
CHAPTER 2. HISTORICAL PERSPECTIVES ON TAXATION

When studying the evolution of tax law and policy, students and scholars typically study official records – decisions by judges, rulings and publications by administrative agencies, statements by elected officials, and legislative histories. These are the traditional tools for uncovering the “history” of taxation, and yet the story these official records tell is incomplete. The contributors to this chapter seek to fill the gaps in our understanding of the social and political meaning of taxation in everyday life. Historical perspectives on the Code yield multiple implications for our understanding of the tax system.

In her article *Dollars and Selves: Women’s Tax Criticism and Resistance in the 1870s*, Carolyn Jones examines nineteenth-century news articles to explain how proponents of woman suffrage linked their claims to the right of women to vote with the unfairness of the tax system. As Jones explains, suffrage advocates used tax protests to draw attention to women’s lack of power in the public sphere. Through these tax protests, women made claims both about their economic rights and their right to participate in public life. The very meaning of taxation, Jones reminds us, is historically contingent.

In her second contribution, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, Jones again looks beyond court cases and policy statements to reveal a rich history of an “official” tax story. Jones carefully studies newspaper articles, advertisements, and letters written by citizens to their elected representatives to understand the tremendous role that war, gender, and property rights played in the development in 1948 of the joint income tax return. She urges the reader to analyze the relationship between tax law and everyday “culture.”

In *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, Marjorie Kornhauser focuses on a distinct break with the past – the sustained attack in recent decades on the idea of a progressive income tax. Kornhauser critically examines the seemingly rational and semiscientific terms that scholars use to make the case against progressivity. Through her article’s provocative title, Kornhauser draws the reader’s attention to the role of rhetoric in any written or verbal communication, including descriptions of tax policy and, more particularly, the case against progressivity. Lawyers and economists make broad claims about

the incompatibility of a progressive system with individual liberties. Kornhauser inverts these claims to suggest that tax progressivity is a foundational element of a just society. She uses relational feminism as a lens for illuminating that interconnectedness and mutual responsibility are not incompatible with property rights and individual freedoms.

Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s

CAROLYN C. JONES¹

It is true that most people will when I talk of our claim on the ground of human rights, blink like owls in the daylight; but they understand me at once, when I speak of my right to look after the dollars which I have paid as a tax. In short, they understand the worth of my dollars, and my right to look after them, but do not understand what above all I hold of worth – my personal self and my right to represent it.

– Mary Eastman, 1877²

Although women's history scholars have mentioned tax protests and refusals to pay in the woman suffrage movement, relatively little analysis has been devoted to these issues. Key to understanding both the dollars and the selves taxation arguments is an appreciation of the centrality of metaphor.

By trying to use familiar historical narratives of the Revolutionary era [e.g., no taxation without representation] as vehicles to explain or reveal something of women's tax protests and resistance in the 1870s, woman suffragists used a metaphor that was generative of later policy decisions and adverse consequences for the women's movement. The selves arguments were bottomed on metaphoric employment of taxation outside its familiar context of governmental exactions. In writings from the 1870s, taxation was critical to an understanding of gender within society. The selves taxation arguments used by woman suffragists in the 1870s were an attempt both to set forth a meaning for "taxation," an important symbol in American political life, and to use "taxation" to "limit and contain the metaphoric possibilities" of other cultural constructs.

One particularly important construct to the analysis of both types of taxation arguments is another metaphor – the doctrine of separate spheres and the closely connected public–private distinction. The notion that men and women occupied different "spheres and destinies" was both a traditional and dynamic notion in the nineteenth century. The domestic sphere to which women were consigned was seen by some in that period as prescriptive and limiting.

¹ Reprinted by permission from 1994 *University of Illinois Law Review* 265.

² *Annual Meeting Massachusetts Woman Suffrage Association*, 8 *WOMAN'S J.* 48 (1877).

Equalitarian arguments for women's rights attempted to lift certain confining aspects of the separate spheres ideology. These strategies tried to portray women as equal, not separate or different from men. Suffragists, however, also used separate spheres thinking as a positive argument for their cause. Building on women's culture and friendships fostered by segregation, woman suffragists argued that women would bring different and valuable perspectives to public life. Women in the nineteenth century maintained a high degree of separate religious activism. The home in the Victorian age continued to be seen as the repository for civic virtue and religious morality, qualities seen as absent from the male worlds of government and market.

THE WOMAN'S JOURNAL: ITS POTENTIAL AND LIMITATIONS AS DATABASE

This article uses the suffrage newspaper *Woman's Journal* during the 1870s in its analysis of taxation issues in the suffrage movement. The *Woman's Journal* was the most prominent of the suffrage newspapers during the 1870s and enjoyed the longest life, lasting until 1920, the year that the Nineteenth Amendment was adopted. On its masthead, the *Journal* proclaimed that it was "devoted to the interests of Woman, to her educational, industrial, legal and political equality, and especially to her right of Suffrage."³ The newspaper targeted conservative, middle-class, professional men and women, providing a counterpoint at its inception in 1870 to [Elizabeth Cady] Stanton and [Susan B.] Anthony's *Revolution*, a more radical publication that met its demise that same year. The *Woman's Journal* had a distinctly New England focus, featuring lengthy discussions of developments in New England legislatures, particularly that of Massachusetts. Although the *Journal* received missives from editors or correspondents as far west as California, the center of gravity was in Boston. As a weekly paper with at least eight pages in each issue, the *Journal* could, and did, address the issues of taxation and women's rights repeatedly and in detail. The *Journal's* national circulation reached women who could not or would not attend women's rights conventions and meetings. Its intensive focus upon New England and the middle class and the somewhat conservative nature of its editors and audience made the *Journal* unrepresentative of all of the factions of the movement. The extensive concern with taxation, particularly with local property taxation, may have reflected the regional and class concerns of the editors and readership.

DOLLARS ARGUMENTS FOR SUFFRAGE

The models for woman suffragists in the 1870s were Revolutionary tax resisters and contemporary women and a man who refused to pay taxes. Prior to the 1870s, there had been instances of refusal to pay taxes because women could not vote. Lucy Stone, leader of the American Woman Suffrage Association in the 1870s

³ Susan S. Huxman, *The Woman's Journal, 1870–1890: The Torchbearer for Suffrage, in A VOICE OF THEIR OWN: THE WOMAN SUFFRAGE PRESS, 1840–1910*, at 88 (Martha M. Solomon ed., 1991).

and editor of *Woman's Journal*, had experience as a tax resister in the 1850s. Her refusal to pay taxes resulted in a foreclosure sale at which some of her household goods were auctioned. None of the tax resisting or protesting forebears received the national prominence that the Smith sisters achieved in the 1870s.

The Smith sisters, Abby and Julia, were in their seventies when their involvement in the woman suffrage movement began, prompted by what the two perceived as the inefficiency and injustice of the tax system. The Smith sisters were probably the wealthiest women in Glastonbury, Connecticut, and certainly among the most well off in that community as a whole. Abby and Julia were the survivors of a family of five sisters. They had inherited considerable property from their father, an unsuccessful Congregational clergyman turned successful lawyer, and their mother, a wealthy woman in her own right. In June 1869, the overseer of highways asked the Smiths to pay their \$18 assessment early and they obliged, only to be billed for the assessment again in October. The overseer contended he could do nothing about the situation. Angry about this situation, Julia and Abby attended a suffrage convention.

In 1872 the Glastonbury tax collector notified the sisters that their town tax had been increased by \$100. The Smiths believed that the only taxpayers given higher tax bills were women taxpayers. Although the sisters paid the 1872 tax, their sense of indignation heightened and they refused to pay their November 1873 tax installment. On January 1, 1874, the tax collector attached the Smiths' cows, and sold them at auction to satisfy the unpaid tax liability. The foreclosure purchaser for six of the seven cows was an agent for the Smiths. The elements of the Smiths' story – two elderly unmarried women, their refusal to pay taxes, and the sale of the cows at the auction elicited great interest in newspapers and among suffrage groups. The cows became famous at the Union Bazaar. Souvenir bouquets were made from the hair of Alderney cows into the forms of jasmine and buttercups, and tied with black ribbon bearing the legend "Taxation without representation."

The Smiths continued in their refusal to pay taxes. In June 1874, the town collector auctioned eleven acres of meadow land to a neighboring farmer at a price which the Smiths contended was less than 10% of its value. The Smiths resorted to the legal system to contest this auction primarily on grounds that the collector had illegally auctioned land before selling their remaining personalty – their furniture, cows, and hay. This claim prevailed; the town won a reversal on appeal. The appeal was set aside in 1876 by the court of equity in Hartford.

In April that year, the tax collector again auctioned three Alderneys, in addition to bank stock. The Smiths bought back two of the cows. Two more cows were auctioned off in September 1877. Throughout the period from 1873 to 1878, the Smiths publicized their tax resistance and appeared before local, state, and national suffrage meetings and congressional and legislative hearings. The *Woman's Journal* covered their story heavily, reprinting correspondence from the sisters, and editorializing about their plight. Their tax resistance effectively ended with Abby's death at age eighty-one on July 23, 1878. In the spring of 1879, Julia married for the first time at age seventy-seven. Her husband, retired Judge Amos A. Parker, paid taxes on the Smith property. Julia reimbursed him with gifts of money. Julia

died March 6, 1886, asking to be buried between two of her sisters. Her tombstone bore her birth name only.

To the north in Worcester, Massachusetts, was a contingent of suffrage tax resisters during the 1870s consisting of Mrs. Marietta Flagg, Stephen and Abby Kelley Foster, and Sarah Wall. Abby Kelley became an antislavery agent in 1839. Kelley linked the causes of slaves and women. She married Stephen S. Foster, a fellow abolitionist in 1845, and both continued their reform work. The Fosters' tax resistance apparently began with Stephen Foster's announcement at a meeting of the Massachusetts Woman Suffrage Association that he would refuse to pay taxes until his wife and sister could vote. The Fosters' tax strike was compared to their civil disobedience years earlier in aiding fugitive slaves.

The Fosters' home was sold, but they retained possession during the redemption period. Meanwhile, the Fosters' case stayed in the public eye at suffrage conventions, legislative hearings, and Fourth of July celebrations.

The recounting above is[,] of necessity and design, not a complete representation of all "events" of the Smith and Worcester tax resistance. Even the characterization of their activities as tax resistance implies some ideological dimension beyond a mere failure to pay taxes. The "events" in Glastonbury and Worcester were subject to varying interpretations. Some in those towns alleged that the Smiths and others were wealthy women shirking their obligations to their communities as a whole.

At times, supporters made great and obvious attempts to draw parallels between women tax resisters of the 1870s and their predecessors a century earlier. T. W. Higginson rebutted arguments that the American Revolution was fought to secure local, not personal, representation. This use of familiar historic narratives as vehicles to explain or reveal something of the nature of woman suffragist tax resistance is the process of metaphor – the use of a familiar concept to display, primarily, the similarity between the familiar vehicle and a subject dissimilar from the vehicle.

Rather than portraying the Smiths or Fosters as comic crackpots or selfish skinflints, the writers in *Woman's Journal*, including the Smiths and Fosters themselves, fundamentally adopt a tragic romantic myth of civil disobedience or continuation of revolution. In the tales of tax resistance, the strength to oppose the tax collector is found in religious or republican virtue. The vulnerability of the home and the existence of a moral basis for opposition to the government implicate the ideology of separate spheres in ways that both attack and reinforce it.

Although traditional narratives of tragic romance stress the hero's strength, aspects of the tax refusal narratives focused upon the vulnerabilities of the resisters. At one level, the tax resistance of the Smiths, Fosters, and others provided a sharp illustration of the artificiality of a separate, protected "woman's" sphere. Women taxpayers were indeed subject to law. Women tax protesters who worked off their road taxes were making the point that government's exactions could force women out of their homes and out of traditional types of work for Anglo-American women. The story about the sale of Lucy Stone's household furnishings at the foreclosure sale after her refusal to pay taxes provided another illustration of government power over the woman's sphere of home and children. The Smith sisters seemed to be aware of the powerful and repugnant nature of such events. A court eventually held one foreclosure sale of land by the Glastonbury tax collector to be illegal because the tax collector should have taken personal property to pay

taxes before taking real estate. The Smiths' insistence that their furniture, hay, or other personalty be taken first could have merely been the available legal ploy to defeat foreclosure. Alternatively, it could have been a strategic statement about government power and the assailability of the home.

The ultimate lack of protection for woman's sphere also emerged as a theme in the Foster tax resistance case. The vivid demonstration of the subjection of woman's sphere – the home – to government power was in part an argument for suffrage. If the home was not truly separate from the public–governmental sphere, the separate spheres construct was illusory, women were as subject to governmental authority as men, and therefore, women should be equally represented.

By aligning themselves with tax resisters and civil disobedients of the Revolutionary era, woman suffragists repeated the common slogan “no taxation without representation.” Although this may have been true of spoken tax protests, once “taxation without representation” became active tax resistance or civil disobedience, the narrative and metaphoric patterns associated with that type of story and its element of higher law meant that religious imagery became an important component of discourse. Here the separate spheres ideology's celebration of women's greater moral and religious virtue became significant.

Civil disobedience results from refusal to submit to the demands of public law because it conflicts with the dictates of a higher law. Woman suffragists in the 1870s often invoked Christian and republican principles as justification both for suffrage and for refusal to pay taxes. Women could be seen as the special guardians of both types of principles.

The tax resisters' adherence to their personal or private visions of “right” caused them to refuse to submit to existing public law. The religious and republican heritage maintained particularly by women in their separate sphere had the potential to remake the public sphere of politics, again demonstrating the interdependence of public and private spheres. Tax resistance was not merely a justice or equality argument for suffrage; it also partook substantially from expediency – the gains to be made from the differences between men and women. The Smiths, Fosters, and their cohorts chose to occupy the territory of religious and patriotic martyrdom. It was a concept particularly well suited to women.

In making dollars arguments, woman suffragists employed historical, metaphoric, and mythic patterns to assert similarities between woman suffrage tax resisters and martyrs or heroes of the American Revolution. Because of the pervasive background metaphor of separate spheres, however, women's vulnerability to public authority and their essential moral and religious virtues came to be emphasized. Separate spheres were also the focus of a collection of writings in the *Woman's Journal* that dealt not with taxation as an actual governmental coercive exaction, but rather used “taxation” as an image to convey greater truths about women's lives.

TAXATION REDEFINED: ARGUMENTS ABOUT SELF

Traditionally, taxation is conceived as the taking of money or property by the government by use of law. Although most of the tax suffrage discussion focused upon this brand of coercive governmental taking, suffragists writing for the *Woman's*

Journal displayed a more catholic notion of taxation – one that perceived that coercive societal action against women was not just limited to government, but extended in a continuum to increasingly “private” transactions. Some of these women saw the unfairness of their wages in relation to men’s. The market, they said, exacted a tax – in the form of lower wages – from them because they were women. At the evening session of the 1874 Anti-Tax Convention in Worcester, Massachusetts, Mary Cobell spoke and an account appeared in the *Woman’s Journal*:

She said she had heard much about the taxation of women, but one thing she had not heard, and that was the tax on sex. In the difference in remuneration of men and women in different positions in life, she had calculated that she had paid for being a woman at least \$10 a month. She had taught schools successfully where young men had received \$30 per month, and been obliged to receive \$20, if she would keep it as well.⁴

By conceiving of the lower wages paid to women in relation to the male wage as a “tax on sex,” suffragist commentators implied that the reigning liberal vision of the market was inaccurate. First, the imputed “tax” on women suggested a governmental role in the marketplace – certainly it did in the hiring of schoolteachers, a major occupation of women in the 1870s. More importantly, the “tax” label implied coercive elements in the “free” market, elements that limited a woman’s ability to bargain for wages in a way that a man was not constrained. In exposing a structural bias against women in the marketplace, a bias expressed in the governmental sector by taxation without provision of women’s suffrage, these women writing in the 1870s used an expansive notion of taxation to bridge the public governmental and public–private market spheres.

Taxation holds within it the notion of taking valuable things. In characterizing pay inequity as a tax on sex, suffragists were arguing that employers were taking women’s services without paying adequately. Those using the concept of “social taxation” saw clubs, churches, and polite society extracting time and wastefully inefficient amounts of money from women. Although the writers in the *Woman’s Journal* did not quantify the amount of tax extracted through pay inequities, social obligations, and housework, they were convinced that what was taken was both valuable and significant.

The expanded notion of taxation also refuted the idea that American life was divided into separate spheres – one public and one private. By arguing that one word applied to both “public” and “private” transactions, the *Woman’s Journal* authors highlighted similarities that undermined prevailing notions of social organization. Taxation is coercive. It entails an exercise of power over a subject. This is an accepted notion with respect to governmental taxation. It should be less applicable to government in its role as license-giver or benefit-conferrer. Suffragists who attacked the regulation of prostitution objected, in part, because women who were sometimes forced into that profession were required to pay “taxes” or fees that were not levied against their male clients. An unfair license regime operating in

⁴ *Report of the Anti-Tax Convention in Worcester*, 5 *WOMAN’S J.* 52 (1872).

a realm in which suffragists saw women degraded and victimized was labeled as a “tax” – a coercive appellation, not as the voluntary purchase of a governmental privilege.

Market transactions were sometimes characterized as private because they were regarded as nongovernmental. They were, for purposes of gender relations, however, seen as public, as distinct from the private domestic sphere occupied by women. The market was theoretically typified by voluntary transactions entered into by willing participants, each bargaining for his own economic interests. Presumed equality of bargaining power was attacked by the use of the word taxation to characterize market transactions. If women systematically received less than men for the same work, the market was less free than it was said to be. A coercive distorting force was present in market transactions, making the market less distinct from the state and its powers.

Churches, clubs, and relations among neighbors were public in the sense that they were external to the family and home. Such groups could, in theory, be viewed as private because they were outside the competitive public sphere of the market and more characterized by affection and altruism, the hallmarks of the domestic sphere. The idea of social taxation attacked this premise as well. If donations or gifts were demanded, not freely given, and enforced with social sanctions, coercive methods usually associated with government could be said to be at work here. The “private” world of community social relations was not distinguishable from government in this respect.

The family clearly was assigned to the private sphere. Family relationships were supposed to be based upon love and altruism. If housework was taxation – coercive exaction of a woman's time – the special identity of the private sphere was less obvious. Rather than protecting women, the home seemed to replicate the constraining patterns of government, market, and polite society.

The use of *taxation* to signify various types of economic disadvantage experienced by women had the potential to deconstruct the separate public and private spheres, and, indeed, to demonstrate society's exactions across spectral gradations from government to family. It also suggested, however, that taxation was not beyond the intellectual and experiential grasp of the *Woman's Journal* readers. This was a crucial point for woman suffragists who valued an educated electorate. If housework was an example of inequitable taxation, understanding more “difficult” concepts of public finance was not only feasible, but quite likely. The epistemological and metaphoric move from familiar to unfamiliar was a strategy endorsed in the *Woman's Journal*.

“Taxation” in these articles functioned as a metaphor for various types of oppression experienced by women in their dealings with the government, employers, community, social groups, and the family. For suffragists in the 1870s, taxation described features of the social system that took valuable things and time from women without affording them the opportunities or rights they demanded.

An understanding of the woman suffrage movement in the 1870s requires that both dollars and selves arguments be kept in focus. Both arguments could have been fashioned as a basis for universal woman suffrage. The dollars argument and the tax resistance incident to it, however, used historical metaphor and a narrow

definition of taxpayer in ways that were quite consistent with limited woman suffrage. Although the selves arguments with the redefinition of taxation could have resonated with women with very different life experiences and social statuses, the illustrations given appealed primarily to the experiences of middle-class women – the readership of the *Woman's Journal*. The role that taxation arguments played in the woman suffrage movement of the 1870s cannot be understood without considering how race, ethnicity, and class figured in the case for woman suffrage.

PROPERTY AND PARTIALITY: ETHNICITY, RACE, CLASS, AND LIMITED SUFFRAGE

Taxation was in the forefront in the 1870s as men of the era debated public policy. Federal taxes such as the tariff, the Civil War income tax, and alcohol and tobacco taxes were the subjects of intense discussion and violent disagreement. At the state and local levels, men debated the allocation of the tax burden. At farmers' club meetings, critics protested against heavier state and local taxation of real property in comparison with more lightly taxed personal property. Higher corporate and railroad taxes were called for and there was support for state income taxes. During this period, the term *taxpayer* assumed a new descriptive role as committees with memberships numbering in the teens or hundreds were mobilized for political action.

Just like the men in the taxpayers' committees, middle- and upper-class woman suffragists sought to use their ownership of property and payment of direct taxes to distinguish themselves from the lower classes, particularly from the lower-class men who had gained the franchise. The distinction drawn was not only economic, however; it had very strong nativist and racist elements.

The tax protests, refusals to pay, and tax rhetoric of the woman suffrage movement, while recognizing the universality of the incidence of taxation upon women of all classes, tended to focus upon property taxation. Distinctions between property taxpayers and nonproperty taxpayers were initially economic, but a tendency to view recent immigrants and African-Americans as almost uniformly of the lower economic classes provided a more emphasized racial and ethnic dimension. Woman suffragists did not make the metaphoric connection to the American Revolution an occasion to argue unambiguously for universal woman suffrage. Rather, the cleavage drawn between native-born property-holding women and the foreign-born or those facing economic struggles tended to narrow the broadest metaphoric implications of "no taxation without representation" and to accentuate what are now taken to be less attractive aspects of republicanism, particularly its emphasis on self-reliance and property ownership. The Boston Tea Party, Revolutionary mottos, and the legitimacy associated with them were appropriated by one group of women to the exclusion of American women who arrived more recently or were poorer.

The second cultural metaphor, the doctrine of separate spheres, gave women an entry, although again a narrow one, into political life in the 1870s. The separate spheres arguments took at least three forms. The first type of argument posited that educational issues already formed a part of woman's sphere. Granting her the vote in local and school elections would, in substance, augment a woman's

ability to act competently within the sphere of particular interest to her. A second argument used separate sphere language, but expanded the meaning of home to justify woman municipal suffrage.

An expanded notion of motherhood including public motherhood redefined woman's role while conserving the ideology of separate spheres. There is no necessary reason why public motherhood would be confined to the municipality, but if a woman's own family was to be her highest priority, charitable or public motherhood may have been appropriately confined geographically. Finally, separate spheres arguments for municipal or school suffrage sometimes harkened back to the ideal of republican motherhood from early in the nineteenth century. Republican motherhood recognized both the confines of woman's sphere and its impact and contribution to public life through mothering. By giving women a more direct stake in local government, it was hoped that they would more adequately meet the expectations of them as republican mothers and wives.

CONCLUSION

Some of the more important developments in American law in the 1870s focused upon the mutability of the term taxation. Legally significant attempts to control the meaning of taxation were not limited to treatise writers and lawyers of the time. Woman suffragists found in taxation a "cultural symbol"⁵ – a powerful metaphor for their condition in American society in the 1870s. Their efforts to alter law and language provide valuable insight into metaphoric strategies and limitations in legal discourse. Tax protests, work in payment of taxes, and refusals to pay tax were ways of drawing attention to disenfranchised taxpaying women. The dollars arguments of the era's woman suffragists were historical metaphors, patterning the actions of the Smith sisters or the Fosters into familiar narratives of Revolutionary tax resistance and that famous motto: "no taxation without representation." Supporters drew parallels between the stories of refusals to pay by woman suffragists and the Revolutionary pattern. Certain variations were, however, attributable to the predominance of women as civil disobedients. The women were seen as more vulnerable protesters, but ones in tune with higher law because of their segregation in woman's sphere, a place where republican principles were still observed and cherished.

The taxation arguments of the woman suffrage movement were also about self. "Taxation" proved to be an interesting metaphor for the disadvantages women experienced in their dealings with government, the market, civil society, and their husbands and families. Redefining taxation and arguing its applicability to the whole spectrum of women's experience tended to undermine the very powerful metaphor of separate spheres.

The taxation metaphor suggested the acceptability of partial suffrage for women. In fact, these more narrow aspects of historical metaphor triumphed as school suffrage was given, often, to tax-paying women. The dollars arguments tended to reinforce the middle- and upper-class orientation of the woman suffrage movement.

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W. SCOTT CRAWFORD, GENDER AND THE POLITICS OF HISTORY, 43–44 (1988).

Crawford, B. J. (2009). Critical Texts in the Introduction. Retrieved from <http://ebookcentral.proquest.com>

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Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s

CAROLYN C. JONES¹

PERCEPTIONS OF WOMEN'S ROLES DURING THE 1940s

In the 1940s, there was considerable conflict and concern about the role of women in society. During the previous decade, the Depression combined with traditional views of gender roles to create a variety of disincentives or barriers to the employment of women. While the phenomenon of working single women seemed to be accepted, Americans were not convinced that women could or should combine careers with marriage and family.

America's involvement in World War II created tension between perceptions of traditional roles for women and ideas about their contributions to society. The wartime diversion of 12,000,000 men into the military service converged with a period of high industrial production and with business and government requirements to create an unprecedented demand for labor. Women constituted the largest reserve of potential workers. As a result, America's participation in World War II caused a dramatic increase in the employment of women outside the home. One of the most notable trends was the increase in the employment of married women. By the war's end, 23% of married women were employed. Women perceived as making a real contribution to the war effort were usually doing what had traditionally been men's work in factories and on farms. These new factory and farmworkers were celebrated as patriotic citizens, but they were not insulated from tensions created by traditional visions of gender roles. This tension was manifested in efforts to characterize the new women's work as domestic work, in hostility to women workers, in wage disparities, and in the continuing message that the new work was "for the duration" only.²

Voluntary or not, over 2,000,000 women left the labor force by 1946. The decline in employment was most marked in heavy industrial jobs, first opened to women during the war. Part of the decline in the female workforce is attributable to a greater emphasis upon the home as the center of women's lives. "Social stability had replaced military victory as the national goal and women were needed as wives and mothers rather than as workers."³ The homemaker and mother again

¹ Reprinted by permission from 6 *Law and History Review* 259 (1988).

² KAREN ANDERSON, *WARTIME WOMEN* 6, 48, 59–62 (1981).

³ SUSAN HARTMANN, *THE HOME FRONT AND BEYOND: AMERICAN WOMEN IN THE 1940's*, at 25 (1982).

became the prototype of American women. For women, the employment downturn was compounded by hiring preferences for returning veterans, discriminatory reclassification of jobs, and union failures to protect women's seniority.

The end of the war eliminated an impetus for unconventional behavior. New prosperity and a "return" to family-centered norms meant that more women married and had more children than previously. A woman's contribution to society after the war was thought generally to be as a wife and mother.

INCOME SPLITTING AND GENDER ROLES

Tax-law decision makers – Congress, judges, and administrators – were also concerned with questions about the value of the various types of work that women did. They were obviously affected by prevailing views about women and their work, but they were also concerned about maintaining the revenue-producing capabilities of the tax system. The incentives for tax savings through income splitting were fairly substantial and varied according to income bracket. The benefits of income splitting were relatively small for those with net incomes of \$5,000 and below. The savings increased in total dollars with net income, but the percentage of savings declined once the top marginal rates were reached.

With such high stakes, the Bureau of Internal Revenue and the courts attempted to confine the benefits of income splitting to atypical arrangements. Two of the most prominent income-splitting devices, the community-property system and husband–wife partnerships, illustrate this point. The community-property system was until the late 1930s, a system of property used in a relatively small number of states and regarded as strange or foreign. Husband–wife partnerships were recognized when the wife was an active participant in the business or contributed her own capital to it. Significant business activity by a woman was thought to be unusual. The allowance of income splitting in these exceptional cases would not, policy makers thought, do great harm to the treasury of the United States.

The Spread of Community Property

In general, under a community-property regime, a husband and wife each have an equal, undivided interest in income earned by a spouse, unearned income from community property, and in other community property acquired during their marriage. Some states also treat income from separate property as community income. If a couple lived in a community-property state and only one of them produced taxable income, federal recognition of that state's law allowed an equal division of income between husband and wife. This income-splitting opportunity meant that the aggregate community income was often subjected to lower marginal rates than if that income had been earned by an unmarried taxpayer in a community-property state or by one spouse in a common-law state. The certainty of favorable tax treatment in community-property states plus the mixed success of such devices as family partnerships and family trusts for income-splitting taxpayers in common-law states led some of the latter states to conversion to or consideration of a community-property regime. The pressure toward

community property became greater as tax rates began to increase at the end of the 1930s.

In 1939, Oklahoma became the first state to convert to a community property regime. In 1945, the Territory of Hawaii adopted a community-property system, and in 1947, Nebraska, Michigan, and Pennsylvania switched from their traditional common-law systems. By so doing, it was estimated that these states saved their citizens substantial amounts in federal taxes.

There seems to have been a general awareness of the favored tax status of couples in states with this system, and an underlying tone of resentment in accounts written about it. For example, George Werning of Newhall, Iowa, wrote to his Senator, Bourke B. Hickenlooper: "I wish you would do all you can to enact a law, so that husband and wife can split their income and thereby reducing their income tax. It isn't right that some states are able to do so and others are not. For instance Calif. has that law. I have a brother-in-law there that has much larger net income than I have and yet we have to pay more income taxes than they do."⁴ Magazines such as *American Magazine*, *Business Week*, *Collier's*, *Fortune*, *Nation's Business*, *Newsweek*, *Saturday Evening Post*, *Time*, and *U.S. News & World Report* carried articles explaining the tax benefits of a community-property system and emphasizing the point with illustrations and maps.

The puzzle is why, with such incentives in tax dollars, more states did not convert to community property. Colorado, Illinois, Indiana, Kansas, Massachusetts, New Jersey, New York, South Dakota, and Wyoming apparently considered conversion, but either rejected the switch or marked time until Congress acted in 1948. The reluctance to convert can be explained by at least two reasons, both of which suggest that common-law and community-property regimes were not seen as equivalent systems, which tends to undermine the argument of unfairness so often advanced by those seeking a federal solution to the different treatment of couples in community-property and common-law states. The first reason for the failure of more states to switch to a community-property system was a hostility toward a wife's present interest in community earnings and property, which were usually thought of as being the product of the husband's labors. The second reason, no doubt related to the first, was the legal difficulty in engrafting an often brief community-property statute onto a legal system rooted in common-law principles.

The spread of community-property laws during the period from 1939 to 1947 is testimony to the efficacy of the federal tax incentive for readjustment of economic power between spouses. Because the new popularity of community property was apparently based only upon the possibility of tax savings, the new community-property states and territory did away with their community-property systems shortly after Congress adopted the voluntary joint return and gave the tax benefits of income splitting without requiring the wealthier spouse to give assets or legal rights in property or earnings to the other spouse. Without more deep-seated

⁴ Letter from George Werning to Bourke B. Hickenlooper (Jan. 6, 1948) (available in "Tax, Income, 1948," Bourke B. Hickenlooper Papers, Herbert Hoover Presidential Library, West Branch, Iowa).

commitment to economic equalization of husbands and wives, the tax-generated community-property reforms of the 1940s could not survive the removal of that stimulus. The clear perception during the heyday of the new community-property states was that the passage of a community-property regime would involve a transfer of power from men to women.

A Proliferation of Husband–Wife Partnerships

If a taxpaying couple lived in one of the community-property states, their marriage automatically created a partnership that would be recognized for tax purposes and would allow each marital partner to report half of the community income whether that income resulted from labor or from capital. In common-law states, many couples formed business partnerships in order to achieve the same tax advantages. The Bureau of Internal Revenue and the courts were called upon to assess the validity of a number of these husband–wife partnerships. While some fortunate taxpayers did achieve the desired income-splitting results by avoiding audit or defeating Bureau objections, the methodology used by the administrative and judicial decision makers was quite different from that used in evaluating community-property partnerships.

The ability to split income in a community-property state was determined by the community-property statutes and without regard to the behavior of particular couples. The focus in common-law states was quite the reverse. The fact that a spousal partnership was recognized under state law was of little relevance in the determination of tax consequences. The notion of control has been critical in tax jurisprudence. In a number of cases, a grantor’s retention of the income-producing property or continued possession of important powers over the income or property could mean that the grantor, rather than the income recipient, would be viewed as the appropriate taxpayer. The machinations of the market were not assumed to be present in the context of family partnerships. The courts returned to concepts of control in deciding whether such partnerships should be recognized for tax purposes.

The courts, Treasury, and popular press were often reluctant to concede that husband–wife partnerships should be given tax effect because of stereotypical notions of family relationships as hierarchical, and because of tendencies to view “men’s work” as contributing more to a business enterprise than “women’s work.” Almost every factor used by the courts in deciding the tax validity of a husband–wife partnership carried with it these notions of control and valuation of a woman’s business contribution. These factors included service by the new partner (typically the wife), including participation in management, the source of capital contributed to the business, and the use of partnership earnings by the partner. Each of these factors was thought to indicate whether control of the business had remained with the donor or whether it had come to be shared by husband and wife.

Often the result of a partnership case depended upon whether a wife had rendered “vital services” to the business. If the wife wished to be a partner, she usually had to contribute capital or vital services to the business in order to

gain tax-recognized income-splitting benefits. If there is a theme to most of the unsuccessful partnership cases[,], it is the failure of the wife to provide services that would be characterized as “vital” or “manlike.” The wife performed no service for the business in approximately half of the unsuccessful cases.

The partnership cases and rulings from the 1940s are evidence of the two-sphere construct of the world used so often and so long in structuring our world view. Domestic-sphere work was not seen as relevant to or contributing to the business. It was just this sort of view that had animated wartime propaganda portraying housewives as failing to contribute sufficiently to the war effort. While the War Manpower Commission ordered that women with dependent children should not be encouraged to join the paid labor force, other housewives were viewed by planners and propagandists as underemployed or unemployed, and were urged to do their part by taking paying jobs. A 1944 Maxwell House Coffee advertisement implored: “Lets Work – Not Wait – For Victory! Uncle Sam needs womanpower! Trained women workers are already employed – millions more are needed. That leaves just you, Mrs. Housewife. So, for America’s sake, go to work, get a job, and *stick to it*, until Victory comes!”⁵ The negative message, of course, is that housewives were “waiting” for victory and doing nothing to assist in the war effort. The italicized *stick to it* also suggests that housewives, even if employed, were not particularly reliable workers.

If the wives in the unsuccessful court cases rendered services to the business it was often clerical assistance. Clerical work was seen as a “wifely and motherly function” – one that could not really entitle a woman to status as a partner.⁶ The view that the contributions made by clerical workers to business were not adequate to qualify such workers as partners is reminiscent of the failure to commend these workers’ wartime efforts. Even though clerical workers were working outside the home providing needed services, they did not receive the level of “commendation” afforded Rosie the Riveter.

THE ADOPTION OF THE JOINT RETURN – A RETURN TO “NORMALCY”

Pressures for tax reduction had been building after the war; Republicans proved successful in the elections of 1946 partly because of their tax program. Across-the-board tax reductions were attempted twice in 1947 only to be vetoed successfully by President Truman. In 1948, [Harold] Knutson, [Republican chairman of the House Ways and Means Committee,] introduced a new bill that increased personal exemptions, added an exemption for the blind and elderly, and, most significantly, allowed income splitting through the joint return. Truman vetoed the measure. The idea had sufficient Congressional support, however, and the veto was overridden.

The joint return was attractive for several reasons. The Senate Finance Committee report summarized these reasons as a desire for geographic equalization, “forestalling” the “impetuous enactment of community-property legislation by States that have long used the common law”; reduction of incentives to create

⁵ SATURDAY EVENING POST, March 25, 1944, at 51.

⁶ HARTMANN, *supra* note 3, at 18.

trusts, joint tenancies, and family partnerships; and reduction of administrative difficulties resulting from income splitting.⁷

Concerns about the administrability of the tax system became more pressing during the 1940s with the emergence of the income tax as a mass tax. In 1940, approximately 7,000,000 Americans paid income taxes. By 1945, that number had risen to 42,000,000. Increased governmental responsibility for the economy, welfare programs, and America's expanded role on the world scene after World War II meant that the tax would not return to prewar levels.

Yet income-splitting measures in existence before 1948 were not all administratively burdensome. The recognition of community property as an income-splitting device produced relatively few administrative difficulties. Senators from community-property states did not hesitate to point out that the "inequities" could be remedied if only those in common-law states would be willing to accord wives more legal rights by adopting a community-property system. Yet the spread of the community-property system was unacceptable to many of those in common-law states. Even the continuation of community property in some of the new community-property states was objectionable to some who looked to the federal government as a means of obtaining tax reduction without changing the legal rights between spouses.

The choice of the income-splitting joint return was neither obvious nor inevitable. It was more expensive than allowing the states to adopt community-property legislation. While it possessed the virtue of ease of administration, it also was viewed as a way of conserving traditional gender roles and power relationships. These conservative ideas about family relationships were a major theme in the tax-law decisions of the 1940s and in writings for and by the general public. The pervasive discussion of gender roles and relationships that surrounded these decisions – decisions that continue to shape the structure of tax law in the 1980s – should be exposed and thought of in terms that go beyond definitions of income, assertions about political credit, and concerns about administrability. While these concepts are important in understanding the tax-law decisions of the 1940s, they focus on too narrow a range of tax-law decision makers. Newspaper and magazine columnists, editorial writers, and citizens writing to senators and to local papers are individuals who also impact upon tax law, yet are often ignored in legal scholarship. The writings of these people make it clear that these tax-law decisions are cultural artifacts – understood as a part of a larger societal structure and, simultaneously, revealing of that culture. By providing a more distant vantage point, the passage of time has made more apparent the connection between these choices about income splitting and postwar American society. There is, however, no reason to assume that the connection between tax law and more general "culture" was unique to the 1940s and to income-splitting issues. For historians and legal scholars, the challenge is to expose and analyze that connection.

⁷ S. REP. NO. 80-1013, at 26 (1948).

The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction

MARJORIE E. KORNHAUSER¹

This title is not exactly true; it's not exactly false either. It contains a truth that has been shaped by my preferences (or, if you wish, my biases, philosophy, or prejudices) and by my desire to grab the reader's attention and force him (and I mean him) to reach a specific conclusion. It is, in short, rhetoric. In that respect it is not unlike many of the arguments now popularly raised against the progressive income tax. My argument differs from many others in its open acknowledgment of the use of rhetoric.

The progressive income tax is currently under siege. This is a new phenomenon: new not in the fact of the opposition itself, but in the extent of the opposition. In 1913, the general public, economists, and politicians argued about the exact schedule of rates and exemptions, but the *idea* of graduated or progressive rates was accepted with surprising ease and generally has remained unquestioned ever since. The economic and political consensus about progressivity began to fall apart sometime in the 1970s. Two alternatives to progressivity gained strength: a modified flat or proportionate income tax and an expenditure- or consumption-based tax. An expenditure-based tax proved politically unacceptable but the (modified) flat tax alternative gained strength and culminated in the Tax Reform Act of 1986. The drastic erosion of support for progressivity spurred the writing of this article. Before we consent to this erosion we should reevaluate the arguments upon which it is based.

Neoconservative philosophy, with its belief in the primacy of individual rights, both leads to and is supported by the belief in the efficacy of the market as the means to achieve each person's rights and satisfactions most fully. The "science" of economics thus easily becomes a tool of this particular vision of society. Because it is a "science," however, its use as a tool – its rhetoric – tends to be masked.

Rhetoric has a bad reputation these days, and with some reason. The term "rhetoric" can be used – and indeed often is used – in its negative sense, to mean insincere or flowery language used to mislead and emotionally sway an audience. But rhetoric need not have this pejorative connotation. Virtually all speech and

¹ Reprinted by permission from 86 *Michigan Law Review* 465 (1987).

writing must use rhetoric because the purpose of language is communication. Rhetoric is the study of “how people persuade,” discovering good reasons for conclusions or beliefs.

Because the underlying assumptions of much of the current progressive tax debate are unstated – indeed unnoticed – by many of the speakers and audience, the debate tends to be rhetorical in the pejorative sense. It hides the underlying premises which give the arguments their force; it confuses rather than illuminates.

THE CLASSIC ARGUMENTS AGAINST PROGRESSIVITY AND THEIR REBUTTALS

The current attack on progressivity stems from the classic arguments against it. First, critics claim that progressivity fails Adam Smith’s criterion of simplicity. Second, progressivity has been called a “politically irresponsible formula,”² because it leads to the majority’s irresponsibly voting higher taxes for the minority, or “soaking the rich.” Progressivity is politically irresponsible in another manner: it leads to rhetorical posturing that often confuses or contradicts reality. For example, Congress votes for high nominal rates but at the same time passes exclusions, credits, and deductions which effectively flatten the rates by narrowing the tax base of the wealthier taxpayers. The appearance is that of a highly progressive system, but the reality is otherwise: the rich don’t get soaked because they have umbrellas in the form of tax preferences or shelters. Thus, the argument continues, the inevitable political posturing surrounding progressivity is itself an argument against progressive rates: a degressive tax is actually more progressive than a system with *nominally* high rates but low *effective* rates due to credits, deductions, and exclusions. The third major criticism of the progressive tax is that it is economically inefficient: marginal tax rates are disincentives to work and/or invest, and therefore they reduce society’s productivity. However, proponents of this objection may be confusing the effect of graduated rates with the effect of high tax rates generally.

In addition to these specific objections, critics reject the major justifications of progressivity as either invalid or too vague to be useful. Specifically, the benefit and marginal utility (or sacrifice) theories are rejected as invalid; theories of equality are rejected as too vague and personal. A less frequently used justification for the progressive income tax is discussed just as summarily. Some proponents argue that progressive taxation can help achieve our social, economic, and political goals. By reducing economic inequality, progressivity helps provide political stability (by insuring against revolution), secure democratic institutions (hungry people don’t care much about freedom of speech), and ensure that political power does not concentrate in the hands of a wealthy few. The rebuttals to this rationale range from ignoring it to denying its effectiveness.

² Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 435 (1952).

ECONOMIC OBJECTIONS TO PROGRESSIVITY

Because the popular press and political rhetoric tend to link unrelated issues (e.g., simplicity and proportionality) the first step in analyzing economic objections to the progressive income tax is to separate out those objections which relate specifically to progressivity. Some economic criticisms of the present system may be accurate but do not really criticize *progressivity*, whereas other complaints do treat progressivity but also apply to many other forms of taxation. For example, progressive taxes have been criticized for creating a drag on the economy, but this can generally be said of all taxes.

Some of the objections to progressivity are, in reality, objections to high rates of tax. To the extent that there is a correlation between taxes and savings, low rates seem to be an important factor. A flat but high rate of tax (e.g., 60%) should depress savings (if at all) as much as, if not more than, a graduated tax with the highest marginal rate equal to the flat rate of 60%. Similarly, if the highest marginal rate is low enough, then the graduation of the rates should be insignificant.

Nevertheless, economics and economic arguments play an increasingly important role in tax policy. [Some economists argue that] increased economic growth achieved through the private market is the best way to help everyone: increased growth enlarges the economic pie so that everyone – including the poor – gets a larger slice.

There are several problems with this theory. First is the empirical question: does the wealth, in fact, “trickle down”? It is far from clear that an increased pie benefits everyone. The gap between rich and poor is widening. This does not necessarily mean that the poor get no benefit from a bigger pie; it may just be minimal when compared to the benefit those in the upper incomes receive. Furthermore, some people may not be affected by the larger pie – they may get the same size slice or no slice at all.

More importantly, even if the (relatively) poor do get a larger slice, there are questions of equity and fairness about the resultant distribution which economic efficiency does not address. Pie (especially apple) may be greatly desired by the American public, but a bigger one is not necessarily a better one. As the private market has shown, quality as well as quantity determine the price a consumer is willing to pay for a good. From a societal standpoint, “quality” includes non-“economic” values such as fairness: traditional tax reform goals include fairness and simplicity as well as economic efficiency. A comprehensive tax theory should deal explicitly with the tradeoffs among objectives. The “bigger pie” theory fails to do this.

Another problem with the efficient private market view is its idealized concept of the private market. Although in *theory* the market always achieves efficiency, in *actuality* there are market failures. These failures may be due to a variety of factors, such as imperfect information, free rider problems, and administrability difficulties. Consequently, and perhaps paradoxically, true economic efficiency may be impossible without state intervention.

Justification for a tax system based on economic efficiency ultimately depends on normative judgments about the distribution of goods, and theories of public

choice. The flat tax movement relies on a contractarian minimal state view of government emphasizing “procedural (or process) justice and private property rights.”³ This approach, with its reliance on voluntary exchange, is seen as more appropriate for a society of free people than theories of end-state (or distributive) justice. To the extent that progressive taxation is justified by an appeal to redistributive justice, it is seen as violative of the liberal rule of law.

Although tax systems need not, and I believe should not, be designed primarily to accomplish specific economic or social goals, the choice of a system inevitably has social, economic, and political effects. The choice must be a normative one.

While the inevitability of normative decisions is recognized in many economic and philosophic discussions, it is generally missed at the popular and political level of debates. In fact, much of the current flat tax reform rhetoric obscures the inevitability of normative choices through its linkage of the flat rate issue to separate issues such as fairness, comprehensiveness, and rate reduction and by its emphasis on economic efficiency and growth as objective goods. This is not surprising; economic analysis has had a “long tradition” of obscuring the normative underpinnings of economic theories of tax.⁴ It lends a patina of neutrality, because economics – particularly neoclassical economics – is viewed by many noneconomists (and even by some economists) as a “science,” and therefore as factual and objective. Economics is indeed a science, but not in the way we understand “science” in high school, not in the way we as laypeople wish it to be: it is not absolute, totally demonstrable, truth; it is, as all human knowledge is, fallible, tentative, and evolving. Nevertheless, the appearance of neutrality and truth is reinforced by the language of economics, the dazzling statistical displays economists produce, and finally by the willingness (even eagerness) of the public (and some economists) to accept the first two on a surface level.

In actuality, however, economics – like all scholarly fields – is a literary endeavor and amply employs rhetoric, metaphors, analogies, and so forth. What is perhaps different about economics is the resistance people display to this notion. The very words used are metaphors – demand curve, production functions, invisible hand – but because economists use the words so frequently, they and their audiences lose sight of the fact that the words remain metaphors even in their “scientific” usage.

The problem, then, with the use of neoclassical economics to support a flat limited tax is that its conclusions are viewed as hard objective facts – facts which, moreover, are the only possible relevant, valid facts, produced by a methodology which is the only relevant, valid methodology. However, the “facts” are not as determinative nor the methodology as exclusive as they claim to be. Because the ascendant theory of economics is premised on private property and market exchange, its assumptions (overt and implicit), as well as the very language of much of its theory, reflect these values. The economic arguments are not neutral and must be evaluated through examination of their underlying premises.

³ James A. Dorn, *Introduction: The Principles and Politics of Tax Reform*, 5 CATO J. 361, 368 (1985).

⁴ Richard E. Wagner, *Normative and Positive Foundations of Tax Reform*, 5 CATO J. 385, 392 (1985).

[This discussion draws much from DEIRDRE N. McCLOSKEY, *THE RHETORIC OF ECONOMICS* (1985). – Eds.]

PHILOSOPHICAL PREMISES AND PROGRESSIVE TAXATION

The Premises of Neoclassical Economics and Neoconservative Philosophy

Both neoclassical economics and neoconservative philosophy are founded on a belief in the primacy of the individual and the satisfaction of his interests. Liberty of individual action and choice is essential because without it individuals cannot achieve their interests. The free private market is the best mechanism to achieve the highest level of satisfaction because individuals themselves are best situated to make choices for themselves and the market allows them to do so in a way that respects autonomy: because the market is based on explicit or implicit consent, this concept of economic efficiency is congruent with its underlying normative value of liberty. Because the market is efficient, most activities should occur in the private market. When government must step in, it should mimic the private market as much as possible. This view inevitably leads to a limited government which raises what little revenue it needs through a flat tax, preferably consumption-based.

This Neo view of individuals and society is anchored in a belief in the total sanctity of private property. What gives people their ultimate right to property? Most proponents derive it from John Locke's theory of a person's natural right to his body, his labor, the fruits of his labor, and any property with which he has commingled his labor. Locke, however, attached an important proviso to the right to property: one is entitled to the property so long as his appropriation does not disadvantage the next person. That is, enough of good X must remain after an appropriation so that others may also appropriate it. Most resources today obviously are not (and have not been for many years) so abundant that this proviso can be met.

Alternative Visions

Neoclassical economic methodology and its underlying neoconservative philosophy see "the history of all hitherto existing society [as] the history of interactions among selfish individuals."⁵ Certainly, selfishness is a human characteristic and much of history can be read as a playing-out of this trait. But selfishness is not the only human trait, and history is not solely the recitation of centuries of acts of selfishness. If we view people and history through a lens of selfishness, then perhaps we see more of it than is really there. There are numerous documented examples of actions which are exactly the opposite of selfish – true "heroic" acts to help others without regard for self – as well as many other acts which are, if not exactly unselfish, at least not purely selfish. These include the acts of Mother Theresa, Albert Schweitzer, Martin Luther King, freedom riders, Peace Corp volunteers, missionaries, Andrew Carnegie medal winners, and ordinary people who helped Jews in Nazi Europe. These people, and many others like them, prove daily that the history of humankind cannot be called simply a history of the interactions of selfish individuals. Through a different lens we might view people and history

⁵ McCLOSKEY, *supra* note 4, at 25.

as the interactions of economic classes, or as the struggle for a kingdom of God on earth, or as the cooperative efforts of people to enrich their lives and those of their fellow humans.

Certain philosophies, or just plain outlooks on life, see people and society not solely in terms of their individual rights and entitlements but also – or even primarily – in terms of people’s needs and obligations to others as well as themselves. Many religious visions, for example, prescribe a life in which individuals help others, are connected to others, and as a community move toward a just society. Both religious and secular utopias throughout the ages, from early Christianity to hippie communes of the sixties, also have had strong communal goals. True, many have failed, but their values persist as each generation reincarnates them in different forms. Various political theories also include communal aspects. Historically, socialism and communism come to mind; more currently, other communal visions of humanity have gained prominence: republicanism, the Critical Legal Studies movement (CLS), and feminism. These theories differ, but according to each, a sense of connectedness with and obligation to others is an intrinsic part of the nature of the individual. Such a view of humanity naturally supports a redistributive progressive income tax. While each vision is supported by a rich body of literature, I shall only briefly describe one – feminism – to illustrate the strength of the alternatives to the Neo view. I have chosen feminism because in its loosest form, the form I shall describe, it is less a theory than a way of knowing and of being, experienced by a large segment of the world’s population.

As an attitude, feminism provides a flexibility that is compatible with the idea of a variety of connections to others. Feminism – as a way of knowing, as an attitude, as a view about human nature – remains receptive to diversity and change.

A major work on the feminine vision is Carol Gilligan’s *In a Different Voice: Psychological Theory and Women’s Development*. She notes, as other feminists have, that the modern paradigm of humanity is in actuality only a paradigm of *man*: man as a being who is essentially individualistic and autonomous. Consequently, moral problems, problems of justice and fairness, are seen as formal, universal, and abstract. Problems are defined in terms of conflicting rights and rules. Under this paradigm, the highest stage of morality and justice is that position at which rights and rules are universally defined and weighted, and decisions are made impartially on the basis of these abstract rules without regard to context. Studies show that women consistently fail to reach this stage; they are mired in a “lower” stage. Gilligan and other feminist writers posit that rather than being a lower level of morality, this is a *different* view of reality and morality. Women see themselves and the world with different eyes and, therefore, they speak with a different voice. Women perceive themselves, and thus the world, in terms of caring for others, in terms of responsibility to others, in terms of connectedness to others, whereas men perceive themselves and the world in terms of separateness, autonomy, and universal rules and rights.

The fact that women see the world as one of interrelatedness, of the interconnectedness of people, as a “web of relationships,” is not a denial of the self. Rather, it is a realization that the self is not immured in a nonpermeable plastic bubble. The self is created, maintained, and enhanced through connections with others.

At its most mature level this view means being responsible not only to yourself but to others. Being responsible to yourself *includes* being responsible for others. Thus, the “male” distinction between self-interest and altruism is a false one which disappears. Responsibility in this sense goes beyond the conventional meaning of making and adhering to a commitment; it means being aware and responsive to others.

Thus, there are “two voices, two ways of speaking. One voice speaks about equality, reciprocity, fairness, rights; one voice speaks about connection, not hurting, care, and response. . . . [T]hese voices are in tension with each other.”⁶ Responsiveness to others is “proactive” in the “female” voice, reactive in the “male.” For the female voice, being receptive to others and caring for others involves initiating action, not merely responding. More importantly, caring is a constitutive act of the self: we become more fully ourselves by caring for others. The male voice, in contrast, sees caring almost as a defensive act to protect the self: we “care” about others so that they will care about us and our rights, so that we may remain our independent selves. Male “caring” is self-referential; it emerges from a need for reciprocal caring by the other in order to protect the self. It is tit-for-tat: I will care for you, so that you will care for me.

However, even under the feminine vision that we care best for ourselves when we also care for others, we cannot care for everyone to the same degree. Such an ideal is unrealistic. To erect such an ideal would be an invitation to ignore the goal in despair of ever achieving it, even in those instances when it is obtainable. Moreover, such a demanding ideal, even if achievable, might lead to a deconstruction of the self. Whereas caring should be a constitutive act, caring about everyone equally would leave no time to care about oneself. This would lead to self-effacement. Therefore, there must be some limits on caring. Even within the limits of care there must be different levels so that our responsiveness and obligations to our friends, for example, are different than our responsiveness and obligations to acquaintances or strangers. Yet we cannot even exclude the stranger that we meet completely from our care. S/he is connected to us, not just as a fellow human, but potentially as a future spouse, a child’s spouse, a dearest friend, a valued employee; every current stranger is perhaps a person who will one day be within the inner circle of caring. Thus, in *direct* contact with a stranger, we must be responsive to her needs.

We also must maintain a minimal, less burdensome connectedness to the non-proximate stranger. At this minimal level of care, I need make no great sacrifices to help the unmet others. Moreover, I need respond only to those others’ most urgent and basic demands. The basic needs of any person go beyond those of bare survival to include attainment of the preconditions of liberty that allow us to be free, voluntary agents working toward self-fulfillment. These conditions include education and some level of personal safety and comfort. Only when a person has these basics is she able to work toward her potential and self-fulfillment. The minimal level of care, then, requires that I help others attain these basics so that

⁶ CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT 37–38 (1982).

they have an *opportunity* to achieve self-fulfillment just as I do. Because it involves a *minimal* level of responsibility, my obligation to help others attain this state of opportunity does not require that I give up my own opportunity, nor even that I constrain it very much. It does require that as my discretionary income grows, I contribute money at a greater rate than previously to help others. This is not an unduly burdensome obligation. It denies me no freedom of action. I can still choose when, where, and how much to work. I am still rewarded for my efforts. The income contribution required of me will not be so large as to unduly handicap my own attempts at self-fulfillment. As my income grows, it is easier for me to contribute more without impinging on my ability to reach my own goals. My minimal obligation to others requires that I contribute that nonintrusive amount. Thus, a progressive income tax rate satisfies my obligation to myself and others. It is not a redistribution of wealth, merely a paying of my “just debts” to others.

The “male” and “female” voices, of course, do not belong exclusively to males and females, respectively. In fact, by the time people are adults, most use both voices. However, approximately 70% of those who use both focus on one voice, using the other minimally. As their labels imply, the female voice is predominantly the domain of women and the male voice belongs to males. The male voice traditionally is the dominant, valued one. It informs our view of the law as a domain of rules, rights, and blind justice: we are autonomous, independent beings and the law as fashioned by men helps maintain that separateness. It constructs barriers between “my” property and “yours”; “my” rights and “yours.” The female voice emphasizes our relatedness to others. It builds bridges rather than barriers. In this sense, the feminist vision is aligned with other communitarian visions such as classical republicanism, whereas the male vision more closely follows the pluralistic, individualist, liberal theory of today.

The female voice not only fits reality but is the best interpretation of reality in that it “fits” what we see. Even on casual observation people display much behavior that does not appear to fit the Neo view that all action is determined by self-interest. Nonselfish altruistic behavior does not “fit” the Neo theory of people. The Neos attempt to explain away these discrepancies, and to achieve “fit” in either of two ways. One Neo approach to altruism acknowledges the existence of altruistic behavior but confines it to the private sphere of life. The other Neo approach to altruism is to define away the behavior. Both approaches fail to achieve a satisfactory “fit.”

The first approach dichotomizes human behavior. People are assumed to be self-interested in the marketplace but altruistic (or at least not totally self-interested) at the hearth. It is natural and proper to care for and share with others – but only within the family circle or small voluntary groups. There is no place for duty to others in the marketplace or the political forum. In those fora, *man* is a separate individual whose rights and self-interests are paramount.

This view is arbitrary at best. How can people have one nature in private and a totally different one in public? Perhaps, as the group gets larger and our participation in it less direct or less voluntary, our relationships with and responsibilities to others in the group are altered, but the connection is not severed. How, indeed, can we separate public from private?

Many of the distinctions we make between private and public areas are artificial and based on exploitation. Under the first Neo approach, “economic man” is self-interested, self-reliant, and individualistic in the marketplace but caring and sharing within the family. Yet even if we accept this dichotomized description, the self-reliant individual is made possible in part by the fact that he has depended on a wife who supplied daily physical and psychological maintenance, cared for the children, and generally provided services that might otherwise cost money in the private or public sector.

When women enter the workforce, they continue to provide caring and support, but doing so becomes more difficult. Thus, the lament in two-career families that what the couple needs is a “wife.” Sometimes it becomes impossible for the family to meet all of its needs. Collective responsibility in the form of some government obligation may then be necessary. This collective responsibility is not necessarily inconsistent with individualism. Individualism presupposes that the government will create or preserve those elementary conditions which allow persons to pursue their own self-interest.

CONCLUSION

The anti-progressive tax movement claims that the progressive income tax is too complex, economically inefficient, and unfair because it unjustly takes private property which belongs to the individual. These arguments are not only overstated, but premised on an atomistic view of humanity which many people do not share and which does not explain the totality of human behavior. Other views of humanity, such as the feminist vision, see people as interrelated and therefore support and even mandate some progressivity.

Progressivity is not necessarily adverse to the Neo view that the amount of tax paid should reflect the benefits received. Governmental benefits and income show some positive correlation. That we cannot determine the precise degree of this correlation does not mean we should abandon graduation. If benefits and income do correlate, a flat tax is clearly erroneous. Where is the merit in choosing a clear error over an approximation at truth? Simply because we cannot attain perfection does not mean we should do nothing. The second-best option is that which does the least harm. Overtaxing those who can more easily afford it is more desirable than overtaxing those less able to bear the burden.

The preconditions of freedom are not merely physical. They include those conditions – such as education, security of person, and property – necessary to enable individuals to be free agents who make voluntary choices. If individualism and individual development require that these basic preconditions be met, then a person’s rights in any excess property may be constrained by a duty to provide these to others. A progressive tax is one way to reflect this.

A redistributive progressive tax can help provide another precondition of freedom: stability of a democratic form of government. Although a democracy does not need an *equal* distribution of wealth, a wide gap between the wealthy few and a large dispossessed or marginal class is destabilizing. Moreover, a healthy middle class (defined only as an income level between poor and rich) also

increases stability by increasing citizens' vested interests in the continuance of the government.

When the organization is as large and diverse as our country is, and when individualism is emphasized, the danger always exists that the pressures of individualism and diversity which pull against organization will overcome the weak center (the state) which holds things together. Some force must counteract this. The only force powerful enough to do so is a sense of community, a sense that we are all connected to each other, that we acknowledge our fates are somehow tied together.

