splitting for separate filers living in common law states, but also because the section 21 credit for child care will probably be unavailable to her as a separate filer.\textsuperscript{396} Consequently, a woman who earns less than her husband faces a conflict: she may either (1) file jointly to minimize the family’s tax liability and bear a larger individual tax burden, thereby facing financial pressure not to work, or (2) file separately to minimize the tax liability attributable to her own income while increasing the family’s tax burden overall.\textsuperscript{397} This conflict is an example of the tensions that arise between “the community of life that marriage involves and the separate, autonomous existence of the individuals who are associated in this community of life.”\textsuperscript{398}

With regard to this conflict, a number of points are worthy of note. The interests of the primary breadwinner, usually the husband, tend to be aligned, giving him an easy choice. He, individually, is better off if he files jointly because the tax on his own income is lower than if he files separately, and the family is better off if he files jointly because the overall tax bill is also lower. Men tend not to have to choose between their own

\textsuperscript{395} See supra notes 106-11 and accompanying text.

\textsuperscript{396} I.R.C. §§ 21(e)(2)-(e)(4) (1994).

\textsuperscript{397} It should be noted that a husband would face the same conflict between self-interest and the family interests if he earned less than his wife. However, in most situations, husbands are not secondary earners. They are, by and large, still the primary breadwinners and, therefore, tend not to face this conflict. Cf. Kornhauser, supra note 29, at 64 (suggesting in the context of whether or not the second earner will enter or remain in the labor force that the joint return subjects the secondary earner, usually the wife, to psychological stress).

\textsuperscript{398} Glendon, supra note 52, at 323 (discussing the conflict between individuals and the families to which they belong in the context of property law). Cf. Kornhauser, supra note 29, at 90 (noting that the interdependence of spouses is usually achieved at the wife’s expense).
interests and the group interests when it comes to selecting a filing status. By contrast, women face a conflict that men rarely face. Women may do either what is better for themselves, file separately, or do what is worse for themselves but better for the family unit as a whole, file jointly. By filing separately, a wife may experience resentment from her husband in whose interest it is to file jointly. If the wife is less powerful in the relationship or if the husband has a history of inflicting physical or emotional

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509 Some critics might argue that women do not experience a conflict in choosing a filing status. In response to this observation, it should be noted that many citizens, including wives, who do not experience such a conflict simply do not understand the costs of filing jointly. They do not realize that by filing jointly rather than separately, the tax attributable to the lower-earning spouse increases, and they do not know that filing jointly exposes them to joint and several liability for their spouse's tax. Finally, they may not know about the aggregation effect or realize that it is one reason why their post-tax disposable earnings are so low. See generally McCaffery, supra note 264 (asserting that cognitive error often induces incorrect decisions with regard to tax).

Other critics might observe that even women who understand the costs of joint filing may not view themselves as experiencing a conflict because they may view their interests as aligned with those of their children. Consequently, women might not see themselves in conflict with their families in the context of choosing a filing status. In fact, if women bond with and feel responsible for their children, then they might not view their choice to file jointly and to benefit the marital unit as presenting any conflict at all. Such wives would prefer to file jointly to make more total resources available to their children. In response to this observation, one school of feminist legal scholars would argue that women's perceived alliance with children is really a method utilized by patriarchy to ensure the continued subjugation of women. See, e.g., Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 828-36, 841 (1989) (raising the argument concerning women's perceived alignment with children in non-tax contexts); T.J. Jackson Lears, The Concept of Cultural Hegemony: Problems and Possibilities, 90 Am. Hist. Rev. 567, 569-70 (1985) (discussing how Antonio Gramsci has described a concept of cultural hegemony, a picture of how the dominant culture rules with the consent of the subjugated groups by shaping a "hegemony" of values, norms, perceptions, and beliefs that "helps mark the boundaries of permissible discourse, discourages the clarification of social alternatives, and makes it difficult for the dispossessed to locate the source of their unease, let alone remedy it"). While this argument is subject to dispute, it does reinforce the notion that the wife's individual interests are often not aligned with those of the family.

Furthermore, even if a wife views her interests as consistent with those of her children, it should be noted that her decision to file jointly does not necessarily make more resources available to those children. It makes more resources available to her husband who may or may not use them to benefit the couple's children.

Finally, the fact that many women view themselves as aligned with their children does not alter the fact that filing jointly benefits the family unit by benefiting the husband and that it tends to be harmful to the wife as an individual. Any given wife may decide that the harm to herself from filing jointly is worth undergoing because of the offsetting benefit her family experiences. In making this determination, however, she has balanced the harm to herself against the benefits to her family and has implicitly faced the very conflict between self-interest and family interest that was described above. Wives, like husbands, should be able to align themselves with their families in choosing a filing status without harming their own financial interests. Justice within the family should not be set up to be in conflict with intimate, harmonious family ties. See Okin, supra note 249, at 32.

400 See Beck, supra note 58, at 332.
harm, the wife may not realistically be able to file separately.\footnote{401} She may have to worry about recriminations from the husband who is angry at her for filing separately given the additional tax liability that results.

Through the mechanisms of income splitting and aggregation, the tax system tends to create a situation in which women consistently face conflict, one in which their own individual interests are at odds with those of the family as a whole. Because the vast majority of married couples file jointly, it is clear that many women are choosing others’ interests over their own.\footnote{402} Society already presents many serious dilemmas to women that men tend to escape, such as the conflict of whether to work for their own independence or to stay at home for their children,\footnote{403} a decision that men may choose to consider but generally are not expected to face. These conflicts facing women could pose psychic costs to the extent that women are aware of them.\footnote{404} The tax system should not impose additional psychic costs on women by presenting them with yet another conflict.\footnote{405}

\footnote{401} Her behavior may have long been modified by a pattern of abuse on the part of the husband, so that she would not even consider filing separately in this instance even if she understood the benefit of doing so.

In some instances, the wife may be able to argue that the joint return is invalid as procured by duress on the part of her husband. See Quick & DuCanto, supra note 57, at 69-70. However, this argument is not always successful even in abuse cases, see, e.g., Osborn v. Commissioner, 66 T.C.M. (CCH) 100 (1993); Estate of Aylesworth v. Commissioner, 24 T.C. 134 (1955), and has been employed by the wife only to avoid joint and several liability, not to avoid the joint return rate structure composed of income splitting and aggregation.\footnote{402} Cf. Williams, supra note 399, at 823-24 (discussing generally how the dominant culture teaches women to “choos[e] to marginalize themselves”). Choosing to file jointly would be one example of that phenomenon.

\footnote{403} See Staudt, supra note 43, at 1616 ("Women at every income level report they experience extreme stress and fatigue when they struggle to balance waged work with household responsibilities.") (footnote omitted); Lucie E. White, On the "Consensus" to End Welfare: Where are the Women’s Voices?, 26 CONN. L. REV. 843, 846-47 (1994) (discussing the dilemma that women face of whether to work or to stay at home for their children); Zelenak, supra note 29, at 370 (noting the existence of this conflict in society at large); Law, supra note 522, at 1771 (discussing the conflict women face between achieving in the public world and nurturing in the domestic sphere).

\footnote{404} Cf. Kornhauser, supra note 29, at 64.

\footnote{405} To the extent women and the public generally are not aware of the conflict, then the features of the joint return tax that cause this conflict, income splitting and aggregation, are problematic for another reason. The gendered nature of the joint filing system is generally unknown to the public. Any laws which are hidden from those subject to them are suspect as "secret" laws and, therefore, ought to have questionable authority. George Hegel has argued that law does not have authority unless it is known. George Hegel, Philosophy of Right 135 (T.M. Knox trans., 1967) ("Hence making a law is not to be represented as merely the expression of a rule of behaviour valid for everyone, though that is one moment in legislation; the more important moment, the inner essence of the matter, is knowledge of the content of the law in its determinate universality."). See also Joseph Raz, The Authority
V. POLICY PRESCRIPTIONS

The purpose of this Article has been to identify gendered aspects of the tax code that result from the joint return rate structure. It is my hope that this critique will inspire further discussion and debate about these problems and about their possible solutions. Numerous responses could mitigate the gendered aspects of the joint rate structure. Some would be incremental changes, while others would be more sweeping.

One partial solution to the aggregation effect and its bias against two-earner families would be for Congress to enact a special allowance for dual-earner couples.406 If large enough, such an allowance could counteract the Code's gender bias by offsetting the higher tax rates that apply to secondary earners, by counteracting the nondeductibility of "personal" working expenses, and by offsetting the Code's failure to tax the imputed income of one-earner couples.407 Such a deduction would also have the effect of roughly counteracting the tendency of the marriage penalty to concentrate harm on spouses with similar incomes. Such an allowance could, however, be attacked as a penalty against single taxpayers408 or as anti-family because it would remove some of the disincentive mothers face from entering the paid work force. Congress enacted a dual-earner deduction in 1981, but repealed it in 1986409 to pay for a reduction in tax rates.410 Because the deduction was limited to 10% of the earnings of the lesser-earning spouse, it was not large enough, however, to counter adequately all of the incentives operating to favor in-home, unpaid labor on the part of secondary earners.

A broader proposal, aimed at encouraging women's paid labor
force participation, would be to subject husbands’ earnings to tax rates that are higher than those that apply to wives’ earnings. Proponents of this tax rate differential would argue that it is justified on normative grounds as a means of overcoming the entrenched, self-perpetuating gender bias found in the tax code. A system in which men were taxed at higher rates than women could also be defended on efficiency grounds, as well. An efficient tax is one that imposes a high rate on activities or goods that have inelastic supply and one that avoids taxing activities and goods with elastic supply. Because the labor supply of husbands is generally inelastic, taxing their income at a high rate would not discourage their work effort significantly and would, therefore, not be inefficient. Because wives’ labor supply is much more elastic, by contrast, a high tax rate would effectively

411 Professor McCaffery tentatively advocates taxing husbands at higher rates than wives. See McCaffery, Fresh Look, supra note 13, at 1040; McCaffery, Slouching Towards Equality, supra note 13, at 656; McCaffery, supra note 162, at 312. Others who have expressed support for this approach include: Michael J. Boskin & Eytan Sheshinski, Optimal Tax Treatment of the Family: Married Couples, 20 J. PUB. ECON. 281 (1983); Daniel R. Feenberg & Harvey S. Rosen, Alternative Tax Treatment of the Family: Simulation Methodology and Results, in Behavioral Simulation Methods in Tax Policy Analysis 7-41 (Martin Feldstein ed., 1983); Martin Feldstein, On the Theory of Tax Reform, 6 J. PUB. ECON. 77, 90 (1976); Gann, supra note 29, at 44; Leuthold, supra note 154, at 103; Harvey S. Rosen, A Methodology for Evaluating Tax Reform Proposals, 6 J. PUB. ECON. 105, 114 n.22 (1976). Among those who have stated their opposition to taxing men at higher rates than women include: Maule, supra note 16, at 547-48; Zelenak, supra note 29, at 371.

412 See generally McCaffery, Slouching Towards Equality, supra note 13, at 662-65 (speculating that taxing men at higher rates than women could help eradicate wage discrimination in the work force by improving women’s labor persistence); McCaffery, Fresh Look, supra note 13, at 1005 (describing beneficial effects of taxing men at higher rates than women).

413 A tax is considered efficient if it does not distort behavior vis-à-vis the no-tax scenario. See U.S. DEP’T OF TREASURY, supra note 29, at 49; Richard A. Musgrave & Peggy B. Musgrave, Public Finance in Theory and Practice 277-95 (5th ed. 1989); Frank P. Ramsey, A Contribution to the Theory of Taxation, 37 ECON. J. 47 (1927); Rosen, supra note 165, at 425-27. Consequently, if an income tax prompts workers to work fewer hours to avoid a portion of the added tax, then that tax would be considered inefficient to some degree.

414 See Gann, supra note 29, at 39 n.151 (describing how an efficient tax system imposes tax on goods with inelastic demand and avoids taxing goods with elastic demand); McCaffery, Slouching Towards Equality, supra note 13, at 856 (noting that the greater the elasticity of demand, the higher taxes could be and remain efficient); Harvey S. Rosen, Applications of Optimal Tax Theory to Problems in Taxing Families and Individuals 3-4 (U.S. Dep’t of Treasury, Office of Tax Analysis Paper No. 21, 1976). Labor supply is inelastic if its quantity remains high even when wages decline. By contrast, labor supply is elastic if it responds quickly to changes in wage rates, declining rapidly when wages fall. A tax imposed on inelastic workers will not discourage them from working and will be considered efficient because it will not distort behavior, while one imposed on elastic workers would discourage them from working and would accordingly be considered inefficient because its imposition distorts behavior.

415 See Gann, supra note 29, at 42 n.137 (describing the labor supply response of husbands as relatively inelastic and that of wives as highly elastic).
induce the substitution of unpaid home production for paid market work. A high tax on wives would distort their behavior and would, therefore, be considered inefficient. To avoid distorting wives’ behavior significantly, a lower tax rate should be imposed on them than could be applied to their husbands’ earnings. Because of the disparity in elasticities of husbands' and wives’ labor supplies, an efficient tax would tax husbands at a higher rate than wives. Such a proposal would undoubtedly face an equal-protection challenge. Nevertheless, one likely proponent of such a system, Professor McCaffery, has suggested that this proposal could be designed to survive constitutional scrutiny by tying the higher tax rate to “primary earners” rather than to husbands and by applying the lower tax rate to “secondary earners” without specifying wives. Taxing husbands at higher rates than their wives could encourage more women to enter the labor force and in that regard could counter the tendencies of income splitting and aggregation to discourage wives from working.

Another broad solution to the gendered problems of joint return filing would require eliminating both income aggregation and automatic income splitting that occurs in the absence of a transfer of the income. Eliminating income aggregation would remove a work disincentive that secondary earners experience. If income aggregation were repealed, income splitting should also be repealed so that couples filing jointly would not be favored unduly over all other taxpayers. Furthermore, eliminating automatic income splitting would have the salutary effect of encouraging wives to work so that income would be produced equally by the two spouses, generating a natural income-splitting effect. By repealing both automatic income splitting and aggregation, the marriage penalty would no longer operate to reward disparate-income couples and to punish similar-income couples.

One means of eliminating these two features of joint return filing would require eliminating both income aggregation and automatic income splitting that occurs in the absence of a transfer of the income. Eliminating income aggregation would remove a work disincentive that secondary earners experience. If income aggregation were repealed, income splitting should also be repealed so that couples filing jointly would not be favored unduly over all other taxpayers. Furthermore, eliminating automatic income splitting would have the salutary effect of encouraging wives to work so that income would be produced equally by the two spouses, generating a natural income-splitting effect. By repealing both automatic income splitting and aggregation, the marriage penalty would no longer operate to reward disparate-income couples and to punish similar-income couples.

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filing would be to abolish the joint return altogether and to institute a system of mandatory individual filing.\textsuperscript{418} This reform would have many beneficial effects. The absence of joint filing would eliminate joint and several liability between spouses.\textsuperscript{419} It would also dispense with the need for the highly litigated innocent spouse exceptions to joint and several liability. Abolishing joint returns could also eliminate the marriage penalty and bonus by taxing each spouse the same as a single taxpayer.\textsuperscript{431} Eliminating joint returns would eliminate automatic income splitting, and accordingly, earned and unearned income that is not transferred to the non-owner could no longer be shifted for beneficial tax computation purposes.\textsuperscript{421} Accordingly, a tax incentive would arise for earners to transfer ownership of property to the nonearning spouse. Such an incentive could benefit women. As noted above, abolishing joint returns would eliminate income splitting, income aggregation, and the attendant work disincentives they each impose on secondary earners\textsuperscript{422} by allowing both spouses to start at the bottom of the

\textsuperscript{418} Abolition of joint return filing has been proposed by Gann, supra note 29, at 39; Zelenak, supra note 29, at 343 & n.16, 365-69; Davis, supra note 18, at 256-58, and has been discussed in Economic Problems of Women, supra note 29, at 608-9 (statement of Carlyn McCaffery, Assistant Professor, New York University Law School); Brazer, supra note 118, at 244-45; Harvey E. Brazer, Comment to McIntyre & Oldman, Treatment of the Family, in Comprehensive Income Taxation 237 (Joseph A. Pechman ed., 1977); Dulude, supra note 358, at 8; Kornhauser, supra note 29, at 65, 110-11; Maule, supra note 16; Munnell, supra note 118, at 247-78; Robinson & Wenig, supra note 31, at 787, 852; Rosen, supra note 165, at 427-28; Winn & Winn, supra note 52, at 869-70. The following commentators have expressed opposition to the idea of abolishing joint returns: Bittker, supra note 29, at 1437-42; Contract with America Hearings, supra note 31, at 87-88, reprinted in 66 Tax Notes at 1345 (statement of Professor Alstott); McIntyre, supra note 118, at 480.

\textsuperscript{419} See Edison-Smith, supra note 56, at 127 (arguing that Congress should repeal joint and several liability); Murray, supra note 52, at 64 (recommending that Congress repeal joint and several liability); Domestic Relations Comm., ABA Sec. on Tax’n, Comments on Liability of Divorced Spouses for Tax Deficiencies on Previously Filed Joint Returns, 50 Tax Law. 395 (1997) (report of resolution recommending the repeal of joint and several liability passed at the 1995 Summer meeting of the Tax section). None of these recommendations involved abolishing joint returns altogether.

\textsuperscript{420} See Contract with America Hearings, supra note 31, at 87-88, reprinted in 66 Tax Notes at 1345 (statement of Professor Alstott); Alstott, supra note 30, at 2010-11; Bittker, supra note 29, at 1437. Of course to attain this result, individual rates for married taxpayers and rates for single taxpayers would have to be equalized.

\textsuperscript{421} See Zelenak, supra note 29, at 390-91 (favoring taxing unearned income to the owner of the income-producing property and noting that this would preclude income splitting in cases where the property was not transferred).

\textsuperscript{422} See Contract with America Hearings, supra note 31, at 86-87, reprinted in 66 Tax Notes at 1344 (statement of Professor Alstott). But see Alstott, supra note 30, at 2017-21 (questioning whether individual filing would really encourage women’s market work by examining the weaknesses of economic studies).
progressive rate schedule.\textsuperscript{423} Abolishing joint returns would also eliminate the annual coerced transfers of money from wives to their husbands that currently occur in the absence of real sharing. Furthermore, it would eliminate the dilemma wives face between acting in their own best interests by filing separately versus acting in the best interests of the marital units by filing jointly. Abolishing joint returns would also serve simplicity goals by eliminating that filing status and the joint rate schedule.\textsuperscript{424} Tax theorists posit that mandatory separate filing would improve the tax system’s efficiency as well by taxing a wife’s first dollar of income in the lowest tax bracket rather than at her husband’s top marginal rate.\textsuperscript{425} These varied effects of a system of mandatory individual filing would probably benefit women by removing the disincentive against wives to work, by putting more assets at women’s disposal, both income-producing property that would be transferred from their husbands in an effort to shift income and greater after-tax earnings from their own paid labor. As a result, women could enjoy more control over expenditures.\textsuperscript{426} These results could lead, in turn, to improved social and political status for women.\textsuperscript{427}

Eliminating joint returns and relying solely on individual returns may require some additional corrective legislation. In abolishing joint returns, or at least their income-splitting component, Congress would have to override Poe v. Seaborn\textsuperscript{428} to prevent a return of geographic disparity.\textsuperscript{429} Congress could do so by requiring community property earnings to be taxed to the

\begin{footnotes}
\item \textsuperscript{423} See Davis, supra note 18, at 237.
\item \textsuperscript{424} See id.
\item \textsuperscript{425} See Gann, supra note 29, at 46; Rosen, supra note 411, at 114.
\item \textsuperscript{426} See Gann, supra note 29, at 46; Rosen, supra note 411, at 114.
\item \textsuperscript{427} See Davis, supra note 18, at 237. \textit{But see} Alstott, supra note 30, at 2017, 2022-26 (questioning whether individual filing would provide much economic benefit to women).
\item \textsuperscript{428} See Davis, supra note 18, at 241. \textit{But see} Alstott, supra note 30, at 2016-17, 2022-23 (questioning whether individual filing would really foster much change in gender roles).
\item \textsuperscript{429} 282 U.S. 101 (1930).
\item \textsuperscript{429} See Gann, supra note 29, at 4; Davis, supra note 18, at 238. Professor Gann argues that Congress could override either Poe v. Seaborn or Lucas v. Earl to avoid geographic disparity. She concludes that the former method would be preferable. \textit{Compare} Zelenak, supra note 29, at 378, 382 & n.206 (arguing that Earl should be retained but that Congress should override Seaborn). \textit{Any constitutional objections to overriding Seaborn and taxing a spouse on all his earnings even though state law vests ownership of half of them in his spouse would probably be overcome.} See Norton, supra note 159; Winn & Winn, supra note 52, at 874-75. \textit{See also} Gann, supra note 29, at 55-58 (discussing potential constitutional objections to a legislative override of Seaborn).
\end{footnotes}
earner and to the individual with management and control over the community property generating the earnings, rather than half to each spouse. Congress has done just that in other tax provisions. Alternatively, geographic disparity could be allowed to persist for the purpose of encouraging states to adopt community property regimes, systems which would give women rights during marriage in their husband's earnings.

Although a regime of mandatory separate filing would have many benefits for women, eliminating joint returns and relying solely on individual returns is not without cost. By eliminating joint returns and restoring marriage neutrality, the goal of couples neutrality would no longer be satisfied. Equal-income couples would no longer be taxed equally. That is, a couple in which the husband earns $100,000 and the wife earns $0, would pay more tax than another couple in which each spouse earns $50,000. This result occurs because an individual return system would prevent the splitting of earned income. Thus, the husband in the first couple would be pushed into a higher tax bracket than either of the spouses in the second couple. His first $50,000 of income would be taxed the same as the income of one spouse from the other couple, but his second $50,000 of income would, under progressive rates, be taxed at a higher rate than the income of the other spouse from the second couple. Attaining marriage neutrality comes at the cost of either taxing equal-income couples equally as described above, or of progressive taxation. Sacrificing progressivity would probably not be acceptable as a political

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430 See Davis, supra note 18, at 238 n.229. See, e.g., I.R.C. §§ 911(c)(3) (1994) (the amount of income earned by a nonresident that is excluded is determined without regard to community property laws applicable to the couple’s income); 1504(c)(3) (1994) (community income is attributed to the earner in applying income averaging rules); 615(e)(3)(A) (1994) (innocent spouse is relieved of tax liability for income attributable to the other spouse, attribution being made without regard to community property laws).

431 See Gann, supra note 29, at 59-60.

432 See STAFF OF JOINT COMM. ON TAXATION, 96TH CONG., THE INCOME TAX TREATMENT OF MARRIED COUPLES AND SINGLE PERSONS 26 (Comm. Print 1980); Tax Treatment Hearings, supra note 118, at 78-79 (statement of Edwin S. Cohen, Assistant Secretary for Tax Policy) (“No algebraic equation, no matter how sophisticated, can solve this dilemma. Both ends of a seesaw cannot be up at the same time.”); Bittker, supra note 29, at 1395-96, 1429-31; Gann, supra note 29, at 9.

433 See Contract with America Hearings, supra note 31, at 87-88, reprinted in 66 TAX NOTES at 1345 (statement of Professor Alstott); Bittker, supra note 29; Davis, supra note 18, at 237.
Even so, abandoning the equal taxation of equal-income couples may be justified even when couples do pool their incomes because the two couples are not similarly situated. The couple in which only one spouse is employed, earning $100,000, is better off than the couple in which both spouses work, each earning $50,000, because the second couple incurs significantly more "work-related" expenses, expenses that are not deductible, and because the first couple enjoys the benefit of untaxed imputed income. The first couple contains two individuals performing
two jobs, one paid job and the other unpaid housework, and the second couple has two individuals performing three jobs, two paid jobs and unpaid housework. Clearly, the first couple is significantly better off than the second couple. Abandoning couples neutrality and taxing the first couple more than the second would recognize that the two “equal-income” couples are not really similarly situated.

Finally a completely different approach to solving these problems would be for Congress to eliminate joint returns and simultaneously to override *Lucas v. Earl*, allowing assignment of income by contract, regardless of state marital property laws. If this avenue were pursued, geographic disparity need not return upon the institution of mandatory separate filing because couples in all jurisdictions would be permitted to contract to split the ownership of their incomes. To obtain the benefits of income splitting under the contract approach, actual ownership in the income would have to be transferred. In this regard, this last approach is superior for women to the automatic income splitting currently available where actual ownership of earnings is not transferred.444

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439 See Audio tape of Tax and Social Policy Forum, supra note 410 (comment by unnamed audience participant).

440 281 U.S. 111 (1930).

441 See Gann, supra note 29, at 19. See also supra note 429.

442 Cf. Cain, supra note 118 (arguing in the context of unmarried couples that contract ought to play a more important role in federal income taxation). Of course, to enter into such a contract, the couple may need to obtain legal advice from an attorney. This fact mitigates against overriding *Earl*.

443 See Davis, supra note 18, at 246 (suggesting this but stating that it is the least desirable solution because of the danger that the inter-spousal contract would be a sham); Gann, supra note 29, at 61-63 (also suggesting this as a solution but preferring mandatory individual returns and a congressional override of *Seaborn*). Accord Zelenak, supra note 29, at 578, 582.

444 See Bittker, supra note 29.
Eliminating automatic income splitting by eliminating joint returns without permitting assignment of earned income by contract would revive the problem that only unearned income could be assigned between spouses.\textsuperscript{445} As long as the high-bracket earner was willing to transfer income-generating property to the other spouse, the assignment of unearned income would be effective and would generate a tax savings.\textsuperscript{446} This tax minimization strategy would be permitted but would be available primarily to high-income couples, those with significant unearned income, and would not be as readily available to lower-income couples whose incomes come primarily from wages, earnings which could not be shifted under \textit{Lucas v. Earl}.\textsuperscript{447} The renewed shifting of unearned income would probably generate significant litigation over whether a transfer of income-generating property is effective when the transferor has not relinquished total control over the shifted property.\textsuperscript{448} Another consequence of eliminating joint returns would be to revive problems regarding the allocation of deductions between spouses.\textsuperscript{449} Deductible expenses that benefit both spouses would have to be allocated or divided between them in some manner.\textsuperscript{450}

The proposals described above should be examined more thoroughly. A more complete treatment of these possible policy prescriptions is the subject of a future article. It is my hope that the current Article will stimulate further debate not only on the biases hidden in the tax code, but also on the best means for eliminating them.

\textsuperscript{445} See McIntyre \& Oldman, \textit{supra} note 51, at 1590.

\textsuperscript{446} See Bittker, \textit{supra} note 29, at 1440-41.

\textsuperscript{447} 281 U.S. 111 (1930).

\textsuperscript{448} Laura Ann Davis proposes special rules for allocating unearned income between the two spouses. See \textit{Davis, supra} note 18, at 242-48 (proposing that unearned income should not be split in the absence of an actual transfer of ownership. In common law states, unearned income would be taxed to the spouse who owns it. In community property states, unearned income would be taxed to the spouse who contributed to the income-generating property.).

\textsuperscript{449} See Beck, \textit{supra} note 58, at 397 n.394; Bittker, \textit{supra} note 29, at 1441 \& n.144, 1442; Gann, \textit{supra} note 29, at 65 n.208.

\textsuperscript{450} Allocation problems arise currently when spouses file separately. However, because the vast majority of married couples file jointly, most allocation problems never arise and, consequently, have not yet been resolved. See, e.g., Beck, \textit{supra} note 58, at 396; Richard B. Malamud, \textit{Allocation of the Joint Return Marriage Penalty and Bonus, 15 Va. Tax Rev. 489, 497-98 (1996).}
VI. CONCLUSION

Four major themes emerge from this Article. First, the joint return rate structure, through income splitting and aggregation, penalizes couples in which spouses earn similar incomes and rewards couples in which spouses' incomes diverge. These patterns benefit, thereby rewarding, families in which only one spouse works. The joint return penalizes couples in which both spouses do paid labor, thereby discouraging secondary earners in the family from participating in the paid labor force. Because this pattern has a disparate impact on women, calls have arisen to repeal the joint return and to institute a system of mandatory separate returns for married taxpayers. The first theme arising in this Article, therefore, concerns the privileging of single-earner couples over dual-earner couples and the concomitant disincentive for wives to participate in the paid work force.

The second theme emerging from this Article involves a pattern that has not been documented previously in the tax literature: joint filing, in contrast to separate filing, redistributes resources from the lower-earning to the higher-earning spouse, that is, typically from the wife to her husband. This pattern results because income splitting and aggregation act together to reduce the tax liability of the higher-earning spouse and to increase that of the lower-earning spouse. Abolishing joint return taxation would alleviate this problem as well. In the absence of reforms eliminating income splitting and aggregation, the Internal Revenue Service could mitigate this concern by publicizing the problem and by instructing married taxpayers that the fairest manner to apportion their joint return liability is in proportion to what their relative individual liabilities would have been had they filed separately. Given power differences between the spouses, sociological patterns regarding the earner's retention of control over income, and the continuing economic incentive for husbands to file jointly rather than separately, wives may, nevertheless, often file jointly using improper apportionment. In such instances, the joint return system could continue to effect a coerced wealth transfer from wives to their higher-earning husbands even if the IRS does publicize the problem and instruct taxpayers how to apportion liability properly.
The third theme arising from this Article and which has not been discussed previously in the tax literature is that the tax rate structure tends to impose conflicts on women that it fails to impose on men. First, because a wife's first dollar of income is taxed at her husband's highest marginal rate, the joint return rates exacerbate the conflict wives face over whether or not to participate in the paid labor force. The rates present no such conflict to husbands in the usual case in which husbands are the primary earners. Second, because joint returns tend to increase a wife's taxes, while diminishing those of the marital unit overall, the wife tends to face another conflict from which her husband is generally immune: the conflict over whether to file jointly for the benefit of the family overall or to file separately for her own individual financial interest. Eliminating income splitting and aggregation would eradicate both of these conflicts.

The fourth theme addressed in this Article concerns the self-perpetuating nature of gender bias within the tax code. Not only do patterns exist which adversely impact wives, but they tend to reinforce the very practices which originally allowed the Code to operate in a biased fashion. First, disparity in incomes induces joint filing which discourages women from working. This disincentive for women to work in paid labor, in turn, perpetuates the very income disparity that led to joint filing in the first place. Second, a disparity in incomes induces joint filing. Joint filing, in turn, results in a transfer of wealth from the lower-income spouse to the higher-income spouse. Thus, through the operation of the joint return rate structure and the incentives it creates (to file jointly), a disparity in incomes leads to the regressive and gendered result of a transfer of wealth from the lower-earning spouse, probably the wife, to the higher-earning spouse, probably the husband. In this manner, the tax rate structure perpetuates the economic subordination of women. These sources of self-perpetuating bias which this Article identifies have not been discussed in the tax literature until now. This Article has demonstrated that the tax rates do not operate in a neutral fashion as applied. Furthermore, they tend to interact with societal realities to perpetuate and exacerbate bias.

The joint return provisions are objectionable because they react to women's subordinate economic status and have the effect of furthering it. The gendered characteristics of the joint return
all converge to send restricting messages to society about which roles are appropriate for women, messages that have the effect of perpetuating negative and harmful stereotypes. They tend to sanction the notions that a good woman is one who does not work for financial remuneration, that women do not deserve to hold money of their own, and that they do not need access to their own financial resources. Rather, the law portrays wives as drains on their “husbands’” resources.

Every element described in the introductory Ames hypothetical is present and operating in the United States of America. The U.S. government rewards men who marry non-working women over men who marry working women. Women’s after-tax income generally drops and men’s after-tax income generally increases upon marrying. Incentives operate in the rate structure to induce women not to work in the labor force once they marry. The U.S. government also participates in harming women economically by sustaining the overwhelming incentive to file jointly, and consequently by forcing wives to transfer their relatively meager financial resources to their relatively wealthier husbands. This transfer is required, in effect, for every year in which the wife remains married to her husband. The combined impact of these various effects of the joint return rates is to disadvantage women substantially and to ensure their continued economic subordination. Clearly, the U.S. tax system is in dire need of reform if justice is to be served.

Debates within feminist jurisprudence concerning how best to advance women’s interests have profound implications for the direction tax policy should take with regard to the joint return rate structure. Currently, the tax system is tilted in favor of women staying out of the labor force. Much of the discussion in tax literature and, indeed, in this Article presumes that dismantling the tax policies that discourage women from entering the work force would serve women’s interests. It is widely assumed in tax scholarship that women, as a group and as individuals, benefit from policies encouraging them to take paid positions.451 Tax

451 See, e.g., Blumberg, supra note 10, at 49, 90-95; Gann, supra note 29, at 40 (describing how aggregation adversely impacts wives, discouraging them from working and criticizing that fact); McCaffery, Slouching Towards Equality, supra note 13, at 602, 657 (describing how the tax structure interferes with wives’ ability to participate in paid labor and that, therefore, that structure is inefficient and objectionable); McCaffery, Fresh Look, supra note 13, at 1029, 1055 (criticizing tax laws for discouraging married women from
discourse has almost universally failed to scrutinize that underlying assumption, however. Are women's interests really served if they are encouraged to undertake paid labor? Or would such policies push some women into the workplace against their wishes or against their best interests?

As described above, different approaches to reforming the rate structure would go to different lengths to encourage married women into the work force. For example, a proposal to eliminate joint returns would eliminate income splitting and aggregation and would allow the wife's first dollar of income to be taxed in the lowest rate bracket. Under such a regime, a wife's decision to participate in the paid labor force would be no more influenced by the tax rates than would her husband's decision. Other proposals would go further, taxing husbands at higher rates than their wives. These other approaches could not only serve to counteract the many disincentives within the tax system that discourage women from working but could affirmatively encourage or subsidize women's paid labor.\footnote{A similar formulation of this point can be found in Alstott, supra note 30, at 2007. Either of these two approaches can be described as creating a neutral system. Tax rates would be neutral under the former proposal in which husbands and wives each enjoy the benefit of the lowest tax brackets for their own wages. Tax rates would not be responsible for discouraging wives from working to any greater degree than they discourage husbands from working. Other approaches could potentially operate to push women into the paid work force by making paid labor more worthwhile to women than to men. Taxing wives at lower rates than their husbands would accomplish this objective. Such a system could be viewed as creating more meaningful gender neutrality not only by countering the disincentives within the rate system against women's labor force participation, but also by countering the other features of the tax code which discourage secondary-earner paid labor, such as the nondeductibility of work-related personal expenses and the tax-free status of self-performed services. Consequently, taxing husbands at higher rates than their wives could be viewed as permitting neutrality within the tax system as a whole. One commentator has pointed out that making only the tax system neutral in a non-neutral society will permit the persistence of non-neutrality overall. See McCaffery, Slouching Towards Equality, supra note 13, at 668-69, 675; McCaffery, Fresh Look, supra note 13, at 1052. For example, if employment discrimination and cultural pressures discourage women from working, those women will continue to face pressure against paid labor even if the tax system is corrected to remove any bias inherent in it. Professor McCaffery has argued compellingly that tax policies could be used affirmatively to encourage many more women to work. In essence, he contemplates setting spouses' relative tax rates not only to offset bias within the tax system overall, but also to counter non-tax sources of bias such as employment discrimination, for example. Tax rates could be designed to accomplish this broader social goal by adopting much larger differentials in the rates applicable to men and women. Taxing wives at negative effective tax rates would also effectuate such a goal and}

undertaking paid labor); Davis, supra note 18, at 198-99 (describing the work disincentive that the tax rates place on married women as having a negative impact on women and as creating problems for women); Note, supra note 118, at 363 (describing the tax disincentive against the paid labor of wives as a "drawback"). Even Boris Bittker assumed that women's interests would be served through additional participation in the paid work force. See Bittker, supra note 29, at 1433 (noting that the tax system is "biased against women" because of the work disincentive caused by aggregation).

\footnote{A similar formulation of this point can be found in Alstott, supra note 30, at 2007. Either of these two approaches can be described as creating a neutral system. Tax rates would be neutral under the former proposal in which husbands and wives each enjoy the benefit of the lowest tax brackets for their own wages. Tax rates would not be responsible for discouraging wives from working to any greater degree than they discourage husbands from working. Other approaches could potentially operate to push women into the paid work force by making paid labor more worthwhile to women than to men. Taxing wives at lower rates than their husbands would accomplish this objective. Such a system could be viewed as creating more meaningful gender neutrality not only by countering the disincentives within the rate system against women's labor force participation, but also by countering the other features of the tax code which discourage secondary-earner paid labor, such as the nondeductibility of work-related personal expenses and the tax-free status of self-performed services. Consequently, taxing husbands at higher rates than their wives could be viewed as permitting neutrality within the tax system as a whole. One commentator has pointed out that making only the tax system neutral in a non-neutral society will permit the persistence of non-neutrality overall. See McCaffery, Slouching Towards Equality, supra note 13, at 668-69, 675; McCaffery, Fresh Look, supra note 13, at 1052. For example, if employment discrimination and cultural pressures discourage women from working, those women will continue to face pressure against paid labor even if the tax system is corrected to remove any bias inherent in it. Professor McCaffery has argued compellingly that tax policies could be used affirmatively to encourage many more women to work. In essence, he contemplates setting spouses' relative tax rates not only to offset bias within the tax system overall, but also to counter non-tax sources of bias such as employment discrimination, for example. Tax rates could be designed to accomplish this broader social goal by adopting much larger differentials in the rates applicable to men and women. Taxing wives at negative effective tax rates would also effectuate such a goal and}
Certainly, to the extent the tax system itself restricts women's access to the paid labor market and to economic independence, it should probably be modified. The tax system arguably should not be permitted to operate as a systematic bar to women's employment. To the extent the tax structure contributes to inequities, using the tax system to combat them is appropriate. Even critics who oppose affirmative inducements toward women's paid work would probably oppose constraints that deny women the meaningful opportunity to work. Because a woman's decision not to work in the marketplace is favored under the current tax system, encouraging women to undertake paid labor by removing tax-based disincentives to their paid work should not be viewed as "pushing" women into the work force or as eliminating their choice not to work. Rather, such reform should be viewed as affording women a meaningful choice by making the options of accepting and declining paid labor more neutral. Eliminating features of joint filing that discourage women's paid labor would allow real choice by putting the options of paid labor and nonparticipation in waged employment on a more level playing field.

Before policymakers undertake broader, more radical reforms designed to combat the non-tax causes of women's limited labor force participation, that is, policies that are designed to encourage women's paid labor affirmatively, a thorough examination of whether women would benefit from increased labor force participation should be undertaken. Few tax scholars have explicitly addressed the question of whether encouraging more women to work would actually serve women's interests. Rather, the literature generally assumes that such encouragement would serve women well. Although most tax literature has virtually ignored this question, scholarship within feminist jurisprudence has grappled with the issue.

could be described as neutral in the sense that tax and social bias would counteract each other to create overall social neutrality. See Alstott, supra note 30, at 2015-16, 2034-35 (describing this broader notion of neutrality).

Accord Silbaugh, supra note 43, at 47 (acknowledging that the tax code ought to be neutral with regard to women's decision to enter the paid work force while declining the position that paid labor is necessarily the best means of serving women's interests).

Among the few tax scholars who have explicitly acknowledged this issue are Nancy Staudt and Anne Alstott. See generally Staudt, supra note 43, at 1572-74; Alstott, supra note 30, at 2024-26.
A brief review of feminist literature on this question reveals that many feminist scholars believe that women's interests would be served by policies designed to increase their paid labor. Increased participation in the paid work force serves women's interests, they argue, because it gives them greater access to and control over economic resources. Doing paid work allows women greater levels of economic independence. To the extent access to money fosters power and autonomy, encouraging women to work would improve women's status generally. The failure to engage in market work has harmed women by preventing them from accumulating their own private savings and by preventing them from developing human capital. Consequently, women who have not participated in paid labor suffer the greatest economic risks upon divorce or widowhood. In a society in which economic resources are critical to survival and in which caregiving in the home is unpaid, women's interests would be served, these feminists argue, through policies that make paid labor more attractive.

Another benefit derived from women's increased participation in the labor force is that paid work and women's movement into society's economic mainstream have helped to counter longstanding stereotypes in which women are viewed as marginal, as having little value to contribute, and as being subordinate to men. To the extent tax policies encourage more women to do paid labor, such stereotypes will be weakened further. Negative stereotypes will probably persist, these feminists assert, as long as women's labor participation continues to be

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455 See, e.g., OKIN, supra note 249; Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HArV. L. REV. 1497, 1543-60 (1983); Pateman, supra note 164, at 231, 237 (noting how "[p]aid employment has become the key to citizenship").

456 See BERGMANN, supra note 248, at 5; Alstott, supra note 30, at 2024-26 (noting that the increasing availability of market work has benefited many women, particularly those who are skilled doctors, lawyers, or nurses, and those who do not have caregiving responsibilities, offering them greater economic and social independence).

457 See Alstott, supra note 30, at 2026 (noting that women who do not participate in the paid labor force are "at risk for impoverishment upon divorce"); McCaffery, Fresh Look, supra note 13, at 1051.

458 See Alstott, supra note 30, at 2017 (describing some feminists' arguments that "[w]omen's market employment may ... confer political and psychological benefits"); McCaffery, Fresh Look, supra note 13, at 1051-52 (noting that unwaged labor leaves women socially disempowered).
viewed as more discretionary than that of men.  

Finally, others note that encouraging women to enter the paid labor force would allow more women to enjoy the psychic benefits that accompany a productive professional life. Given that historically wives tended to be excluded from the paid work force, it would seem contrary to women’s interests not to encourage their further entry into the labor market.

More recently a number of feminist scholars have questioned whether encouraging paid labor serves women’s interests. They question whether policies designed to promote additional work force participation would really operate to improve women’s lives. They point out that the opening of paid positions to women has been most helpful to upper-class and upper-middle-class white women with educations, those women who, arguably, least need economic enhancement. As for women of color and lower-class women who have historically enjoyed fewer educational opportunities, access to the labor market has done much less to improve economic standing. In large part, high-paying jobs are not available to these women. The jobs most women obtain typically offer low pay, few fringe benefits, and little opportunity for advancement. Women who work and have children often see very limited economic benefit from their positions because they need flexible jobs that accommodate child-care responsibilities and because those positions typically pay less

459 But see Staudt, supra note 43, at 1617 (noting that “women’s entry into the market may not work to break down the current gender hierarchy”).

460 See Zelenak, supra note 29, at 1571-72. See also Gerson, supra note 252, at 69-91 (discussing reasons why women choose to work); Law, supra note 322, at 1779 (noting that “most women do not want a lifetime of unpaid work in the home and economic dependence on a man”).

461 Even if other women are in greater need of financial security than are well-to-do white women, I would assert that even these relatively privileged women benefit from the economic independence that their own paid labor affords. See also Alstott, supra note 30, at 2025-26.

462 See Alstott, supra note 30, at 2024-25 (“studies of low-income workers suggest that persistence at low-wage work may not materially improve earnings or enhance women’s ability to achieve economic self-sufficiency”); Claudia Goldin & Solomon Polacheck, *Residual Differences by Sex: Perspectives on the Gender Gap in Earnings*, PAPERS & PROCEEDINGS 99TH ANNUAL MEETING AM. ECON. ASS’N, in AM. ECON. REV. 145, 146 (1987); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 108 HARV. L. REV. 1749, 1799-814 (1990); Staudt, supra note 45, at 1574, 1583, 1585, 1615 (noting that “[m]any wage earners … remain economically vulnerable and are often in poverty due to low wages and limited benefits” and that there is a “weak relationship between market participation and economic independence”).
than others that demand longer hours or travel. For these women, participating in the paid work force has not translated into economic independence. Consequently, policies designed to encourage women to work would not always result in significant financial resources being made available to women.

Many feminists have observed further that as wives enter the paid work force, they remain primarily responsible for the bulk of the family labor. As a result, wives who take paid positions typically undertake a double shift. They work a paid job and then return home to start their "second shift," the unpaid jobs of cooking, cleaning, and caring for children. Policies designed to push women into the paid work force, but which fail to address the existence of unpaid domestic labor in women's lives do not

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464 See BERGMANN, supra note 248, at 261-69; SARAH FENSTERMAKER BERK, THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN AMERICAN HOUSEHOLDS (1985); David H. Demo & Alan C. Acock, Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?, 42 FAM. REL. 329 (1993) (women continue to be responsible for three-fourths of housework responsibilities); NONA GLAZER, EVERYONE NEEDS THREE HANDS: DOING UNPAID AND PAID WORK, in WOMEN AND HOUSEHOLD LABOR 249, 261-68 (Sarah Fenstermaker Berk ed., 1980); Hadfield, supra note 252, at 97; JULIA A. HEATH & DAVID H. GICSEL, PATRIARCHY, FAMILY STRUCTURE AND THE EXPLOITATION OF WOMEN'S LABOR, 22 J. ECON. ISSUES 781, 787 (1988) (noting that in 1983 employed wives worked an average of 44% more hours than did housewives); Graeme Russell, Problems in Role-Reversed Families, in REASSESSING FATHERHOOD: NEW OBSERVATIONS ON FATHERS AND THE MODERN FAMILY 161, 163-64 (Charlie Lewis & Margaret O'Brien eds., 1987) (noting that in families in which the wife works and the husband does not, many wives retain greater responsibility than their husbands for "decision-making, planning, monitoring and anticipating" children's needs); Silbaugh, supra note 43, at 8-13 (citing sociological studies demonstrating that women do more unpaid work than men, even when both spouses are employed at paid labor); Staudt, supra note 43, at 1580 ("Sociological studies indicate that despite labor-saving appliances and women's move into the market, the number of hours women work in the home has remained constant."); Joann Vanek, Household Work, Wage Work, and Sexual Equality, in WOMEN AND HOUSEHOLD LABOR 275, 277 (Sarah Fenstermaker Berk ed., 1980); Tamar Lewin, Women Are Becoming Equal Providers, N.Y. TIMES, May 11, 1995, at A27 (describing a survey of single and married employed women, in which 90% report that "it [is] their responsibility to take care of the people in their families").

465 See HARRIS, supra note 183, at 98-99; HOCHSCHILD & MACHUNG, supra note 183, at 3, 276; AISTOTT, supra note 30, at 2023; McCaffery, Fresh Look, supra note 13, at 984-85; Staudt, supra note 43, at 1580-81; MYRA H. STROBER, TWO-EARNER FAMILIES, in FEMINISM, CHILDREN AND THE NEW FAMILIES 161, 169 (Sanford M. Dornbusch & Myra H. Strober eds., 1988); WHITE, supra note 403, at 846-47.

466 Arlie Hochschild fashioned the term "second shift" in THE SECOND SHIFT, supra note 183, at 6.
necessarily serve women's interests. Although these women may have additional access to some economic resources as a result of holding a paying job, that access comes at the great cost of additional anxiety, stress, and exhaustion, problems which not only impair the quality of life but which also pose significant health risks.

The current social reality, in which women do the majority of the family care even when they also have paying jobs and in which those jobs typically offer limited economic rewards, indicates that policies designed to increase women's labor-participation rates burden women substantially without providing sufficient offsetting economic rewards. Feminists emphasizing these arguments assert that given these social and cultural constraints, perhaps the best means to empower women would be to assign greater value to the domestic functions that women typically carry out rather than to push women into the labor force.

467 See Staudt, supra note 43, at 1573; Law, supra note 322, at 1782 (noting that formal equality, formal access to the work force would not yield substantive equality in a world in which women do most of the housework).

468 See Staudt, supra note 43, at 1581 ("Studies indicate that women who perform these dual roles in the market and in the home sleep less, enjoy less leisure, and work far longer hours than the average man."). Staudt, supra note 43, at 1617. See McCaffery, Fresh Look, supra note 13, at 1051-52 (arguing that women who choose traditional roles may believe they are serving their own best interests but are wrong in light of the economic and emotional devastation they would suffer upon divorce or widowhood); Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. Rev. 1559, 1607-08, 1611-12 (1991) (asserting that women's decisions to remain at home and to undertake nurturing responsibilities are not free choices because society substantially restricts the range of options for women, imposing caretaking roles on women rather than on men); Williams, supra note 399, at 828-32 (noting that society is structured to provide women with unacceptable choices); Law, supra note 322, at 1774.

469 See Christine A. Littleton, Reconstructing Sexual Equality, 75 Cal. L. Rev. 1279, 1297 (1987) (noting that "if women currently tend to assume primary responsibility for childrearing, we should ... figure out how to assure that equal resources, status, and access to social decision-making flow to those women (and few men) who engage in this socially female behavior"); Silbaugh, supra note 43, at 85 (declining to presume that increased labor participation would best serve women's interests, but arguing instead that housework and child care should be valued more highly and treated within legal systems as creating economic value); Staudt, supra note 43, at 1617. But see McCaffery, Fresh Look, supra note 13, at 1051-52 (arguing that women who choose traditional roles may believe they are serving their own best interests but are wrong in light of the economic and emotional devastation they would suffer upon divorce or widowhood); Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. Rev. 1559, 1607-08, 1611-12 (1991) (asserting that women's decisions to remain at home and to undertake nurturing responsibilities are not free choices because society substantially restricts the range of options for women, imposing caretaking roles on women rather than on men); Williams, supra note 399, at 828-32 (noting that society is structured to provide women with unacceptable choices); Law, supra note 322, at 1774.

Professor Staudt describes the various strains of feminist thought which incorporate the approach that valuing caretaking and nurturing more highly would benefit women. See Staudt, supra note 43, at 1581-85 & nn.47-57. The literature she describes mirrors the conflict over whether women are better off staying at home or entering the paid work force using biological, economic, and/or psychological explanations. The biological view generally asserts that women are biologically more suited than men to care and nurture. See generally Browne, supra note 468. Some feminists, therefore, argue that perhaps women would be most readily empowered if law and society enabled them to fulfill these roles without exacting social or economic costs. See Becker, supra note 562. Cf. Robin L. West,
Accordingly, many feminists posit that policies affirmatively encouraging significant additional work force participation would not serve women's interests. On the contrary, such policies would encourage women to act like men and would devalue women's traditional roles further.\textsuperscript{470} Policies designed to value caretaking and nurturing adequately would be more effective in serving women's interests. To this end, some feminists have argued that women's domestic contributions to family life should

\textit{The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory}, 3 Wis. Women's L.J. 81, 81-82 (1987) (describing radical feminism which posits differences between the sexes, differences society ignores, thereby harming women). Caretaking roles deserve more value than is currently assigned to them, these feminists argue. These feminists could conceivably argue against policies designed to encourage women's labor force participation, but would opt, instead, for society to reward caretakers financially. The economic or structural explanation of the conflict between staying at home and working in the market is that economic forces relegate women to household pursuits by making the market relatively unattractive. See Patricia Gerald Bourne & Norma Juliet Wikler,\textit{ Commitment and the Cultural Mandate: Women in Medicine, in Women and Work Problems and Perspectives 111-121} (Rachel Kahn-Hut et al. eds., 1982); Martha Albertson Fineman, \textit{Preface to Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood at x-xii} (Martha Albertson Fineman & Isabel Karpin eds., 1995); Schultz, supra note 462, at 1799-815. For example, wage discrimination and relegation of women to positions with little opportunity for advancement limit women's success in the market and make the decision to assume the traditional roles of homemaker and caretaker easier. See Rosabeth Moss Kanter, \textit{The Impact of Hierarchical Structures on the Work Behavior of Women and Men, in Women and Work: Problems and Perspectives} 234-47 (Rachel Kahn-Hut et al. eds., 1982). An atmosphere of harassment, whether overt or subtle, would also tend to chill women's desires for employment and would make the role of homemaker that much more attractive. This strain of feminist thought generally assumes that women would be better off if they were able to participate in the work force freely but that their choices to do so are constrained by both economic and organizational factors that make paid labor less desirable.

A third school of thought within feminist literature asserts that psychological differences between men and women may contribute to separate gender roles. Feminists in this group argue that psychological differences, whether biological or socially constructed, lead women towards connection, caring, and responsibility, and lead men towards individual autonomy, competition, and a rule-bound orientation. See Chodorow, supra note 219; Carol Gilligan, \textit{In a Different Voice: Psychological Theory and Women's Development} 2 (1982); Linda C. McClain, \textit{"Atomicistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence}, 65 S. Cal. L. Rev. 1171, 1184-86 (1992); Nel Noddings, \textit{Ethics from the Standpoint of Women, in Theoretical Perspectives on Sexual Difference} 160, 166-71 (Deborah L. Rhode ed., 1990). In general, feminists subscribing to this school of thought argue that the traits of connection, interdependence, and care have historically been undervalued because they do not fit within the psychological framework endemic to men. These feminists would generally argue that these feminine values, which lead naturally to women taking roles involving interconnection such as childrearing rather than those in the working world that evolved around men's traits, ought to be rewarded and valued much more than they are currently. Consequently, the roles women may choose naturally as a result of psychological predispositions ought to be recognized and valued more highly by society. Presumably the ethic of care would heighten the perceived value of women who choose to stay at home with their families, but it would also infiltrate the public world as other women choose the work force and would allow for a feminization of all areas of life.

\textsuperscript{470} See Staudt, supra note 43, at 1617 (arguing that accepting the "male norm of achievement" devalues what women do); Law, supra note 522, at 1772.
be compensated financially.\textsuperscript{471}

Other feminists counter that proposals to pay women for housework and caring for their children are politically impossible, if not economically unfeasible, and that society is unlikely to value women's domestic contributions appropriately.\textsuperscript{472} They assert that women's economic and social status will not improve until women gain greater access to economic resources through paid work. In fact, valuing women's nurturing capacities more highly could unintentionally result in the perpetuation of socially oppressive roles for both men and women.\textsuperscript{473} In response to the problem of women's disproportionate home responsibilities and the double-shift phenomenon, these feminists assert that women should be pushed into the work force but not on the same terms as men.\textsuperscript{474} Rather the work force should be restructured to offer more alternatives including shorter working hours, viable part-time

\textsuperscript{471} See Martha Albertson Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies 161-66 (1995); Nancy Foner, Who Pays for the Kids?: Gender and the Structures of Constraint 123 (1994); Okin, supra note 249, at 181-82 (arguing that the state should intervene to require spouses to divide their wages equally so that unpaid labor is compensated as much as paid labor); Alstott, supra note 30, at 2007; Littleton, supra note 469, at 1301, 1329-30 (asserting that the government should pay mothers the way it pays soldiers); Silbaugh, supra note 45, at 67-71 (arguing that feminists should encourage society to value the productive nature of women's labor both in the home and in the market and that society should pay women for housework by providing access to social welfare benefits such as social security for their contributions to domestic life); Staudt, supra note 43, at 1573-74, 1617. But see Browne, supra note 468, at 906-81 (noting that if women are biologically more nurturing than men, then "it is not obvious that social policy should be oriented toward ensuring that economic outcomes [for men and women] are nonetheless equivalent").

\textsuperscript{472} See Law, supra note 322, at 1771 (noting that society undervalues nurturing, in part, because it views caregiving as being inextricably intertwined with self-sacrifice); id. at 1776 (noting that nurturing has been "devalued by being removed from the market and assigned to people removed from the market").

\textsuperscript{473} See McClain, supra note 469, at 1198 (warning that "advocating an ethic [of care] ... may have the unintended effect of creating or perpetuating socially oppressive expectations of both women and men and that [doing so] may validate the already unequal and deeply gendered division of labor for caretaking"). But see Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law 154 (1989) (noting that many women do not view caring for their children as oppressive); Jennifer Roback, Beyond Equality, 82 Geo. L.J. 121, 129 (1993) (same); Dorothy E. Roberts, Motherhood and Crime, 79 Iowa L. Rev. 95, 97 (1993) (same); Staudt, supra note 43, at 1573 (same).

\textsuperscript{474} See Fineman, supra note 523, at 8-9, 20-21 (distinguishing equality of treatment from equality of result when individuals are not similarly situated). Cf. Fineman, supra note 523, at 20 (noting in the context of property division rules that govern in divorce proceedings that an over-adherence to the concept of equality has subverted the development of substantively fair rules); Pateman, supra note 164, at 257-58.
employment, and more flexible schedules. To avoid the mommy-track syndrome in which those positions are held only by women and are consequently underpaid, some feminists argue further that all employment should be restructured to acknowledge both parents' domestic commitments. Many feminists assert that a restructuring of workplace expectations would benefit both men and women by enabling both spouses to spend more time with their children.

The question of whether a policy serves women's interests presupposes that all women have the same needs, that women are monolithic. A policy that encourages women's work force participation may advance the interests of some women, but do little for women without access to desirable positions, that is, women of lower socioeconomic classes. A policy pushing women into the work force may even harm some women, those with significant household responsibilities.

Even if an identifiable "best" policy exists for women overall, such a policy may not coincide with the best interests of individual women or of certain identifiable groups of women. Any adequate policy analysis

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475 See McCaffery, Slouching Towards Equality, supra note 13, at 665 (criticizing current employment options for lacking flexibility); Dowd, supra note 164, at 450.

476 See, e.g., Susan Vogel, The Perils of Part Time: For Many Women Lawyers, the Panacea of the '80s Has Become the Albatross of the '90s, CAL. LAW., Apr. 1996, at 37. See also supra note 252.

477 See Dowd, supra note 164, at 438-56; Finley, Transcending Equality Theory, supra note 7; Frug, supra note 249, at 61, 66; Carrie Menkel-Meadow, Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change, 14 L. & Soc. INQUIRY 289, 304-12 (1989); Williams, supra note 469. They argue that the workplace evolved around the "ideal worker," a man who typically devoted all his energy to work and who needed little time for family responsibilities because he typically had a wife who took care of such responsibilities. Because employers could historically expect full-time commitment, jobs evolved to require full-time workers. They did not serve the needs of workers with significant outside responsibilities. See Schwartz, supra note 252, at 300-02 (arguing that employers unfairly treat the male employee as the norm).

478 Cf. Okin, supra note 249, at 181-82 (arguing that the government should require spouses to share equally the responsibilities for both paid and unpaid labor); Dowd, supra note 164, at 132 & n.177 (arguing that the law should require husbands to assume equal responsibility for a family's domestic obligations to lessen women's double shifts); Ann C. Scales, Towards a Feminist Jurisprudence, 56 IND. L.J. 375, 441 & n.341 (1981) (same).

479 See Alstott, supra note 30, at 2024, 2032 (arguing that a single tax policy cannot address the needs of all women).

480 Professor Cain makes the point that there is no such thing as an "essential woman." Patricia A. Cain, Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism, 2 VA. J. SOC. POL'Y & L 43, 43-45 (1994). See also Twila L. Perry, Alimony: Race, Privilege, and Dependency in the Search for Theory, 82 GEO. L.J. 2481, 2482 (1994) (noting generally that "all too often, feminist analysis is based on the assumption that all women are white and middle or upper-middle class. As a result, it is argued, feminist theory is largely irrelevant to the lives of poor women and, in particular, poor women of color." (footnote omitted);
should consider the impact of reform upon the variety of women who are intended to benefit under that reform. The effect of reform by race, by class, and by other groupings of individuals should be identified and evaluated.

A more complete discussion of whether women's interests are served through policies designed to increase their labor force participation is beyond the scope of this Article. Nevertheless, before policies are adopted which affirmatively push women into the labor force, a thorough analysis of this issue should be undertaken. I conclude that ridding the Code of bias against women is appropriate. At a minimum, good tax policy would require abandoning the unfair bias symbolized through the Amesian tax system hypothetical. Therefore, the disincentives against women undertaking paid labor should be eradicated from the Internal Revenue Code. However, because a policy affirmatively subsidizing women's work force participation may counteract the interests of many women, it is also my tentative conclusion that such far-reaching reform would be inappropriate until further analysis demonstrates that an affirmative subsidy of women's paid labor would serve women's and society's interests.