

Pandemics, Paid Sick Leaves, and Tax Institutions

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The COVID-19 pandemic is currently ravaging the world, and the United States has been largely unsuccessful at containing the coronavirus. One long-standing policy failure stands out as having exacerbated the pandemic in our country: the lack of a national mandate of paid sick leaves, without which workers face financial and workplace-cultural pressures to attend work while sick, thus spreading the virus to their fellow employees and the public at large.

This Article provides the blueprint for a national, subsidized mandate of paid sick leaves and two additional insights about our tax institutions as mechanisms of effectuating broader societal goals. It first justifies a paid-sick-leave mandate on the grounds of market failures (both cognitive biases and externalities) and workplace equality. It also argues for the need of subsidies in order to protect lower-income workers from unemployment risks imposed by a national mandate. Second, the Article critically assesses the current federal legislative approach utilized in the Families First Coronavirus Response Act (FFCRA). Third, the Article proposes designing a national employer mandate of paid sick leaves funded by general-revenue business tax credits and providing partial wage replacement.

This Article's discussion of paid sick leaves yields two insights about our tax institutions. It questions the role of payroll taxes, which are highly regressive, impose burdens almost exclusively on labor, and are normatively unjustified when the spending funded by payroll taxes benefits the broader non-wage-earning public. The Article also reveals the malleability of tax institutions with respect to funding, administrability, and costs. These comparative advantages of tax institutions make them perennially popular in times of crisis.

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INTRODUCTION	384
I. THE NEED FOR SUBSIDIZED PAID-SICK-LEAVE MANDATES	389
A. <i>Introducing Paid Sick Leaves</i>	389
B. <i>Market Failures and Externalities</i>	392
C. <i>Workplace Equality</i>	396
D. <i>Tax Subsidies</i>	398
II. THE CURRENT APPROACH: FFCRA	401
A. <i>The Regulatory Framework</i>	401
B. <i>Potential Problems with FFCRA: Costs, Incidence, Coverage, and Windfalls</i>	403
III. DESIGNING A PERMANENT PAID-SICK-LEAVE MANDATE	410
A. <i>Existing (Scholarly and Legislative) Models</i>	410
B. <i>Financing: Payroll Taxation or General Revenue?</i>	414
C. <i>Choice of Institutions</i>	419
D. <i>Subsidy Levels and Wage Replacement</i>	422
IV. IMPLICATIONS AND DIRECTIONS FOR FUTURE RESEARCH	427
A. <i>The Future of Payroll Taxation</i>	427
B. <i>The Malleability of Tax Institutions</i>	431
CONCLUSION	435

INTRODUCTION

The COVID-19 pandemic is currently ravaging the world. It has infected over 90 million people worldwide,¹ led to quarantine and stay-at-home orders on an unprecedented scale,² and resulted in millions losing their jobs.³ The United States, in particular, has been hit hard by the novel coronavirus. Although scholars have not yet systematically investigated why COVID-19 has impacted the United States more than

1. See *Coronavirus Disease (COVID-19) Pandemic*, WORLD HEALTH ORG., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> [<https://perma.cc/4TF7-7CE5>] (last visited Jan. 5, 2021) (reporting infections in 223 countries or territories and over 1.9 million total deaths worldwide).

2. See, e.g., *Executive Order No. 202.6: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency*, N.Y. STATE (Mar. 18, 2020), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.6.pdf> [<https://perma.cc/9MAG-9N9C>] (citing that the state, between January and March 2020, had the highest infection rate of the country, leading to the state's "vigilant efforts" to reduce infections).

3. According to Department of Labor statistics, in the week ending on March 21, 2020 alone, approximately 3.28 million people filed initial claims for unemployment benefits in the United States, the highest number in recorded history (the previous record was 695,000 in 1982)). See *News Release: Unemployment Insurance Weekly Claims*, DEP'T OF LABOR (Mar. 26, 2020), <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/ui-claims/20200510.pdf> [<https://perma.cc/6M9F-STHT>].

other developed countries, there are many plausible candidates to blame: ineffective federal government response, including its failure to enact social-distancing policies or distribute test kits at an early stage of the pandemic; undercoordinated actions of the state governments in containing the domestic and community spread of the virus; and the impossibility of shutting down the whole country in a democracy.⁴

Among these factors, one longstanding policy failure stands out, which both scholars and federal officials have recognized as having exacerbated the COVID-19 pandemic: the absence of a paid-sick-leave mandate. Unlike most developed countries, the United States does not require employers to provide paid sick leaves to employees on a national level.⁵ To be sure, employers may offer employees access to paid sick leaves without being required to do so: Starbucks, for example, announced a nationwide paid-sick-leave policy in 2018.⁶ A dozen states and numerous municipalities have also enacted paid-sick-leave mandates,⁷ which generally entitle the employee to accrue paid sick hours on the basis of a specific amount of worktime, up to a statutory maximum each year.⁸ But at the end of the day, a substantial number of American workers—approximately 24% of the workforce in private sectors, according to Bureau of Labor Statistics, or about 30 million—does not have any access to paid sick leave at all.⁹ Multiple prior attempts to fill this gap and

4. See, e.g., *Experts Are Calling for a 9/11-Style Commission on U.S. Coronavirus Response. Here's Where It Could Start*, STAT (June 29, 2020), <https://www.statnews.com/2020/06/29/us-needs-federal-commission-investigate-covid19-response-where-it-should-start/> [<https://perma.cc/BSC7-NA7V>] (noting that a broad review of the government's missteps would identify the lack of a national infrastructure to implement testing and contact tracing).

5. See Jody Heymann et al., *Ensuring a Healthy and Productive Workforce: Comparing the Generosity of Paid Sick Day and Sick Leave Policies in 22 Countries*, 40 INT'L J. HEALTH SERVS. 1, 1 (2010) (finding that, among 22 countries with high human development indices, only three—the United States, Canada, and Japan—do not require employers to provide paid sick days for workers who must miss five days of work, and that the United States is the only country that does not provide any paid medical leave for workers who must miss fifty days of work, for example, to recover from cancer treatments).

6. See *Starbucks Announces New Investments in Paid Leave, Wage*, STARBUCKS (Jan. 24, 2018), <https://stories.starbucks.com/press/2018/starbucks-announces-new-investments-in-paid-leave-wage> [<https://perma.cc/E2XS-VPKQ>] (reporting that the benefit will allow partners to accrue approximately five days of sick leave per year).

7. See Suzanne Hultin & Tatiana Follet, *Paid Sick Leave*, NAT'L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx> [<https://perma.cc/PZ99-NW7R>] (listing Arizona, California, Connecticut, Maryland, Massachusetts, Michigan, Nevada, New Jersey, Oregon, Rhode Island, Vermont, and Washington as states that require paid sick leaves).

8. Under the Connecticut Paid Sick Leave Act, for example, an employee can accrue one hour of paid sick leave for every forty hours worked, up to forty hours each year (corresponding to one week of paid sick leave). See CONN. GEN. STAT. § 31-57s(a) (2015).

9. See *National Compensation Survey: Employee Benefits in the United States, March 2019*,

implement a federal mandate of paid sick leaves have failed. Most recently, the Healthy Families Act of 2019 would have required employers to let employees accrue paid sick leaves on the basis of their working hours, but the proposed legislation died in a Senate committee without much discussion or publicity.¹⁰

Scholars have long recognized that, without paid sick leaves, workers may feel financial and workplace-cultural pressures to continue working even if they experience symptoms of infectious diseases. These symptomatic workers may then transmit the pathogen to their colleagues and others with whom they have sustained physical contact.¹¹ In times of pandemics,¹² of course, these concerns take on additional importance. With an explosive growth of cases over large swaths of the country, it is even more critical that workers have the financial capacity to stay at home rather than risk infecting others. Each new infection has compounded impact on the exhaustion of medical resources, given the exponential nature of the spread of the virus.¹³ This risk is heightened in the United States compared to other countries: most American jurisdictions embrace the doctrine of employment at will, so that employers may terminate employees for any reason other than for statutorily protected traits (e.g., race, sex, or sexual orientation).¹⁴ Millions of sick employees who are

U.S. DEP'T OF LAB.: BUREAU OF LAB. STAT. 119 (2019), <https://www.bls.gov/ncs/ebs/benefits/2019/employee-benefits-in-the-united-states-march-2019.pdf> [<https://perma.cc/K4ZW-8F8Z>] [hereinafter *National Compensation Survey*].

10. See S. 840, 116th Cong. § 5 (2019) (proposing that each employee earn one hour of sick leave for every thirty hours worked, generally up to fifty-six hours of sick leave annually).

11. See, e.g., Supriya Kumar et al., *The Impact of Workplace Policies and Other Social Factors on Self-Reported Influenza-Like Illness Incidence During the 2009 H1N1 Pandemic*, 102 AM. J. PUB. HEALTH 134, 137 (2012) (showing that, during the 2009 H1N1 flu pandemic, the likelihood of reporting a flu-like illness was significantly correlated to lack of access to paid sick leave).

12. Although there is no single accepted definition, pandemics are generally characterized by a widespread geographic distribution of the pathogen and high attack rates (i.e., the number of new cases in a given period divided by the total number of population). See David M. Morens, Gregory K. Folkers & Anthony S. Fauci, *What Is a Pandemic*, 200 J. INFECTIOUS DISEASES 1018, 1019–20 (2009).

13. While research on coronavirus's contagiousness remains preliminary, scholars have tentatively established that the R_0 value associated with COVID-19 is between 2 and 3, implying that each infectious person can expect to infect two to three additional people. See Ying Liu et al., *The Reproductive Number of COVID-19 Is Higher Compared to SARS Coronavirus*, 27 J. TRAVEL MED. 1, 4 (2020). Any R_0 value smaller than 1 means that virus transmission is likely to die out, whereas any R_0 value above 1 means that the number infected is likely to increase barring containment actions. *Id.* at 1.

14. See Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 85 (2000) (describing the employer as having "total dominance" over its employees). Further, antidiscrimination laws are obviously limited to the statutorily protected traits. *Id.* See also *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020) (including sexual orientation and gender identity within the definition of "sex" for purposes of Title IV of the Civil Rights Act of 1964).

absent from work, therefore, not only receive no replacement wage but also can be fired by their employers without legal consequences.

The federal government has recognized the importance of paid sick leaves—at least in the context of this pandemic—and enacted, on March 18, 2020, the Families First Coronavirus Response Act (FFCRA).¹⁵ This Act requires all employers with fewer than 500 employees to provide two types of leaves: (1) public health emergency leaves, where an eligible employee is unable to work due to child-care responsibilities as a result of COVID-19-related school closures;¹⁶ and (2) emergency paid sick time, where an eligible employee is unable to work either because she is herself experiencing COVID-19 symptoms or taking care of those in quarantine.¹⁷ While some types of leaves are partially paid and others are fully paid under the FFCRA, all are 100% funded by the federal government—employers receive a refundable tax credit, equivalent to the full amount of the wages paid to employees under the Act, to their share of the Social Security Taxes.¹⁸ The FFCRA also bars employers from retaliating or discriminating against employees for exercising any paid-leave entitlements under or seeking enforcement of the Act.¹⁹

This Article identifies the need for a federal, subsidized paid-sick-leave mandate, analyzes the current approach undertaken by the FFCRA, and offers a blueprint for designing a permanent, subsidized paid-sick-leave mandate. Its analysis also provides broader insights about payroll taxation and using tax institutions to effectuate broader societal goals. Although the labor market tends to provide employee benefits where efficient (i.e., the value of the benefit to the employee exceeds the cost to the employer),²⁰ market failures, including cognitive biases and externalities, and workplace equality help justify the mandated provision of paid sick leaves. Concerns about unemployment, as well as political

15. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) [hereinafter FFCRA].

16. *See id.* § 3102, 134 Stat. at 189–91 (stating, in addition, that the applicability threshold for employers was modified from fifty or more employees to apply to those with “fewer than 500 employees”).

17. *See id.* § 5102, 134 Stat. at 195–97 (stating that full-time employees are eligible for eighty hours of emergency paid sick leave and part-time employees are eligible for the time equivalent for hours worked over a two-week period).

18. *See id.* §§ 7001, 7003, 134 Stat. at 210–12, 214–16 (limiting the amount of wages qualified for a tax credit for each employee to two hundred dollars per day (of qualified emergency sick leave) and \$10,000 in aggregate per year).

19. *Id.* § 5104, 134 Stat. at 196–97.

20. *See* Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177, 178 (1989) (“If employers and employees can negotiate freely over the terms of the compensation package, they will reach a mutually efficient outcome. . . . [B]enefits will be provided up to the point where an extra \$1 spent by employers on benefits is valued by employees at \$1.”).

will, point to the need for subsidies. The FFCRA thus represents a major step in the right direction of effectuating a federal paid-sick-leave mandate. But it presents both practical and distributive problems, especially given its enormous expected cost to the government—estimated at \$105 billion over its brief operational period of nine months.²¹ After exploring alternative methods, this Article suggests designing a refundable business tax credit, whose amount varies depending on the wage income of the employee taking the leave, as a superior (albeit still imperfect) mechanism of permanently subsidizing a national paid-sick-leave mandate.

The remainder of the Article proceeds as follows: Part I examines the justifications for a federal mandate of paid sick leaves, focusing on market failures, externalities, the political and practical needs for subsidies, and the role of workplace equality. Part II describes and evaluates the regulatory regime introduced by the FFCRA. Part III examines alternative models of institutional design for subsidizing paid sick leaves, including prior scholarly proposals and § 45S, which the 2017 tax legislation²²—commonly called the Tax Cuts and Jobs Act (TCJA)—added to the tax code, and which grants a general business credit to employers with qualifying paid-leave policies.²³ Part III then provides more details about how the federal government can implement a business tax credit for subsidizing paid sick leaves. Part IV, lastly, examines implications and provides guidance on further research.

Overall, this Article aims to make one specific policy intervention and produce two additional insights about tax institutions. The immediate upshot consists in a blueprint for designing a national mandate of paid sick leaves, which have proven particularly pressing given the COVID-19 pandemic. But more broadly, the Article's discussion of funding a subsidized paid-sick-leave mandate should make us question the role of payroll taxation in our government: payroll taxes are highly regressive,

21. See JOINT COMMITTEE ON TAXATION, ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN DIVISION G OF H.R. 6201, THE "FAMILIES FIRST CORONAVIRUS RESPONSE ACT," 1 (2020) [hereinafter JOINT COMMITTEE ON TAXATION, FFCRA ESTIMATES] (estimating the tax credits to cost the Treasury \$89.127 billion in fiscal year 2020 and \$15.728 billion in fiscal year 2021). The tax credits are only available for on-leave wages paid between a start date chosen by the Secretary of the Treasury and December 31, 2020. See FFCRA § 7001(g), 134 Stat. at 212. Subsequently, the IRS and the Treasury set the start date as April 1, 2020. See *COVID-19-Related Tax Credits*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/covid-19-related-tax-credits-general-information-faqs> [<https://perma.cc/J36V-WEPN>] (last visited Nov. 11, 2020) (explaining that the start date for tax credits to cover eligible sick leave will begin on April 1, 2020).

22. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified in scattered sections of 26 U.S.C.)

23. See I.R.C. § 45S (explaining that the credit given is equal to "to the applicable percentage of the amount of wages paid" to qualified employees who take this type of leave).

impose burdens only on labor (especially lower-income households), and are normatively unjustified when the spending funded by payroll taxes also benefits the public at large. The Article ends with an explanation of the comparative advantages of tax institutions in times of emergency.

I. THE NEED FOR SUBSIDIZED PAID-SICK-LEAVE MANDATES

This Part of the Article first introduces paid sick leaves as a form of employee benefits. It then discusses justifications for paid-sick-leave mandates, focusing on market failures, externalities, the political and practical needs for subsidies, and the role of workplace equality.

A. *Introducing Paid Sick Leaves*

Access to sick leaves—whether paid or unpaid—is a form of employee benefits, a large category of employment-related privileges including unemployment insurance, retirement plans, and workers’ compensation programs. Before addressing the pre-COVID-19 regulatory landscape of paid sick leaves (largely a matter of state and local legislation), it is worthwhile to note one threshold distinction. This Article concerns sick leaves, as distinguished from family or medical leaves in their purpose and duration. Employees generally take family leaves to take care of family members or following the birth or adoption of a child; the employees themselves, however, are generally healthy during family leaves. Medical leaves help employees recover from their own serious health conditions that require either continuing medical attention or inpatient care,²⁴ so medical leaves tend to last a substantial amount of time (e.g., two months). In contrast, sick leaves tend to be short because they are usually triggered by relatively minor illnesses (e.g., the seasonal flu).

This distinction is important because a permanent federal regulatory regime exists for family and medical leaves but not for sick leaves²⁵: in the United States, the Family and Medical Leave Act (FMLA) entitles eligible employees to take up to twelve weeks of unpaid family and medical leave while having their jobs protected.²⁶ If the employee merely

24. See 29 C.F.R. § 825.113 (2020) (defining serious health condition as “an illness, injury, impairment or physical or mental condition that involves inpatient care . . . or continuing treatment by a health care provider” for purposes of the Family and Medical Leave Act).

25. It is also important to note that factors distinguishing sick leaves from family leaves trigger different justifications for state regulation: an important form of family leave consists in parental leave to take care of newborn children, and because women tend to bear much of the burden of childrearing, paid maternity leaves may serve the goals of gender equality in the workplace inapplicable to a consideration of sick leaves.

26. See 29 U.S.C. § 2612 (describing the eligible reasons for leave as (1) the birth of a child;

experiences a minor illness that does not affect her ability to perform the essential functions of her job, then the FMLA does not entitle her to any leave at all. Of course, *if* the employee's mild illness develops into a serious health condition that requires inpatient care (as COVID-19 sometimes does),²⁷ then the FMLA kicks in and entitles the employee to unpaid, job-protected medical leave of up to twelve weeks,²⁸ as long as the employee has worked for the employer for at least twelve months.²⁹ But most workers who catch the flu or the occasional case of a bad cold will not be able to take any FMLA leave because their illnesses are unlikely to develop into a serious health condition that makes them unable to perform the essential functions of their jobs. In any event, an important concern motivating the adoption of paid-sick-leave mandates is the reduction of infections that results from the worker's increased financial capacity to stay at home—a goal that the FMLA is unlikely to advance since any FMLA leave is unpaid and provided only when the worker's health condition is sufficiently serious (by which point the worker has likely already spread the virus to others).

These distinctions in duration and in the health condition of the on-leave employee also have institutional-design implications, since funding mechanisms and choice of implementation methods will vary for family leaves (often long but predictable as to timing) compared to sick leaves (often short but unpredictable as to timing).³⁰ I address these institutional-

(2) adoption or foster care placement; (3) to care for a spouse, child, or parent with a serious health condition; (4) a serious health condition of the employee that renders her unable to work; and (5) a qualifying exigency).

27. See, e.g., *COVIDView: A Weekly Surveillance Summary of U.S. COVID-19 Activity*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 8, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> [<https://perma.cc/DK58-GFBN>].

28. See 29 U.S.C. § 2612(a)(1) (stating that the leave is applicable during any twelve-month period).

29. It is notable that the standard for determining employee status for purposes of the FMLA is not the regularly applied right-to-control test, which originates from tort law, but the more encompassing economic realities test. See Kenneth G. Dau-Schmidt, *The Problem of 'Misclassification' or How to Define Who Is an 'Employee' Under Protective Legislation in the Information Age*, in *THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW: REVIVING AMERICAN LABOR FOR A 21ST CENTURY ECONOMY* 143–44 (Richard Bales & Charlotte Garden eds., 2020). But employees must still have worked for an FMLA-covered employer for at least 12 months.

30. In the context of disaggregating family and medical leaves, for example, scholars have criticized the FMLA for amalgamating the two types of benefits: while maternity leaves are predictable in timing and length, serious health conditions that trigger medical leaves are harder to plan for (though perhaps somewhat more predictable than the types of health conditions that trigger sick leaves—it takes a much longer time to diagnose cancer than to find out one has caught a cold). Degrees of predictability therefore counsel differing policy treatment of family leaves and medical leaves, and the same logic applies to designing the paid-sick-leave mandate. See Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 20–21 (2010).

design implications later in the Article.³¹

With the obvious exception of the FFCRA, the regulation of sick leaves currently takes place on the state and local level: many jurisdictions have adopted—either by legislation or by voter ballot measures—paid-sick-leave mandates.³² Most of the state and local policies provide for the accrual rather than a straightforward grant of entitlement: employees in California, for example, can accrue one hour of sick leave for every thirty hours worked, and employers are free to limit payment to a maximum of twenty-four hours per year (i.e., three days of paid leave for full-time employees).³³ Most state paid-sick-leave acts also feature anti-retaliation provisions that prohibit employers from taking adverse employment actions against employees for using their sick leaves,³⁴ in addition to capacious definitions of employee status.³⁵

These state and local legislative initiatives, while helpful, do not cover the entire American workforce. As of the outbreak of the COVID-19 pandemic, only twelve states and the District of Columbia had adopted paid-sick-leave mandates.³⁶ More relevant to the purpose of this Article is the fact that there is no reason to leave the regulation of paid sick leaves to state and local authorities as opposed to the federal government. Infectious diseases do not respect state boundaries, and there is very little regional difference that results in differential needs for paid sick leaves across jurisdictions—New Yorkers benefit from paid sick leave as much as Texans.³⁷ Recent developments in COVID-19 infections have

31. See *infra* Section III.D.

32. See, e.g., CONN. GEN. STAT. § 31-57s(a) (2015) (mandating employers to provide annual paid sick leaves and permitting employers to comply with the law by offering other types of paid leaves (e.g., paid vacation) that may be used for the purposes of sick paid leaves); WASH. REV. CODE § 49.46.210 (2018) (requiring employers to have employees accrue one hour of sick leave per forty hours worked and noting that employees may use the sick paid leave when their place of business has been closed by a public official or for health-related reasons); see also *Paid Sick Leave*, WASH. ST. DEP'T LAB. & INDUS., <https://www.lni.wa.gov/workers-rights/leave/paid-sick-leave> [<https://perma.cc/R992-PM8X>] (noting that Washington's paid sick leave mandate "was passed by voters in 2016 as part of Initiative 1433").

33. See CAL. LAB. CODE § 246 (West 2020) (noting additionally that accrued sick leave may carry over to the next year).

34. See, e.g., *id.* § 246.5(c) (West 2020) (establishing a rebuttable presumption of unlawful retaliation when an employer denies an employee the right to use such leave and takes retaliatory action within thirty days of the employee filing a complaint based on a violation of this statute).

35. Under state statutes, work-duration requirement for paid-leave eligibility is relatively lenient. California, for example, only requires the employee to have worked for the employer for 30 calendar days within a year. See, e.g., CAL. LAB. CODE § 246(a)(1) (West 2020).

36. See Hultin & Follett, *supra* note 7 (describing the adoption of various state-level paid-sick-leave mandates over the course of several years, from Connecticut in 2011 to Nevada and Maine, whose sick leave laws do not take effect until 2020, and 2021, respectively).

37. Recent development of the COVID-19 pandemic has vindicated this proposition: while

demonstrated this basic fact with painful clarity. While northeastern states such as New York reported the highest cases in the spring, southern states such as Texas and Florida broke new-case records daily during the summer wave.³⁸ New COVID-19 infections spiked in Texas and Florida after they re-opened and workers returned to work—notably, neither state has a paid-sick-leave mandate.³⁹

B. Market Failures and Externalities

A federal paid-sick-leave mandate, subsidized or not, would constitute an immutable rule that the government inserts into all employment contracts in the United States. Unlike default rules, which generally fill gaps in incomplete agreements, immutable rules are ones which the parties cannot contract around in a legally enforceable way. That is, immutable rules govern parties' rights and obligations under a contract, regardless of their intentions. As a result, scholars have argued that immutability is justified only if unregulated contracting would be harmful because parties, either internal or external to the contract, cannot adequately protect themselves.⁴⁰ Parties internal to the contract might not be able to protect themselves because they suffer from, for example, insufficient information or cognitive failures; parties external to the contract might not be able to protect themselves because of negative externalities—the contractual conduct of a party might hurt the legitimate interests of the noncontracting public. But “protection” might not be the most accurate term here: just as some contracts can result in negative externalities, others might result in positive externalities that the noncontracting public may desire to encourage (i.e., benefits that the contracting party will not take into account because they do not affect herself). In any event, two main types of considerations ground immutability in contract terms: justified parentalism (e.g., because of contracting parties' cognitive defects) and externalities (whether positive or negative). The intuition here is that the labor market, assuming no

early spread of the virus was concentrated in coastal areas with large, densely populated cities, rural and suburban regions later experienced much more significant rises in cases and fatalities as part of the summer wave of infections. See, e.g., *A Deadly 'Checkerboard': Covid-19's New Surge Across Rural America*, WASH. POST (May 24, 2020), <https://www.washingtonpost.com/nation/2020/05/24/coronavirus-rural-america-outbreaks> [<https://perma.cc/92LL-RDM2>].

38. See Kimiko de Freytas-Tamura et al., *Florida Breaks U.S. Coronavirus Record for Most New Cases in a Day*, N.Y. TIMES (July 12, 2020), <https://www.nytimes.com/2020/07/12/us/florida-coronavirus-covid-cases.html>. [<https://perma.cc/W5B2-K5MH>] (reporting that Florida, at the time the article was published, reached the highest cases reported in a single day, over 15,000).

39. *Paid Sick Leaves*, *supra* note 7.

40. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 (1989); Lawrence H. Summers, *supra* note 20, at 178 (explaining the “parentalist” function of immutability).

market failure, would provide employee benefits where the gain to the employee exceeds the cost to the employer, because the employer can pass the cost to the employee in the form of lower wages and the employee would still be willing to supply labor.⁴¹

Previous scholarship points to the strong likelihood that a federal paid-sick-leave mandate will result in substantial positive externalities in public health. A recent study considers the effects of state and local paid-sick-leave mandates in DC and Connecticut on leave-taking behavior, finding that the introduction of mandatory paid sick leaves in those jurisdictions has resulted in an 18% decrease in *aggregate* work absences (a decrease of 0.5% from the national average absence rate of 2.2%).⁴² In particular, the study points out that the Connecticut paid-sick-leave policy applies specifically to service industries, which have historically lagged behind other sectors in the provision of paid sick leaves,⁴³ *and* finds a statistically significant decrease in absence rates in nonservice sectors that are *not* directly affected by the new state policy.⁴⁴ When theorizing why paid sick leaves would contribute to an overall decrease in work absences, we might think of two main reasons: sick workers, by staying at home, might, *first*, recover faster from their illnesses (and the speedier recovery in turn enables them to return to work earlier) and, *second*, have fewer occasions to spread contagious illnesses to others (and their communities in turn see an improvement in public health). The former benefits a party internal to the employment contract (the employee); the latter is an externality effect that benefits parties external to the employment contract. The analysis of Connecticut's paid-sick-leave mandate substantiates the latter, externality effect, since absence rates in sectors unaffected by the policy also showed significant decreases.⁴⁵

41. See Christine Jolls, *Law and the Labor Market*, 2 ANN. REV. L. & SOC. SCI. 359, 361–63 (2006) (explaining how employee benefits would function in a theoretical, perfectly efficient labor market).

42. Jenna Stearns & Corey White, *Can Paid Sick Leave Mandates Reduce Leave-Taking?*, 51 LAB. ECON. 227, 227 (2018).

43. See *National Compensation Survey*, *supra* note 9, at 119 (noting that 61% of service-industry workers receive some form of paid sick leave in March 2019, compared to 76% of all workers and 91% of workers in management and professional services).

44. See Stearns & White, *supra* note 42, at 235–36 (summarizing the study's finding that statistically significant decreases in leave-taking due to illness occurred in all sectors pursuant to enactment of a paid-sick-leave policy—for the first two years of the policy in Washington, DC, and for all three years of the study in Connecticut).

45. It is worth noting just how large an externality effect the Stearns & White study has shown: when designing paid-sick-leave mandates, most policymakers would conclude that the policy is a success if it does not encourage inefficient behavior such as shirking or absenteeism. Put differently, given the goal that paying sick workers to stay at home should not result in an *increase* in aggregate work absences, the fact that Connecticut's paid sick leaves produced an 18% *decrease* in aggregate work absences shows that the improvement in public health must have been enormous.

Other recent studies have confirmed this result.⁴⁶

Employees may also suffer from cognitive biases that make them undervalue the benefits associated with paid sick leaves. The most prominent is optimism bias—human beings tend to overestimate the likelihood of positive outcomes and underestimate the likelihood of negative outcomes. For example, we underrate our chances of getting divorced and expect to live longer than the average life expectancy, but those beliefs cannot all be correct.⁴⁷ Importantly for our purposes, flu-vaccination literature has suggested that people manifest optimism bias and often believe that they are invulnerable to the flu (or illnesses that present flu-like symptoms, such as COVID-19) or at least less likely to catch it than others.⁴⁸ This cognitive defect has been unfortunately pervasive during the current COVID-19 outbreak, with media reporting many cases of college students partying on Florida beaches during spring break, who all thought that the coronavirus would not infect *them*—beliefs that ultimately proved to be largely incorrect.⁴⁹ Of course, misjudging the likelihood that one will be affected by infectious diseases results in undervaluing the benefit of paid sick leaves—underestimating the probability that one will take paid sick leaves makes the benefit appear worth less than it actually is.⁵⁰

46. See Stefan Pichler et al., *Positive Health Externalities of Mandating Paid Sick Leave* (forthcoming 2020) (manuscript at 15) (“[M]andating employers to provide employees with access to paid sick leave can reduce negative externalities through lower flu infection rates. In the first year after the laws’ implementation, ILI [influenza-like-illness] rates fell on average by 11% in states that provided employees with the possibility to earn and take sick days, relative to control states that did not.”). Studies have also found that other forms of employee benefits may engender large positive externalities. See, e.g., Rafael Lalive et al., *Market Externalities of Large Unemployment Insurance Extension Programs*, 105 AM. ECON. REV. 3564, 3566 (2015) (showing that a temporary extension of unemployment-insurance benefits in Austria “induced a 2 to 4 week decrease in the average unemployment duration of all non-eligible workers aged 46 to 54 compared to similar workers from [control] regions”).

47. See, e.g., Tali Sharot, *The Optimism Bias*, 21 CURRENT BIOLOGY R941, R941 (2011) (explaining that the tendency to overestimate the probability of desired events and underestimate the probability of undesirable ones is a persistent human bias).

48. See Frederick Chen & Ryan Stevens, *Applying Lessons from Behavioral Economics to Increase Flu Vaccination Rates*, 32 HEALTH PROMOTION INT’L 1067, 1069 (2017) (discussing feelings of invulnerability to the flu as part of the optimism bias); Alex Dubov & Connie Phung, *Nudges or Mandates? The Ethics of Mandatory Flu Vaccination*, 33 VACCINE 2530, 2533 tbl.1 (2015) (surveying the “[c]ognitive biases involved in vaccination decision-making and potential nudges that may alleviate their effect,” including optimism bias).

49. See, e.g., Patricia Mazzei & Frances Robles, *The Costly Toll of Not Shutting Down Spring Break Earlier*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/us/florida-spring-break-coronavirus.html> [<https://perma.cc/PH95-7QR7>] (reporting on the Winter Party Festival in Miami Beach, the decision of state and local governments to allow it to continue, and the resulting health toll).

50. In addition to the more familiar cognitive biases, employees may also undervalue paid sick

Employers, in addition, may also suffer from information failures that make them overestimate the cost (or underestimate the profitability) of providing paid sick leaves to their employees. A recent study, for example, shows that paid sick leaves reduce the incidence of nonfatal occupational injuries—a fact that many employers, the study suggests, may not recognize.⁵¹ More importantly, just as employees might exhibit optimism bias and underestimate the likelihood of catching an infectious disease, employers may miscalculate the extent to which a virus can spread among its workforce and cause business disruptions, thus underestimating the costs of not paying its employees when they call in sick. Previous literature has focused on cognitive biases from the employee side, primarily because it has posited that employers, as more sophisticated actors, may and do take precautions to mitigate their cognitive biases.⁵² The COVID-19 pandemic has shown that not all employers completely mitigate their biases: businesses in the meat-processing industry, for example, encountered significant business interruptions because of coronavirus infections in their workplaces, but many still do not provide any paid sick leaves to their workers.⁵³

In the context of contagious diseases and paid leaves, externalities and cognitive biases may exacerbate each other: younger, healthier, and more mobile people tend to have the most optimism bias in thinking that they will not catch the coronavirus.⁵⁴ They will therefore value paid sick leaves less (and even less accurately) than others. But they are also most likely to bring the coronavirus to others because they are more likely to

leaves because they do not recognize the full extent of the positive externalities that can result from this employee benefit. That is, even if employers can fully account for the fact that paid sick leaves may reduce the number of sick employees, employees themselves may not understand this benefit. Having fewer sick colleagues around the workplace is surely a benefit to most employees, who would accept a lower wage given perfect information.

51. See Abay Asfaw et al., *Paid Sick Leave and Nonfatal Occupational Injuries*, 102 AM. J. PUB. HEALTH 59, 61 (2012) (finding a nonfatal occupational injury incidence rate of 2.59 per 100 full-time workers among those with access to paid sick leave, as opposed to an incidence of 4.18 among those without access to paid sick leave).

52. See, e.g., Christine Jolls, *Employment Law*, in 2 THE HANDBOOK OF LAW AND ECONOMICS 1355 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (“[T]he usual modeling assumption in the case of an employer-side information failure is that employers are aware of the limits on their information and respond rationally to these limits.”).

53. See Kate Taylor, *At Least 4,500 Tyson Workers Have Caught COVID-19, with 18 Deaths. The Meat Giant Still Doesn't Offer Paid Sick Leave, as the Industry Blames Workers for Outbreaks*, BUS. INSIDER (May 11, 2020), <https://www.businessinsider.com/tyson-4500-covid-19-cases-as-meat-industry-blames-workers-2020-5> [<https://perma.cc/TB5M-S9E4>] (reporting meat-packing plants as coronavirus “hot spots”).

54. While evidence for coronavirus-related optimism bias among youth has been largely anecdotal, previous studies have found that younger drivers tend to exhibit more optimism bias in evaluating their driving skills. See Melanie J. White et al., *Young Drivers' Optimism Bias for Accident Risk and Driving Skill: Accountability and Insight Experience Manipulations*, 43 ACCIDENT ANALYSIS & PREVENTION 1309, 1310 (2011).

travel and come into contact with other people (while having fewer financial resources to miss work if the leave is unpaid).⁵⁵ Those who undervalue paid sick leaves the most, therefore, also pose the greatest risks for negative externalities (or, in other words, present the greatest magnitude of gains in positive externalities should a paid-sick-leave mandate come into existence).

The presence of large public-health externalities and various information failures and cognitive biases helps justify a federal mandate of paid sick leaves, which may result in overall efficiency gains.

C. Workplace Equality

Robust provision of employee benefits promotes workplace equality by empowering certain marginalized groups in their course of employment. The uneven distribution of workers across different economic sectors and types of employers means that a federal paid-sick-leave mandate can benefit disadvantaged demographics in the labor market. According to Department of Labor statistics, workers in the service, sales, construction/agricultural, and production industries—sectors dominated by immigrants and Hispanic, African, and Asian Americans—have lower-than-average access to paid sick leaves.⁵⁶ Hispanic Americans, for example, constitute 24.4% of the workforce in the service sector; 46% of the workforce in the farming, fishing, and forestry sectors; and 37% of the construction workforce, compared to their 17% share of the national population.⁵⁷ Therefore, paid sick leaves under the current setup of voluntary provision or state/local requirement do not reach many of the marginalized communities. These data also help explain recent findings that the absence of paid sick leaves increases the risks of influenza-like illnesses in the general population but disparately impacts Hispanic Americans.⁵⁸ Further, the existing legal regime makes it exceedingly difficult for workers in some of these economic sectors to bargain for employee benefits collectively. Section 152(3) of the National

55. See also Jonathan Wolfe, *Young, Confident and Flying, Virus Be Damned*, N.Y. TIMES (Mar. 13, 2020) <https://www.nytimes.com/2020/03/13/travel/coronavirus-travel-deals.html> [https://perma.cc/N3KW-A8X2] (documenting the tendency of “cash-strapped young people” to take up travel deals during the pandemic).

56. See *National Compensation Survey*, *supra* note 9, at 119 (noting that 61% of workers in the service sector; 64% of workers in the sales sector; 59% of workers in the construction, farming, fishing, and forestry sectors; and 68% of workers in the production sector have access to paid sick leaves, compared to a national average of 76%).

57. See *Labor Force Characteristics by Race and Ethnicity 2018*, U.S. BUREAU OF LAB. STAT. 38–50 (Oct. 2019), <https://www.bls.gov/opub/reports/race-and-ethnicity/2018/pdf/home.pdf> [https://perma.cc/7YMM-L9NK].

58. See Kumar, *supra* note 11, at 135–37 (noting that all ethnicities reported inability to stay home if they had flu-like symptoms, but that Hispanic Americans were disproportionately affected by H1N1 and reported less ability to socially distance while at work).

Labor Relations Act (NLRA) excludes agricultural labor and domestic service workers from its definition of employees,⁵⁹ and the fact that this facially neutral provision disproportionately impacts workers of color is hardly a coincidence.⁶⁰ If a paid-sick-leave mandate is subsidized through general revenue rather than through targeted social insurance funded through payroll taxation, the policy will also serve the goals of distributive justice and provide lower-income workers with an important employee benefit without substantially depressing their wages.⁶¹

The current COVID-19 pandemic, in particular, has confirmed the disparate impact of a public health crisis across demographic groups and the need for a subsidized mandate of paid sick leaves. Early data from the Centers for Disease Control and Prevention have shown that all minority groups, including Hispanic, Black, Asian, and Native Americans, have higher age-adjusted COVID-19-associated hospitalization rates compared to non-Hispanic white Americans.⁶² The differential in hospitalization rates reflects both long-standing social inequities in medical treatment and different groups' access to paid sick leaves,⁶³ so that minorities are, *ex ante*, more likely to catch the coronavirus because members of their communities have diminished financial capacity to stay at home while sick and, *ex post*, less likely to receive effective treatment because of implicit bias and cultural barriers in medical institutions. Preventing the spread of a virus *ex ante* is at least as important as—if not much more important than—repairing our medical institutions *ex post*. Paid sick leaves would be instrumental for the former goal.

59. 29 U.S.C. § 152(3) (“The term ‘employee’ . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home.”).

60. See generally Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95 (2011).

61. See also *infra* Section III.B.

62. *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> [<https://perma.cc/J5HA-5CB4>] (suggesting racial disparities in the effects of COVID-19 in the United States); see also Eboni G. Price-Haywood et al., *Hospitalization and Mortality Among Black Patients and White Patients with Covid-19*, 382 NEW ENGLAND J. MED. 2534, 2534 (2020) (finding that being Black was associated with increased probability of being hospitalized with COVID-19, though not with increased mortality once hospitalized).

63. Cato T. Laurencin & Aneesah McClinton, *The COVID-19 Pandemic: A Call to Action to Identify and Address Racial and Ethnic Disparities*, 7 J. RACIAL & ETHNIC HEALTH DISPARITIES 398 (2020).

D. Tax Subsidies

Before discussing the current approaches to subsidizing paid sick leaves (and how to design a more optimal regime if the current approaches are defective), there is a threshold question of whether the government *should* subsidize paid sick leaves through the tax system, or at all. I first address the general issue of subsidization and then proceed to the question of using the tax system.

First, government subsidies may be justified because employers' provisions of paid sick leaves can both generate large, positive externalities and advance the goals of workplace equality.⁶⁴ The presence of positive externalities means that the broader public, which is not a party to the employment contracts, stands to benefit when workers have access to paid sick leaves. Advancing workplace equality and empowering targeted demographic groups may provide an additional ground for the government to pay part of the cost. Second, and perhaps more relevant to our current crisis, there is simply no political will behind requiring employers to offer additional benefits to employees without government assistance in the current economic environment. By the end of the second month of the COVID-19 outbreak, over 26 million American workers had filed for unemployment insurance.⁶⁵ Economic output dropped by nearly 33% in the second quarter and would unlikely recover in 2020.⁶⁶ Congress is largely occupied with drafting stimulus bills, rather than considering imposing additional regulatory regimes on businesses with substantial compliance costs. Many workers who lack access to paid sick leaves are employed by small businesses,⁶⁷ which Congress has proven especially reluctant to subject to various protective statutes in the past. For example, the FMLA only covers employers with fifty or more employees,⁶⁸ and even antidiscrimination statutes, such as the ADA and Title VII, only cover employers with fifteen or more

64. See *supra* Sections II.A & II.B.

65. See *News Release: Unemployment Insurance Weekly Claims*, U.S. DEP'T OF LABOR 1 (Apr. 23, 2020), <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/ui-claims/20200691.pdf> [<https://perma.cc/YE43-YDPA>] (disclosing that seasonally adjusted insured unemployment was at its highest level since such records began to be kept).

66. See *Gross Domestic Product, 2nd Quarter 2020 (Advance Estimate) and Annual Update*, U.S. BUREAU ECON. ANALYSIS (July 30, 2020), <https://www.bea.gov/news/2020/gross-domestic-product-2nd-quarter-2020-advance-estimate-and-annual-update> [<https://perma.cc/LV3T-LW3X>] (explaining that the decrease in real GDP reflects the decreases in personal consumption expenditures, exports, investments, and governmental spending which is offset by increased federal spending).

67. Only 64%, compared to a national average of 76%, of workers employed by firms with between one and forty-nine employees have access to paid sick leaves. The vast majority (91%) of employees who work for large employers (i.e., those with more than 500 employees) has access to some form of paid sick leaves. See *National Compensation Survey*, *supra* note 9, at 120.

68. See 29 U.S.C. § 2611(4)(a)(i).

employees.⁶⁹ Should Congress enact a permanent paid-sick-leave mandate in response to the coronavirus pandemic, it would very likely provide some type of support to small businesses, as it did in the FFCRA.

Since lower-income workers in particular lack access to paid sick leaves, concerns with unemployment may constitute an additional reason for subsidizing paid-sick-leave mandates. In a competitive labor market, employers will pass the cost of providing the mandated employee benefit to workers and lower their wages. But for low-income workers, this may not be possible, since employers cannot legally pass on the cost and lower their wages below the minimum wage required by the federal or state governments.⁷⁰ The dual presence of minimum-wage and paid-sick-leave mandates, therefore, may create unemployment—an unintended consequence that is even more likely now as states and localities have pushed for higher minimum wages in the past decade of economic growth.⁷¹ This problem is especially concerning because the COVID-19 pandemic has already created massive unemployment. Pandemic-related unemployment has affected minority groups more than the general population,⁷² so mechanisms of preventing further unemployment or wage depression (e.g., federal subsidies) may also be justified on the additional normative basis of empowering marginalized workers in their course of employment. If the government at least partially funds the provision of paid sick leaves, mandating the benefit will be less likely to create unemployment or depress wages.

Even if government subsidies are justified or politically necessary, policymakers should consider whether to use tax institutions to implement the subsidy. Traditional scholarship characterizes the tax system as primarily (or even solely) fulfilling a revenue-raising function and counsels against using the tax system to subsidize or implement regulatory policy. Scholars advocating a comprehensive tax base have contended that distributing government resources in the form of a tax concession is inefficient, poses difficulties in administrability, and shields the government from accountability by hiding spending in the tax

69. See 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111(5)(A).

70. See Lawrence H. Summers, *supra* note 20, at 181 (noting the problem mandates encounter when they collide with other rigid mandates, such as minimum wage, that already distort the labor market for lower-wage workers).

71. New York City, for example, sets a minimum wage of \$15/hour. See N.Y. LAB. LAW § 652 (McKinney 2020).

72. See Laura Montenovo et al., *Determinants of Disparities in COVID-19 Job Losses 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27132, 2020) (finding disparately higher unemployment in the first two full months of the pandemic for Hispanic workers).

code.⁷³ Other scholars have identified tax incentives as tax expenditures—deviations from a normal income tax that are equivalent, in financial terms, to (but have multiple disadvantages compared to) direct spending programs.⁷⁴

In recent years, however, the winds have shifted, perhaps as a result of the recognition that the federal government has used—and continues to use—the tax system to implement major policies ranging from health care⁷⁵ to home-ownership.⁷⁶ Whether to implement a policy through tax, scholars now argue, is a matter of institutional design and how best to compartmentalize government functions to provide the best set of public services.⁷⁷ In other words, the mere fact that administering a federal policy complicates the tax system is not enough reason to reject the approach. Rather, policymakers should engage in an analysis of whether the coordination benefits resulting from integrating the spending program with the tax system exceed the specialization benefits of creating a separate agency to administer the program.⁷⁸ Social programs whose operation requires income measurement, for example, may be better implemented through tax institutions that have expertise in that area. In addition, scholars have convincingly identified advantages and weaknesses unique to implementing nontax policies through tax institutions, most prominently by analyzing the popular Earned Income Tax Credit (EITC), which grants individual income tax credits to working people with low or moderate income.⁷⁹ Compared to direct spending

73. See, e.g., Boris I. Bittker, *A "Comprehensive Tax Base" as a Goal of Income Tax Reform*, 80 HARV. L. REV. 925, 926 (1967) (describing, but not supporting, the view that "a tax concession is a poor way to distribute a government bounty or to encourage activities that are in the public interest: the value of the concession varies with the beneficiary's tax status, the impact of the program may be erratic and unpredictable, its cost cannot be accurately estimated or budgeted in advance, and its operation is covert rather than open to public inspection and criticism"); see also R.A. Musgrave, *In Defense of an Income Concept*, 81 HARV. L. REV. 44 (1967) (responding to Professor Bittker's criticism of the comprehensive-tax-base literature).

74. See STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 92–125, 140 (1973) (surveying the "waste, inefficiency, and inequity" associated with tax expenditures and implementing regulatory programs through tax incentives).

75. See I.R.C. § 36B (providing a tax credit for purchasing qualified health plans).

76. See I.R.C. § 163 (providing a tax deduction for mortgage interest on qualified residences).

77. See David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 957 (2004) (arguing that when governments combine taxing and spending programs, the salient question is one of institutional design—i.e., assigning different tasks to different units of government for optimal performance).

78. See *id.* at 959 (noting that there is a tradeoff between coordinating a program with the tax structure and the benefits of having a specialized agency to administer the program).

79. The amount of EITC to which the taxpayer is entitled is a fixed percentage of her wage income until the credit reaches a statutory maximum, at which point the amount stays constant for a specified income level (depending on the number of the taxpayer's children) before it phases out. See I.R.C. § 32.

programs such as social insurance, advantages associated with tax institutions include greater accessibility, cheaper administration, and reduced stigma for recipients of the benefits; on the other hand, utilizing tax institutions may also result in less accurate targeting of the beneficiaries, lack of responsiveness to changing circumstances, and either noncompliance or insufficient participation.⁸⁰ These considerations present additional factors that may weigh for or against subsidizing a paid-sick-leave mandate through tax credits, which I address later in the Article.⁸¹

II. THE CURRENT APPROACH: FFCRA

A. *The Regulatory Framework*

Enacted on March 18, 2020, the FFCRA is one of the federal government's first responses to the current COVID-19 pandemic and creates two sets of temporary paid-sick-leave mandates, both set to expire at the end of 2020.⁸² The first portion of the FFCRA, the Emergency Family and Medical Leave Expansion Act (EFMLEA), amends the FMLA and requires employers (with fewer than 500 employees) to provide partially paid "public health emergency leave" to eligible employees.⁸³ Employees may take public health emergency leaves when they are unable to work because they need to take care of non-adult children due to coronavirus-related school closures.⁸⁴ The second portion of the FFCRA, the Emergency Paid Sick Leave Act (EPSLA), requires employers to provide paid "emergency paid sick leave" to eligible employees (i.e., those employed by the employer for at least thirty calendar days).⁸⁵ The ESPLA establishes two tiers of reasons that entitle an employee to emergency paid leave: under the first tier, the employee is unable to work because the employee herself is under a quarantine order, advised to self-quarantine by a healthcare provider, or experiencing COVID-19 symptoms;⁸⁶ under the second tier, the

80. See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 589 (1995).

81. See *infra* Sections III.B (discussing financing through the payroll tax versus general revenue), III.C (discussing implementation through social-insurance programs versus employer mandates with tax subsidies), and III.D (discussing distribution with respect to determining the appropriate subsidy and wage-replacement levels).

82. FFCRA, Pub. L. No. 116-127, 134 Stat. 178 (2020).

83. See FFCRA § 3102, 134 Stat. at 189–90 (defining the public health emergency related to COVID-19 and expanding the employer threshold required to provide paid sick leave).

84. See *id.* (defining the need to care for a child whose school is closed due to coronavirus as a qualifying need related to the public health emergency).

85. See FFCRA § 5102, 134 Stat. at 195 (requiring that employers provide emergency paid sick leave to employees for reasons related to COVID-19).

86. See FFCRA § 5102(a)(1)–(3), 134 Stat. at 195.

employee is unable to work because she has to care for others affected by COVID-19 or her school-age children, or because she is experiencing substantially similar situations.⁸⁷ For both tiers, the ESPLA entitles full-time employees to eighty hours of paid leave and part-time employees to paid leave equivalent in length to their average hours worked in a two-week period.⁸⁸ The amounts of replacement wage, however, differ depending on employee's reason for taking the leave. Under the regulations subsequently promulgated by the Department of Labor, employers must pay on-leave workers who fall under the first tier of the EPSLA 100% of their regular wages, up to a maximum of \$511 per day; in contrast, employers only have to pay on-leave workers who fall under the second tier of the EPSLA two-thirds of their regular wages, up to a maximum of \$200 per day.⁸⁹ The EPSLA also bars employers from retaliating or discriminating against employees for exercising any paid-leave entitlements under or seeking enforcement of the Act.⁹⁰

Of particular relevance to this Article is the first tier of leaves established by the ESPLA. The “public health emergency leave” established by the EFMLEA is not technically sick leave and is more akin to family leave: the employee is entitled to partially paid leave (at two-thirds of regular wages) on the basis of coronavirus-related school closures and can be (and in most cases likely is) perfectly healthy while on leave. The second tier of “emergency paid sick leave” established by the ESPLA is also akin to family leave: the employee is entitled to partially paid leave on the basis of family members affected by COVID-19 and, again, can be (and in most cases likely is) perfectly healthy while on leave. Of course, this is not to say that these family leaves are not valuable—the point is that the framework established earlier in this Article for subsidizing paid sick leaves⁹¹ (e.g., with respect to externalities and cognitive biases) will not fully apply to analyzing these two types of leaves because the workers in both instances are not necessarily sick themselves. In contrast, the first tier of “emergency paid sick leave” established by the ESPLA is truer to its name: the employee must be either sick herself (i.e., experience COVID-19 symptoms) or subject to quarantine by order of local government or upon advice of

87. See FFCRA § 5102(a)(4)–(6), 134 Stat. at 195–96.

88. See FFCRA § 5102(b), 134 Stat. at 196 (establishing the duration of the emergency paid sick leave time under the EPSLA).

89. See Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,327 (Apr. 6, 2020) (to be codified at 29 C.F.R. pt. 826).

90. FFCRA § 5104, 134 Stat. at 196–97.

91. See *supra* Part I (discussing the need for paid sick leaves, the associated positive externalities, and the cognitive biases that make both employees and employers underestimate the benefits of paid sick leaves).

healthcare officials (probably because the employee had a substantial likelihood of exposure to the coronavirus or is already exhibiting enough COVID-19 symptoms to seek medical attention).

All leaves taken under the first tier of the ESPLA (i.e., true sick leaves) are fully paid and fully funded by the government, up to \$511 per day for two weeks. The government funding comes in as reimbursement, after the employer has already paid the on-leave employees, in the form of a payroll tax credit to the employer-collected portion of the Social Security Tax.⁹² The credit is refundable: in any given tax period, if the amount of FFCRA tax credits exceeds the employer's share of the Social Security Tax, the IRS treats the excess as overpayment and will refund the whole excess to the employer.⁹³ It is notable that the tax credits are only available when the employee's inability to work is caused directly (and *solely*) by one of the statutorily specified reasons.⁹⁴ For example, if the employer has temporarily closed down the business or reduced work hours due to decreased consumer demand during the pandemic, the employer will not be able to receive any payroll tax credits to offset wages paid to on-leave employees even if they experience COVID-19 symptoms, because the employee's health condition is only *one* of the causes of her undertaking the leave.

B. Potential Problems with FFCRA: Costs, Incidence, Coverage, and Windfalls

The FFCRA represents a major step in the right direction: it sets up a (temporary) national mandate of paid sick leaves, which addresses the labor market's potential underprovision of paid sick leaves due to various forms of market failures, such as cognitive biases and externalities;⁹⁵ it offers full subsidies for the mandated provision of paid sick leaves, which should at least diminish the risk of generating unemployment;⁹⁶ and by covering only small- and medium-sized employers (those with fewer than 500 employees),⁹⁷ it targets those employees least likely to have access

92. See FFCRA § 7001, § 7003, 134 Stat. at 210–12, 214–16 (stating that the employer will be reimbursed for 100 percent of the cost of qualified sick leaves through credits against payroll taxes).

93. See *COVID-19-Related Tax Credits*, *supra* note 21 (stating that if an employer pays more in qualified sick leaves than their share of the Social Security tax, the excess over their share of tax liabilities will be refunded).

94. See Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. at 19,329–30 (describing the six statutory reasons under which an employee is eligible for paid sick leave under the FFCRA).

95. See *supra* Section I.B.

96. See *supra* Section I.D.

97. FFCRA § 5110, 134 Stat. at 199.

to paid sick leaves.⁹⁸ But there are significant problems with the FFCRA that prevent it from evolving into a model for permanently subsidizing paid sick leaves. This Section examines these potential problems.

Most conspicuously, the current regime is extremely expensive. The Congressional Budget Office projects the FFCRA to cost the federal government about \$192 billion over its (brief) operational period of nine months (April to December 2020);⁹⁹ the payroll tax credits alone represent a tax expenditure of \$105 billion.¹⁰⁰ Although the Joint Committee on Taxation (JCT) has not broken down the estimated tax expenditure by types of leaves (e.g., how much emergency childcare leaves cost compared to sick leaves), EPSLA subsidies likely represent a substantial share of the \$105 billion in expenditure: sick leaves, while much shorter than family or school-closure leaves, are granted the highest statutory cap of eligible wages and tax credits (\$511 per day for up to ten days).

There are two obvious countervailing observations here. We are in a pandemic, which of course increases the number of aggregate sick times taken by workers. In addition, if the positive externalities generated by a paid-sick-leave mandate are sufficiently large, workers may end up taking not only fewer days off work in general but also fewer sick days, due to a general improvement in public health, thus reducing the costs of any potential subsidies.¹⁰¹ When the COVID-19 pandemic subsides, some may argue, the cost of subsidizing a paid-sick-leave mandate, à la FFCRA, will become lower.

Although these two observations certainly suggest that the COVID-19 pandemic is contributing to the excessive cost of the current regime, it is unlikely that any fully subsidized paid-sick-leave mandate—implemented in similar ways as the FFCRA—will cost anything less than tens of billions of dollars each year. The FFCRA *only* subsidizes COVID-19-related paid-sick-leave wages, so the JCT's estimate of \$105 billion

98. See *National Compensation Survey*, *supra* note 9, at 120 (noting that only 64% of employees who work for small employers (those with 1–49 employees) have access to paid sick leave, versus 91% of employees who work for large employers (those with more than 500 employees)).

99. See Letter from Phillip L. Swagel, Dir., Cong. Budget Office, to Nita M. Lowey, Chairwoman of the Comm. on Appropriations, U.S. House of Representatives (Apr. 2, 2020), <https://www.cbo.gov/system/files/2020-04/HR6201.pdf> [<https://perma.cc/EJ88-HDC8>] (stating that the FFCRA will increase the deficit by \$192 billion over ten years, with most of that being fiscal years 2020 (ending on September 30, 2020) and 2021).

100. See JOINT COMMITTEE ON TAXATION, FFCRA ESTIMATES, *supra* note 21 (stating that the tax credits for paid sick and paid family and medical leave expiring at the end of 2020 will cost about \$105 billion).

101. See Stearns & White, *supra* note 42, at 240 (concluding that paid sick leave mandates may reduce the overall number of sick days taken and provide public health benefits that could exceed the costs imposed on employers).

for providing the payroll tax credits for nine months does not take into account any other type of sickness that necessitates an employee's taking time off work. The seasonal flu, for example, affects about ten to fifty million Americans each year,¹⁰² many more than COVID-19 has thus far in 2020. Further, while a paid-sick-leave mandate stands to generate positive externalities and improvement in public health, illnesses will never completely go away: a very optimistic study found an 18% reduction in aggregate illness-related work absences as a result of Connecticut's paid-sick-leave mandate,¹⁰³ so even with mandated paid sick leaves, a substantial majority of current sick leaves will remain. Should Congress extend FFCRA to cover future years and all illnesses, therefore, the subsidized mandate will likely become one of the most expensive items in the tax expenditure budget, on par with the government subsidies for employer-provided health insurance or retirement plans.¹⁰⁴

The source of the FFCRA funding is as concerning as its magnitude. As previously described, the subsidy takes the form of a refundable tax credit against the employer-collected portion of the Social Security Tax,¹⁰⁵ which is collected from both the employer and the employee at a rate of 6.2% each (12.4% total), on the first \$137,700 of wage income of the employee.¹⁰⁶ Importantly, the Social Security Tax, as its name

102. *Frequently Asked Questions about Estimated Flu Burden*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 14, 2020), <https://www.cdc.gov/flu/about/burden/faq.htm> [<https://perma.cc/96Q2-ZJ8X>] (“CDC estimates that flu has resulted in between 9.3 million and 45 million illnesses each year in the United States since 2010.”).

103. See Stearns & White, *supra* note 42, at 234.

104. See JOINT COMMITTEE ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2019–2023, at 28–29 (2019) [hereinafter JOINT COMMITTEE ON TAXATION, EXPENDITURE ESTIMATES] (estimating that between 2019 and 2023 \$933 billion will be spent on tax expenditures for employer-provided health insurance and over \$1.3 trillion will be spent on employer retirement benefits and contribution plans).

105. See *supra* notes 92–93 and accompanying text.

106. I.R.C. § 3111 (imposing 6.2% tax on employers); I.R.C. § 3101 (imposing 6.2% tax on employees); Press Release, Soc. Sec. Admin., Social Security Announces 1.6 Percent Benefit Increase for 2020 (Oct. 10, 2019), <https://www.ssa.gov/news/press/releases/2019/> (stating that the maximum amount of earnings subject to the Social Security tax will increase to \$137,700 for 2020). Although half of the tax is paid by the employer, the economic incidence of the tax is a subject of scholarly debate. The traditionally accepted view is that the employee bears the economic burden of the tax. One recent study, however, found that employers may bear at least a substantial part of the economic burden of payroll taxation. Compare, e.g., Don Fullerton & Gilbert E. Metcalf, *Tax Incidence*, in 4 HANDBOOK OF PUBLIC ECONOMICS 1789 (Alan J. Auerbach & Martin Feldstein eds., 2002) (“The standard view of the economic burden of the payroll tax in the United States is that it is borne entirely by employees.”), with Emmanuel Saez et al., *Payroll Taxes, Firm Behavior, and Rent Sharing: Evidence from a Young Workers’ Tax Cut in Sweden*, 109 AM. ECON. REV. 1717, 1717–18 (2019) (offering some evidence that firms and employers may bear part of the payroll-tax burden).

suggests, funds the Social Security program,¹⁰⁷ which provides basic incomes to workers and their family members as the workers age, become disabled, and die. Social Security is underfunded. Some of the program's trust funds are projected to deplete by 2023, and the current program, considered as a whole, will remain solvent only until 2034, after which point the Administration can only afford to pay about 77% of the scheduled benefits.¹⁰⁸ Maintaining solvency after 2034 requires either a substantial reduction in promised benefits or a 3.58 percentage point increase in payroll tax.¹⁰⁹ A permanent paid-sick-leave mandate subsidized by payroll tax credits would exacerbate existing deficiencies in the Social Security program.

Of course, the federal government has used payroll tax funding to support a variety of other economic and social policies in the past. Prominent examples include payroll tax cuts or credits for the purpose of stimulating the economy or the labor market during a short-term recession.¹¹⁰ For example, the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 temporarily reduced the employee-side Social Security Tax rate from 6.2% to 4.2%.¹¹¹ Earlier on, the Carter administration implemented a (much-criticized and short-lived) payroll tax credit to encourage businesses to hire additional workers and reduce unemployment.¹¹² More recently, under § 41(h) of the tax code, eligible small businesses may claim a portion of their research and development expenses as credits against their Social Security Tax liability, but the maximum allowed payroll tax credit amount is \$250,000.¹¹³ In any event, *when* the federal government has reduced payroll tax burdens through a rate cut or provision of tax credits,

107. About 89% of social security funding comes from payroll taxation. *See How Is Social Security Financed?*, SOC. SEC. ADMIN., <https://www.ssa.gov/news/press/factsheets/HowAreSocialSecurity.htm> [<https://perma.cc/4G46-DNMN>] (last visited Nov. 15, 2020).

108. H.R. DOC. NO. 114-145, at 2–6 (2016).

109. *Id.* at 5–6.

110. Payroll tax cuts and credits have been highly popular mechanisms to spur economic growth, likely because they are perceived as distributively justified—lower-income households bear disproportionate burdens for taxes on wage income—and cost-effective, even though well-targeted direct spending programs are likely more successful. *See* MOLLY F. SHERLOCK & DONALD J. MARPLES, CONG. RSCH. SERV., IN11159, PAYROLL TAX CUTS AS ECONOMIC STIMULUS: PAST EXPERIENCE AND ECONOMIC CONSIDERATIONS 2 (2019).

111. *See* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 601, 124 Stat. 3296, 3309 (reducing the employee payroll tax to 4.2% for a “payroll tax holiday period” of calendar year 2011).

112. *See* Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 202, 91 Stat. 126, 141–42 (reducing payroll taxes); *see also* Leonard E. Burman, *New Jobs Tax Credit (From the Archives)*, TAX POL'Y CTR. (Jan. 8, 2009), <https://www.taxpolicycenter.org/taxvox/new-jobs-tax-credit-archives> [<https://perma.cc/HZ8J-JNH5>] (explaining the slight impact of the credit in stimulating employment).

113. I.R.C. § 41(h).

the modification to the funding structure of Social Security is either temporary (e.g., to stimulate the economy during a downturn) or heavily limited (e.g., by instituting a statutory cap on the amount of credit that the taxpayer can claim). The current wave of legislation does not deviate from this pattern: the FFCRA payroll tax credits are set to expire by the end of this calendar year, and the CARES Act (Coronavirus Aid, Relief, and Economic Security Act) provides only for the deferral (rather than the elimination) of payroll tax liability, with a temporary employee retention credit that, again, is set to expire by the end of this calendar year.¹¹⁴ These legislative patterns reflect a deeper underlying concern that uncoupling payroll taxes from the Social Security program risks weakening the unique relationship between revenue and expenditure inherent in payroll taxes, which might eventually lead to destabilizing the funding for a social safety net. Given these considerations, FFCRA's provision of Social Security Tax credits is not a viable way of subsidizing paid sick leaves in the long run.

Mandating employers to provide benefits to employees often raises issues of incidence, but they are attenuated in the case of the FFCRA because the government is fully subsidizing the paid leaves. I briefly address some of these issues here because they arise in the Article's subsequent discussion about alternative models of funding. In the case of paid sick leaves, there are two main types of costs: the direct costs of providing replacement wages to the employees while they are on leave and the indirect costs associated with implementing the government mandate. These indirect costs may include finding substitutes for on-leave workers, enforcing the anti-retaliation provisions, and keeping track of which employees have taken how many weeks of leave. For example, an employer may have to keep more employees on its payroll than the work requires to account for anticipated sick leaves and hire compliance officials to exercise oversight over potential retaliation claims. The Department of Labor's regulations implementing the FFCRA contain a breakeven analysis that estimates the magnitude of select indirect costs, including those incurred by employers in rule familiarization, documentation, and posting notices, which total roughly \$553 million.¹¹⁵ This estimate does not include the costs incurred by employers in finding substitutes for on-leave workers, which are likely even more substantial compared to notice or compliance costs given that a company's daily operation often depends on the employee's scheduled

114. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, §§ 2301–2302, 134 Stat. 281, 347–52 (2020).

115. See Paid Leave Under the Families First Coronavirus Response Act, 85 Fed. Reg. 19,326, 19,344–45 (Apr. 6, 2020) (to be codified at 29 C.F.R. pt. 826).

attendance at work. These business-disruption costs may be larger for paid sick leaves in comparison with paid family or medical leaves, because short-term illnesses (such as catching a bad cold) are harder if not impossible to predict and plan for, in comparison with pregnancy (where the due date is communicated to the mother usually at least a few months in advance, leaving time for planning) or serious illnesses (whose treatments are often scheduled with some advance notice). In a competitive labor market, employers will pass these costs onto the employees by lowering wages,¹¹⁶ though in the context of emergency legislation in the middle of a pandemic, passing on these costs may take other forms or be delayed (e.g., employers may delay raising wages or forgo granting promotions).

In any event, even if the costs are absorbed by the employees, there will be efficiency gains overall as long as the objective benefits to the employee (rather than the employee's subjective valuation of them, which may be distorted by cognitive biases) exceed the costs to the employer. In other words, the joint welfare of employers and employees is maximized when (and even if) employers pass the costs of providing paid sick leaves—indirect costs, given FFCRA's subsidies—onto the employees. The problem arises where the employer *cannot* pass the costs onto the employees,¹¹⁷ for example, due to wage rigidities introduced by minimum-wage regulations. That is, for low-income workers whose wages are set at or immediately above the minimum wage level, mandating paid sick leaves may result in their unemployment.¹¹⁸ For purposes of the FFCRA, this concern is attenuated because the federal government is funding 100% of the on-leave wages (which constitute a majority of the total costs of the mandate). But this observation underscores the need for at least *some* federal subsidies for low-income

116. Leading studies have found that employers pass close to 100% of the costs associated with providing certain employee benefits to the workers in the form of lower wages. *See, e.g.*, Jonathan Gruber, *The Incidence of Mandated Maternity Benefits*, 84 AM. ECON. REV. 622, 623 (1994) (“The findings consistently suggest shifting of the costs of the mandates [of comprehensively covering childbirths in health insurance plans] on the order of 100 percent, with little effect on net labor input.”); *see also* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1506–08 (1998) (using the endowment effect, a type of loss aversion where people are less willing to sell their entitlements than to buy entitlements that they do not possess, to explain Gruber’s empirical findings).

117. *See also* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 362 (1991) (arguing, in a consumer-seller context, the seller’s inability to pass on the costs of a legal rule may harm, rather than benefit, consumers).

118. *See supra* text accompanying notes 70–71 (explaining that minimum wage policies coupled with paid sick leave policies can have the side effect of harming low-income workers).

workers if Congress enacts a permanent paid-sick-leave mandate.¹¹⁹ At the same time, the concern with unemployment, while diminished, does not completely vanish—the business-disruption costs themselves may lead some employers to conclude against retaining minimum-wage workers during a pandemic, since the government is not reimbursing any of the indirect costs associated with paid sick leaves. This underscores the need to direct at least some of the federal subsidies to *employers*, rather than employees alone.¹²⁰

An additional issue here is that the FFCRA does not cover the entire American workforce: for private-sector employers, the statute only applies to those with fewer than 500 employees.¹²¹ This limited coverage, of course, was intended to target the mandate to workers with the least access to paid sick leaves, since 91% of employees who work at large firms with 500 or more employees already have access to some paid sick leaves.¹²² But this means that about five million workers (9% of workers employed by large firms) both lack access to paid sick leaves and do not fall under the coverage of FFCRA.¹²³ To be sure, many large employers have voluntarily adopted emergency paid-sick-leave benefits for the duration of the pandemic. But it is unlikely that those benefits will stay in place after the pandemic subsides. Even right now, those employers with emergency paid-sick-leave benefits related to COVID-19 have designed their policies in such a way as to discourage workers from taking advantage of them.¹²⁴ Moving forward, a national mandate of paid sick leaves should not exclude part of the workforce, though a wide statutory coverage also accentuates the problem of cost: government subsidies for paid sick leaves will have to be limited in some way, as the current regime is highly costly even without including a large portion of the workforce in its coverage.

119. Of course, the other approach is to eliminate wage rigidities by repealing minimum-wage laws. This is impractical and will also require the (unlikely) coordination of state and local governments in repealing their minimum-wage regulations.

120. See *infra* Section III.D (proposing that a federal mandate of paid sick leaves at least partially reimburses employers for indirect costs).

121. FFCRA § 5110(2), 134 Stat. at 199.

122. See *National Compensation Survey*, *supra* note 9, at 120 tbl.31.

123. See *Distribution of Private Sector Employment by Firm Size Class*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/web/cewbd/table_f.txt [<https://perma.cc/38ME-BC9G>] (showing that 8.657 million and 51.074 million individuals are employed at firms with between 500 and 999 employees and 1,000 or more employees, respectively).

124. It has been reported, for example, that under Amazon's emergency paid-sick-leave policy, workers will not be paid *until* they return to work after their coronavirus-related quarantine—a feature that clearly has the effect of deterring some workers from taking the sick leaves. See Olga Khazan, *Amazon Is Struggling to Pay Workers in Quarantine*, ATLANTIC (Mar. 26, 2020), <https://www.theatlantic.com/health/archive/2020/03/does-walmart-provide-paid-sick-leave/608779/> [<https://perma.cc/H33Y-MHK9>].

A related concern with the FFCRA is that the provision of tax credits is overinclusive. Approximately 70% of the employees falling under the statutory coverage already have access to paid sick leaves of some sort prior to the pandemic. Of course, the FFCRA has increased the amount of benefit for many—five to nine days are generally the norm for paid sick leaves, and most state and local initiatives provide for the maximum accrual of forty hours of paid leaves within a calendar year,¹²⁵ rather than the two work weeks (eighty hours) provided by the FFCRA.¹²⁶ But for many employers, the FFCRA payroll tax credits represent a windfall: they would have provided the paid sick leaves anyway (and indeed did provide them), perhaps because their employees took steps to address their cognitive biases and information failures and more accurately assessed the values of paid sick leaves. For those employers, government subsidies for a permanent paid-sick-leave mandate may not be necessary, as long as unemployment concerns are not triggered and there is sufficient political will to mandate paid sick leaves.

III. DESIGNING A PERMANENT PAID-SICK-LEAVE MANDATE

This Part of the Article examines alternative methods of effectuating a national paid-sick-leave policy and suggests designing a refundable tax credit to the employer, whose amount varies with the wage income of the employee, to subsidize a national paid-sick-leave mandate. The first Section briefly summarizes previous models of funding. The remainder of this Part discusses three main institutional-design issues that are relevant to a permanent subsidy of paid sick leaves: financing (through the payroll tax or general revenue), implementation (through social-insurance programs or employer mandates), and distribution (with respect to determining the appropriate subsidy and wage-replacement levels).

A. Existing (Scholarly and Legislative) Models

This Section briefly examines three separate models for funding a national policy of paid sick leaves that have been proposed by scholars (for the purpose of funding paid family leaves rather than paid sick leaves—but still helpful to our discussions) or enacted into the tax code.

The first model, developed in 1994 in the wake of FMLA's enactment, involves imposing payroll taxes to pool together a general fund to

125. See Hultin & Follet, *supra* note 7 (showing that at least eight states use the 40-hour maximum).

126. See *National Compensation Survey*, *supra* note 9, at 131 tbl.34 (showing that 46% of all workers with access to paid sick leaves receive a benefit period of five to nine days).

subsidize maternity leaves.¹²⁷ Professor Issacharoff (together with his co-author) argues that women of childbearing age are deterred from labor-force participation not because of invidious discrimination but insufficient accommodation of the needs of pregnancy; the two scholars then develop an insurance model that involves financing from an additional payroll tax (that he estimates will be substantially lower than 2.4% and requires overcoming less political headwind), payout as a percentage of pre-leave earnings for a fixed term (twelve weeks), and anti-abuse measures such as a minimum eligibility period before conception.¹²⁸ In particular, this model suggests splitting the payout between employers and employees. Part of the fund's benefits (between 15% and 40%) will not be wage replacement but will be paid to employers to cover their costs in finding temporary substitutes for on-leave employees—the percentage paid to employers is positively correlated to the specialization of the employee's job (and therefore the wage income of the employee). This structure is intended to cover the increased costs of replacing highly specialized workers to employers and to recognize that more highly compensated employees likely have independent financial resources on which to rely during pregnancy.¹²⁹ In short, this model chooses payroll tax funding, pre-set schedules of benefits, and some kind of social-insurance administration to distribute the benefits.

The second model departs from the first in focusing on state unemployment insurance programs as a starting point for implementing reforms (again, for paid family rather than sick leaves).¹³⁰ Contending that women's increased participation in the labor force will promote the broader societal value of gender equality, Professor Lester provides a normative basis for subsidizing paid family leaves through general revenue rather than payroll taxation, which is imposed on wage income only. Her conclusion, however, represents a compromise and draws funding from payroll tax (imposed on workers to create buy-in—employee-collected payroll tax strengthens the impression that workers themselves are paying for their own benefits) supplemented by sources

127. See Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2158–59, 2216 (1994).

128. *Id.* at 2216–18.

129. *Id.* at 2218–20.

130. See Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 66 (2005). The focus on state rather than federal instrumentalities for implementing and subsidizing paid family leaves is in part due to the political environment of the mid-2000s: given the Bush presidency's hostility against the Clinton administration's policies on paid family leave (e.g., the Birth and Adoption Unemployment Compensation regulation, which allowed states to provide wage replacement for parents following the birth or adoption of children), "legislation providing for paid family leave is most likely to happen at the state level," according to Professor Lester. *Id.*

of general revenue.¹³¹ Observing that high-income employees tend to take leaves even if unpaid, Professor Lester proceeds to design a model that would “more assuredly . . . reach workers of middle and lower incomes,” recommending a payout amount as a percentage of regular wages but with a benefit floor and ceiling—akin to unemployment-insurance programs.¹³² In order to minimize frivolous leave-taking and, at the same time, allow the employee to continue her normal standard of living, she suggests setting the replacement wage level at 70%.¹³³ In short, this model chooses a combination of payroll tax and general revenue funding, pre-set schedules of benefits, and state unemployment agencies to distribute the benefits.

A third model of effectuating a paid-sick-leave policy, which is very much on the table as a legislative possibility, is found in § 45S of the tax code, enacted as part of the 2017 tax legislation—commonly known as the Tax Cuts and Jobs Act (TCJA).¹³⁴ This section provides a general business tax credit to incentivize employers’ voluntary adoptions of paid-leave policies. Very little scholarly attention has been devoted to § 45S, primarily because it was a temporary measure set to expire in 2019.¹³⁵ But Congress has shown willingness to extend § 45S, which will remain in effect until at least the end of 2020, and may extend it further after 2020.¹³⁶ As a threshold issue, it is important to note that, while some commentators initially expected § 45S to apply to paid sick leaves as well as paid family and medical leaves, the IRS’s subsequent regulations implementing the statute clarified that § 45S would only apply to the latter at this time.¹³⁷ But with the COVID-19 outbreak and the continuing need for employees to stay away from their physical workplaces,¹³⁸ it is

131. *Id.* at 73–74.

132. *Id.* at 75.

133. *Id.*

134. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 [hereinafter TCJA] (codified in scattered sections of 26 U.S.C.).

135. The only academic analyses of § 45S are found in accounting scholarship and focus on explaining the statute and how to calculate the credit, instead of any systematic assessment of policy. *See, e.g.*, Matthew Geiszler & John McKinley, *New Tax Credit for Paid Family and Medical Leave*, 226 J. ACCT. 20, 21–21 (2018); Sidney Kess, *First Look at the Tax Cuts and Jobs Act of 2017*, 88 CPA J. 6, 8 (2018).

136. *See* I.R.C. § 45S(i).

137. *See* I.R.S. Notice 2018-71, 2018-41 I.R.B. 548 [hereinafter Notice 2018-71], <https://www.irs.gov/pub/irs-drop/n-18-71.pdf> [<https://perma.cc/F7FE-UGTY>] (stating that the § 45S credit applies “only if the leave is specifically designated for one or more FMLA purposes, may not be used for any other reason, and is not paid by a State or local government or required by State or local law”).

138. Google, for example, recently announced that its employees may work from home until July 2021. *See Google Extends Work from Home Through June Next Year*, REUTERS (July 27, 2020), <https://www.reuters.com/article/us-health-coronavirus-alphabet-google/google-extends-work-from-home-through-june-next-year-idUSKCN24S1M8> [<https://perma.cc/5E4T-9UQY>].

not unlikely that Congress will consider designing a permanent paid-sick-leave policy as a parallel to (and based on the model of) § 45S. The remainder of this Section describes the mechanics of this provision.

Section 45S is a nudge rather than shove: instead of mandating provision of paid leaves, it grants a general business credit, ranging from 12.5% to 25% of the family and medical leave wages actually paid by the employer to the employee, that reduces dollar-for-dollar the employer's tax liability.¹³⁹ In order to qualify for the credit, employers must institute a written policy that provides at least two weeks of annual paid family and medical leave for all covered full-time employees,¹⁴⁰ as well as an amount of paid leave for covered part-time employees that corresponds to their working hours as a percentage of full-time employees' working hours.¹⁴¹ The written policy must, in addition, contain an anti-retaliation provision that prevents the employer from interfering with employees' exercises of rights under the policy.¹⁴² The amount of tax credit correlates with the generosity of the paid leave policy: employers must, at a minimum, pay their on-leave employees at least 50% of their regular wages—and this minimum provision of 50% of regular wages is subsidized by a credit equal to 12.5% of the actual family and medical leave wages paid to the employee. Each additional percentage of the employee's regular wages that the employer's paid-leave policy provides (i.e., beyond the minimum 50% of regular wages) will then entitle the employer to a 0.25% increase in the tax credit, up to a maximum of 25% of total family and medical leave wages, which the employer receives when it pays its on-leave employees 100% of their regular wages.¹⁴³

139. See I.R.C. § 45S(a)(2). Although the general business credit is nonrefundable, it can be carried back to offset the taxpayer's liability from the previous tax year and carried forward to offset the taxpayer's potential liabilities in future tax years.

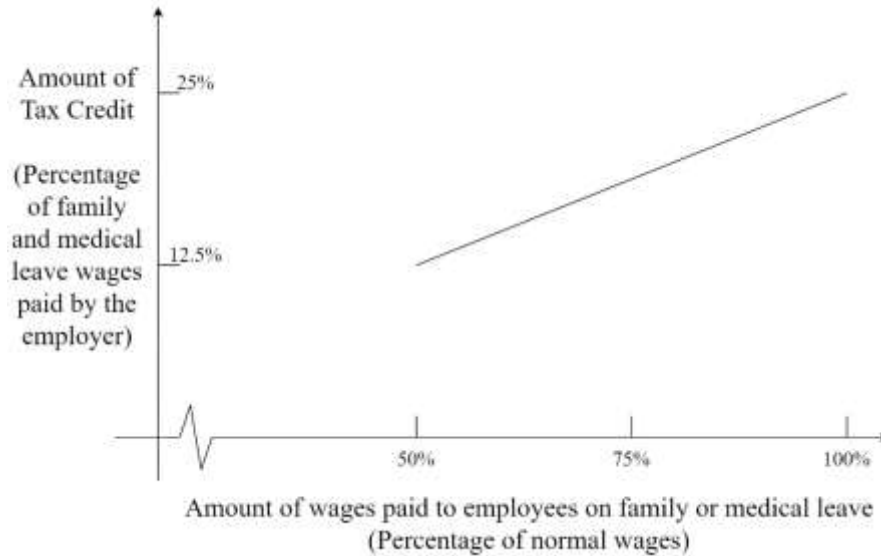
140. For purposes of § 45S, an eligible employee is defined as someone employed by the employer for at least one year and not excessively compensated (i.e., the employee's salary does not exceed 60% of the salary of a highly compensated individual, as defined by § 414(q)—this threshold currently stands at around \$75,000 per year). See *id.* § 45S(d); see also Notice 2018-71, *supra* note 137, at 2 (“[Qualified employees] must not have had compensation from the employer of more than \$72,000 in 2017.”).

141. For example, if a full-time employee is expected to work for the employer for 40 hours per week and a part-time employee 20 hours (50% of the full workload), then the employer must provide at least one week (50%) of annual family and medical leave to the part-time employee.

142. See I.R.C. § 45S(c)(2)(A) (stating that employer's medical leave policy must contain a clause that the employer will not interfere with “any right provided under the policy”).

143. See *id.* § 45S(a)(2).

There is no additional federal tax incentive for replacing over 100% of the employees' regular wages when they are on sick leave. The following figure illustrates § 45S's scheme:



In short, § 45S chooses general revenue financing, no pre-set schedule of benefits besides a minimum floor of 50% wage replacement rate, and tax institutions for distributing a subsidy to employers, who will independently pay their employees.

B. Financing: Payroll Taxation or General Revenue?

One recurring issue in designing a subsidized paid-leave policy concerns the source of funding: on the federal level, the choice is generally between payroll taxation or general revenue.¹⁴⁴ Payroll taxes

144. Unlike the state governments, the federal government does not have plenary power to tax: the Sixteenth Amendment authorizes Congress to tax "income," but certain other taxes, such as taxes on personal property or the much-debated proposed tax on wealth, may fall under the Direct Tax Clause and have to be apportioned among the states by their population. *See, e.g.,* Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334 (1997) (arguing that some consumption taxes violate constitutional norms); Alex Zhang, *The Wealth Tax: Apportionment, Federalism, and Constitutionality*, 23 U. PA. J.L. & SOC. CHANGE 269 (2020). *See also* U.S. CONST. amend. XVI (allowing Congress to levy an income tax); U.S. CONST. art. I § 2, cl. 3 (requiring that direct taxes imposed by the national government be apportioned among the states on the basis of population). State funding can come from a more diverse variety of sources: property, sales (consumption), and income taxes are all possibilities. But in reality, state funding for social welfare and insurance programs is limited because of interstate competition, which constrains the rise of taxes, and inadequate borrowing capacity. Scholars have

are imposed on wage income only and take three forms: the Social Security Tax (which is collected from both the employer and the employee at a rate of 6.2% each), the Medicare Tax (which is collected from both the employer and the employee at a rate of 1.45% each), and unemployment taxes (which are generally collected from the employer only at varying rates depending on the state). Taken together, payroll taxes constitute about 37% of federal tax revenue¹⁴⁵ and fund distinct spending programs: the Social Security Tax funds the Social Security program, the Medicare Tax funds Part A of the Medicare program, and the unemployment taxes fund unemployment benefits. In contrast, income taxes—which constitute the largest source of federal revenue¹⁴⁶—are not designated for any particular spending. Despite some notable deviations (i.e., tax expenditures¹⁴⁷), income taxes are imposed on accretions to economic well-being over a period of time, conceptualized as the sum of consumption and savings and encoded in § 61’s broad definition of income.¹⁴⁸

Because payroll tax is imposed only on wage earnings and income taxes on a much more comprehensive tax base, the choice between payroll-tax funding or general-revenue (principally income-tax) funding reflects a more fundamental policy judgment whether to spread the costs of paid sick leaves among workers only or across a broad swath of society. As a threshold matter, it is also worthwhile to note that mandated benefits do not produce as much deadweight loss (and inefficient distortions in the labor market) as public provision of (the same) benefits

previously argued that countries are also under pressure, in an increasingly globalized world, to use tax incentives to attract and compete for international investment, thus constraining the national governments’ abilities to support social welfare programs. See Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000) (explaining how corporations seeking the most favorable tax treatment abroad harms the welfare state at home). But because interjurisdictional competition exerts a lower fiscal pressure on national compared to state governments—it is still much easier to move businesses across state borders than national boundaries, even if globalization has made outsourcing more feasible—federal funding of paid sick leaves is much more realistic than state funding. Tellingly, none of the states that have enacted mandates allowing employees to accrue paid sick leaves subsidize replacement wages. The 2017 legislation’s cap on the state and local tax deduction further constrains the ability of state and local governments to tax and spend. See Alex Zhang, *The State and Local Tax Deduction and Fiscal Federalism*, 168 TAX NOTES 2429 (2020).

145. See *Taxes*, CONG. BUDGET OFF. (Sept. 2, 2020), <https://www.cbo.gov/topics/taxes> [<https://perma.cc/2VQ5-WBVM>] (estimating that \$1.3 trillion will be collected in payroll taxes for fiscal year 2020).

146. Individual and corporate income taxes constitute about 51% of federal revenue. See *id.* (projecting \$1.5 trillion in individual income taxes and \$151 billion in corporate income taxes).

147. See *supra* note 74 and accompanying text.

148. See I.R.C. § 61 (defining gross income as “all income from whatever source derived”).

through payroll taxation,¹⁴⁹ so there is an efficiency-based argument for employer provision of paid sick leaves rather than a social-insurance implementation. The remainder of this Section argues that there are good normative, practical, and distributive reasons to fund a paid-sick-leave mandate through general revenues.¹⁵⁰

First, the large, positive externalities created by a paid-sick-leave mandate help justify general-revenue funding. As already described, in the case of funding paid family leaves, Professor Lester argued that women's increased participation in the workforce advances broader societal values of gender equality, which in turn provides an ethical foundation for general-revenue funding of paid family leaves.¹⁵¹ In the case of paid sick leaves, an employer mandate brings benefits that similarly promote broader societal goals beyond worker welfare. Improvements in public health and advancement in distributive goals (e.g., workplace equality), for example, may have positive spillover effects on communities with no wage income.¹⁵² When employees, particularly those in the service sectors, can afford to stay at home while exhibiting symptoms of infectious diseases, all members of society—whether they earn wage income or not—benefit because they incur a smaller likelihood of catching an illness through contact in public spaces. The most poignant illustration can be found in COVID-19's impact on nursing homes, where the coronavirus killed countless numbers of workers and elderly residents, the latter of whom are unlikely to have wage income but will immensely benefit from a paid-sick-leave policy for their caregivers.¹⁵³ These positive externality effects provide a

149. See Lawrence H. Summers, *supra* note 20, at 180 (arguing that free negotiation for compensation allows for mutually efficient outcomes).

150. It is worth emphasizing that payroll taxes are not an undifferentiated whole but compose of distinct revenue streams that fund distinct parts of our social safety net. While Section II.B has shown that the Social Security Tax cannot sustainably provide funding for a mandate of paid sick leaves, see *supra* text accompanying notes 105–114, an intriguing proposal would draw funding from the Medicare Tax, which funds medical care for the elderly. This intuition is grounded in an innovative study on the 1918 Influenza Pandemic, which shows that pandemics can have lasting health effects on infected populations sixty-five to eighty years after the initial infections. See Douglas Almond & Bhashkar Mazumder, *The 1918 Influenza Pandemic and Subsequent Health Outcomes: An Analysis of SIPP Data*, 95 AM. ECON. REV. 258 (2005). Because provision of paid sick leaves reduces current infection rates, it also lightens the future fiscal burden on the Medicare program as fewer people suffer from the long-term health consequences associated with the pandemic virus, thus justifying Medicare Tax funding of a paid-sick-leave mandate. This thought is worth exploring but subject to the flaw that we cannot know, *ex ante*, which pandemic virus will result in lasting health effects—the seasonal flu certainly does not.

151. See Lester, *supra* note 130, at 73–74 (emphasizing that there are multiple ethical justifications for spreading the costs of paid family leave beyond leave-takers).

152. See also *supra* Sections I.B, I.C.

153. See Karen Yourish et al., *One-Third of All U.S. Coronavirus Deaths Are Nursing Home*

normative basis for spreading the costs of paid sick leaves across society at large, through the mechanism of, for example, an income tax credit.¹⁵⁴ It is also noteworthy that general-revenue funding does not imply that workers will not contribute to the costs. Wage income represents the largest source of personal income in the United States (and therefore one of the largest sources of general federal revenue). General-revenue funding, therefore, simply means that the costs will be shared between labor and those with no wage income but other forms of income, *not* that labor is off the hook.¹⁵⁵

Second, the rationales behind proposals of payroll-tax funding have lost some of their persuasive power given changes in the political environment. Scholars and policymakers have chosen payroll taxes to fund possible expansion in social-insurance programs primarily for political reasons: Professor Issacharoff, for example, has rejected general-revenue funding of paid pregnancy leaves because the legislative history of the FMLA “suggests the enormous political difficulties in using general revenues for expanded social benefits programs.”¹⁵⁶ Professor Lester similarly suggests imposing some additional payroll tax on workers to create “stronger political appeal and facilitate buy-in by the public and pro-business legislators.”¹⁵⁷ Beyond inertia in initial legislative enactment, general-revenue funding of social benefits has also been criticized for fiscal instability: in times of budget tightening, they might be the first on the chopping block. Given the COVID-19 pandemic, however, there is much political will (and indeed, pressure) to institute a federal policy on paid sick leaves, even if they involve general-revenue subsidies from the federal government. The enactment of § 45S, which uses a general-revenue funding mechanism and provides business tax credits, itself shows that the political difficulties are not impossible to overcome. In addition, the stigma associated with general-revenue funding of expanded social benefits, which might deter pro-business

Residents or Workers (May 11, 2020), <https://www.nytimes.com/interactive/2020/05/09/us/coronavirus-cases-nursing-homes-us.html> [<https://perma.cc/Y78N-LHK2>] (estimating that at least 46,400 nursing home residents and nurses had died from the coronavirus by mid-May 2020).

154. Of course, this argument also applies to other social-insurance programs that may have large positive externalities. For example, if having an adequate social safety net for unemployment and disability is found to benefit society at large in addition to workers, then there might be an argument to fund those programs through general revenue rather than payroll taxation. A more detailed discussion of this issue, however, belongs to another project.

155. INTERNAL REVENUE SERV., *Individual Income Tax Returns, 2017*, in INDIVIDUAL INCOME TAX RETURNS 2017: PUBLICATION 1304 19, 19 (2017), <https://www.irs.gov/pub/irs-soi/17inin-taxreturns.pdf> [<https://perma.cc/V63R-4A8A>] (“Salaries and wages, the largest component of total income (67.8 percent in 2017) . . .”).

156. Issacharoff & Rosenblum, *supra* note 127, at 2215.

157. Lester, *supra* note 130, at 73.

legislators from extending their support, is most pronounced when the government *spends* money to promote social welfare. When the government implements a measure through a reduction in revenue rather than an increase in spending (especially by providing a tax credit to businesses), the optics are very different, even if the economic substance is the same.

More importantly, payroll-tax funding involves fixed revenue streams that cannot accommodate the fiscal needs of a paid-sick-leave mandate. In general, payroll taxes are imposed at a fixed rate, determined at the time of their creation, which cannot be changed without subsequent legislative actions. Therefore, payroll taxes are best for financing spending programs whose expenditures can be predicted in advance: retirement benefits and paid maternity leaves are good examples—it is unlikely that the number of retirements or pregnancies among workers will drastically change from year to year.¹⁵⁸ Sick leaves are completely different: a pandemic, or even annual variations in the spread of the seasonal flu,¹⁵⁹ can trigger wide cyclical variations in the number of leaves taken and in the required funding levels that are impossible to predict in advance. In theory, of course, Congress can set the tax rate at a substantially higher level than needed during a regular year and save the excess for funding sick leaves during pandemics—but in practice the annual budgetary surplus in those social welfare programs will inevitably be attacked as unnecessary taxation. Unemployment, of course, is cyclical, and in the context of the current COVID-19 pandemic, payroll-tax funding of unemployment benefits has shown its disadvantage: by early April 2020, many states' unemployment trust funds only had the capacity of funding a few weeks of total projected benefits.¹⁶⁰

Third, distributive reasons counsel against funding paid sick leaves through payroll taxation. Federal payroll taxes are highly regressive: while income taxes are imposed at progressive rates with no cap on the amount taxed, payroll taxes are imposed at usually fixed rates with a

158. The average number of maternity leaves taken in the United States, for example, have remained very stable between 1994 and 2015, varying between a low of 237,761 per month in 2011 and 299,861 per month in 2015, and the number of maternity leaves taken per 10,000 births has essentially remained the same. See Jay L. Zagorsky, *Divergent Trends in US Maternity and Paternity Leave, 1994–2015*, 107 AM. J. PUB. HEALTH 460, 461 tbl.1 (2017).

159. See *Frequently Asked Questions About Estimated Flu Burden*, *supra* note 102 (showing that the seasonal flu affects anywhere between 10 and 50 million Americans each year—an exceedingly wide range).

160. See Jared Waczak, *States' Unemployment Compensation Trust Funds Could Run Out in Mere Weeks*, TAX FOUND. (Apr. 9, 2020), <https://taxfoundation.org/state-unemployment-compensation-trust-funds-run-mere-weeks> [<https://perma.cc/B42D-ZDMU>] (outlining the results of a 2020 survey about how many weeks of unemployment benefits state trust funds can cover).

defined cap on total amount taxed.¹⁶¹ The Social Security Tax, for example, is collected at 6.2% each from employers and employees on only the first \$137,700 of the employee's annual salary; any wage earning beyond the cap is untaxed.¹⁶² For these reasons, payroll-tax burdens, measured as a percentage of one's income, correlate inversely with one's total income level: the Joint Committee on Taxation estimates the average payroll tax rate for Americans in the lowest income group (with an adjusted gross income of less than \$10,000) at 11.8%, and, for Americans in the highest income group (with an adjusted gross income of more than \$1 million), at 1.9%.¹⁶³ Funding a paid-sick-leave mandate from payroll taxes might therefore result in distributive injustices (assuming that we do not want lower-income workers to contribute proportionally more to the provision of benefits), even if we adopt Professor Lester's call for a high cap on amount taxed.¹⁶⁴ Using general-revenue funding, on the other hand, does not carry this disadvantage: making up the lost revenue incurred by business or individual income tax credits would automatically involve the income tax system, which has progressive rates.¹⁶⁵

C. Choice of Institutions

Another fundamental choice concerns institutions: should we implement paid sick leaves as a government-administered social-insurance program, an employer mandate with tax subsidies, or an incentive policy without a mandate? As previous discussions and the title of the Article already suggest, my conclusion is that an employer mandate represents the best option, and this Section explains why by examining the disadvantages associated with institutional mechanisms previously considered attractive.

One of the most apparent apparatuses to administer paid sick leaves is through a social-insurance program. Previous academic recommendations for implementing paid pregnancy and family leaves—

161. Research has shown that unemployment taxes are similarly regressive. See Patricia M. Anderson & Bruce D. Meyer, *Unemployment Insurance Tax Burdens and Benefits: Funding Family Leave and Reforming the Payroll Tax*, 16 (Nat'l Bureau of Econ. Rsch., Working Paper No. 10043, 2003).

162. I.R.C. § 3111.

163. See JOINT COMMITTEE ON TAXATION, OVERVIEW OF THE FEDERAL TAX SYSTEM AS IN EFFECT FOR 2019, at 34 tbl.A-6 (Mar. 20, 2019) (showing the distribution of income and taxes and projected average tax rates).

164. See Lester, *supra* note 130, at 74 ("There should also be a relatively high ceiling on the taxable wage base, closer to what we see for Social Security than for UI, to avoid regressivity.")

165. Previous scholarship also notes the distributive pitfalls of using payroll taxes to expand social welfare programs. *E.g.*, Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 381 (2001).

as well as most collectively funded employee benefits in the United States (e.g., unemployment and social security benefits)—center on these institutions. But there are at least two significant disadvantages to paying employees sick-leave wages through (state or federal) government agencies. First, this approach would involve substantial administrative costs to the government and bureaucracy-related costs to the employee claimants, the latter of which may become so high that workers are disincentivized from taking any paid sick leaves. As already explained in the Introduction, this Article concerns sick leaves, which are distinguished from family or medical leaves by their short duration and the compromised health condition of the on-leave employee.¹⁶⁶ The monetary benefits associated with taking sick leaves (usually a few days' worth of wages), therefore, are much smaller than those associated with taking medical or family leaves (usually at least a month's worth of wages) or receiving unemployment benefits (where the uncertainty surrounding the length of job loss itself may motivate workers to go through the filing process). In order to file claims with social-insurance programs, workers often must go through a fairly complex procedure with an unfamiliar government office. Given the small size of benefits, high costs of application, and their illness, workers may simply decide to forgo taking a paid sick leave. In a pandemic, of course, social-insurance agencies that administer the paid sick leaves may also become overwhelmed. Second, government administration of employee benefits also runs the risk of excessive rigidity.¹⁶⁷ Social insurance generally involves pre-set benefit schedules and gives employers little room to tailor policies to the needs of their employees. For these reasons, most countries have implemented paid sick leaves through employer sponsorship rather than social insurance.¹⁶⁸

Another possibility is to incentivize employers to adopt voluntarily paid-sick-leave policies rather than mandating them, and this is precisely the route chosen by the TCJA with regard to paid family and medical leaves. In comparison with social insurance, this approach has the advantage of avoiding substantial administrative costs to the government, preserving employer flexibility in designing their benefit plans, and

166. See *supra* text accompanying notes 24–26.

167. See Lawrence H. Summers, *supra* note 20, at 179–80.

168. See Jody Heymann et al., *Contagion Nation: A Comparison of Paid Sick Day Policies in 22 Countries*, CTR. FOR ECON. & POL'Y RES. 6 tbl.1 (May 2009), <https://cepr.net/documents/publications/paid-sick-days-2009-05.pdf> [<https://perma.cc/K3NH-TWQC>] (showing that, out of the nineteen countries surveyed with paid sick leaves, fourteen implement the policy through employer sponsorship, three through social insurance, and two through a combination of both). In comparison, more countries use either social insurance or a combination of social insurance and employer sponsorship to implement paid medical leaves. See *id.* at 5.

reducing at least some of the bureaucracy-related costs to the employee. On the other hand, this approach carries the significant disadvantage that not all employers will respond to the incentives, so some workers will still be left without any access to paid sick leaves. Section 45S, for example, certainly has not revolutionized the provision of paid family and medical leaves in the United States. According to the Joint Committee on Taxation, the federal government is projected to spend about \$2.4 billion on the tax credit for family and medical leaves in fiscal years 2019 and 2020.¹⁶⁹ On the assumption that the average worker taking such leaves makes a weekly wage of \$949,¹⁷⁰ § 45S subsidizes about five to ten million weeks of family and medical leave in a given year (§ 45S does not require employer's paid-leave policy to be new or adopted in response to TCJA, so even preexisting policies are entitled to the tax credits¹⁷¹). While this certainly shows that some employers are taking advantage of the § 45S tax credits, they do not go anywhere close to incentivizing a majority of American employers to offer paid family and medical leaves—if fully utilized at twelve weeks per birth, maternity leaves alone would likely produce over ten million weeks of leave each year.¹⁷² In order to strengthen the incentive effects, the federal government will have to offer much more generous subsidies than the 12.5% to 25% tax credits that § 45S currently provides, incurring costs as high as a fully subsidized mandate.

In any event, if Congress decides to use § 45S as a model for enacting a permanent paid-sick-leave policy, it should not adopt its federalism penalty: § 45S denies the tax credit to the extent that the paid-leave policy is paid by state or local authorities *or* required by state or local law.¹⁷³ For example, if a state law requires the employer to provide two weeks of paid leave with 100% wage replacement to all full-time employees, then an employer who complies with all aspects of the statutory requirement (e.g., by instituting a written policy providing nonretaliation and two weeks of fully paid leave) will not be entitled to any § 45S credit.

169. JOINT COMMITTEE ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2019–2023, at 27 (2019).

170. See *Economic News Release: Median Usual Weekly Earnings of Full-Time Wage and Salary Workers*, U.S. BUREAU OF LAB. STAT. (Oct. 16, 2020), <https://www.bls.gov/news.release/wkyeng.t01.htm> [<https://perma.cc/AK27-WLY4>] (showing the total median weekly earnings of full-time wage and salary workers from 2011–2020).

171. See also Notice 2018-71, *supra* note 137 (stating that an employer's "written leave policy or an amendment to a policy (whether it is a new policy for the taxable year *or* an existing policy) will be considered to be in place" if it complies with other requirements (emphasis added)).

172. See Zagorsky, *supra* note 158, at 461.

173. See I.R.C. § 45S(c)(4) ("For purposes of this section, any leave which is paid by a State or local government or required by State or local law shall not be taken into account in determining the amount of paid family and medical leave provided by the employer.").

It certainly makes sense to deny the tax credit when a state government has *funded* the replacement wages (e.g., through a social-insurance scheme), since the employer is not responsible for paying the on-leave employees. But it makes little sense to deny the tax credit when a state government has only *required* sick leaves to be paid, since the employer is responsible for paying the on-leave employees. Importantly, concerns with unemployment do not vanish just because state and local governments have required employers to provide paid leaves. Requiring employers to provide a certain benefit through state and local laws and denying them a federal tax credit available to employers in other jurisdictions (while the employer is unable to pass the costs onto employees because of minimum-wage constraints) may heighten the risk of under-compliance. Employers might encourage the development of a workplace culture against taking the leaves (thus reducing their costs), which could spill over even to companies where the leaves are subsidized.¹⁷⁴ The denial of tax credits would create horizontal inequity: similarly situated employers will receive differential treatment in federal subsidies solely by virtue of the policy variance of the states and localities where they conduct business.¹⁷⁵ Denying tax subsidies to employers in jurisdictions that already have paid-sick-leave policies also punishes states and localities that have recognized the value of those requirements and deters other states from adopting similar policies in the future.

D. Subsidy Levels and Wage Replacement

The last set of features in our discussion concerns subsidy and wage replacement levels: if the federal government institutes a paid-sick-leave mandate and funds (at least part of) it by means of general revenue, how (and how much) should it subsidize the mandate? This Section argues for a substantial but incomplete wage replacement, together with a

174. Starbucks, for example, allegedly violated state and local paid-sick-leave mandates by requiring employees (referred to as “partners” by Starbucks) to find substitutes when they desired to exercise paid-sick-leave entitlements under New York law. Failure to find replacement could result in discipline and termination of employment. Starbucks settled the investigation after adopting a nationwide policy of paid sick leaves. *See Starbucks Corp.*, Assurance No. 19-155, 2–3 (Dec. 2019) (assurance of discontinuance) (noting that Starbucks, in order to settle this lawsuit, agreed to adopt a nationwide policy “designed to comply with all state and municipal leave policies applicable to any location in the United States in which Starbucks stores are located, including New York City . . .”).

175. *See also* Letter from Ilyse Schuman, Senior Vice President, Health Policy, The American Benefits Council to the Internal Revenue Service 3 (Nov. 19, 2018) (“[T]he Council believes that the exclusion for employer-paid FML when mandated or paid for by a State or local government is fundamentally unfair to employers. . . . We also think it raises serious federalism concerns for an employer to be punished with higher federal taxes simply because the employer is located in a state that requires the employer to provide a particular benefit that would generate a federal tax credit if provided voluntarily.”).

refundable business tax credit whose amount depends on the income of the on-leave worker.

One threshold consideration here may lie in eligibility requirements: Should the federal mandate immediately grant entitlements to paid sick leaves, or should employees be required to accrue sick days by hours worked? The latter method has been popular both in state and local regulations and in proposed congressional legislation: the Healthy Families Act of 2019 would have required employers to let employees accrue paid sick leaves on the basis of their working hours, and all pre-COVID-19 state legislations and ballot measures provide for the accrual rather than an outright grant of entitlement to paid sick time.¹⁷⁶ Traditional justifications for allowing employees to accrue paid times off (including because of minor illnesses) are grounded in concerns of costs and perceptions of desert. It may be especially costly for employers to pay when new employees take time off, and because they have not contributed to the business of the employer, they may be perceived as somehow less deserving of a generous benefit—accrual, on the other hand, makes it appear that the worker has “earned” the benefit. As a matter of optics in politics, employers might also more readily agree to providing paid sick leaves to more senior employees as opposed to everyone. But as this Article has already argued,¹⁷⁷ paid sick leaves benefit not only the employee but also the broader public, including the employer and its workforce. Importantly, the extent of this positive externality does not depend on the length of the employee’s tenure for a particular employer: a new employee who can afford to stay at home while sick can lessen the spread of a virus as effectively as a veteran worker. Because of government subsidies, concerns of costs are attenuated, and the current pandemic represents a unique political environment of support for any legislation for paid sick leaves. Given these considerations, a federal mandate should provide for a grant of entitlement rather than require the employees to accrue paid sick time.

Further, any mandated provision of employee benefits must grapple with the risk of moral hazard, and in particular with absenteeism in the case of mandated paid sick leaves. If workers receive full wages while on sick leave, and no monitoring mechanism is in place to ensure they are actually sick, then employees may take advantage of paid sick leaves while healthy, resulting in absences from work and unnecessary losses of productivity. It is for this reason that scholars have suggested generous but not full wage replacement rates, for example at 70% for paid family

176. See S. 840, 116th Cong. § 5 (2019); Hultin & Follett, *supra* note 36.

177. See *supra* Section I.B.

leaves.¹⁷⁸ While recent research may assuage some of the absenteeism concerns by showing an aggregate decrease in absences from work from paid sick leaves,¹⁷⁹ this result does not necessarily mean that there is no moral hazard involved at all in mandating sick leaves. The positive externalities may simply be so large that an overall improvement of public health has canceled out any possible effect of absenteeism. Further, other empirical studies have largely confirmed the existence of at least some absenteeism or shirking behavior in other jurisdictions that have increased the mandated wage replacement rate for sick leaves to full (or close to full) pre-leave earnings.¹⁸⁰ For these reasons, a generous but incomplete wage replacement may be desirable for maintaining work incentives, and somewhere between 70% and 80% payout of pre-leave earnings seems to strike the right balance and should be set as a minimum floor for on-leave wages.¹⁸¹

Concerns with absenteeism may present an additional reason for implementing a paid-sick-leave policy through employer mandate rather than social insurance. Most countries that have enacted national paid-sick-leave policies have done so through employer liability, and even countries that have implemented general paid-leave (i.e., including family and medical leaves) policies through social insurance have utilized a “two-stage” model where short-term leaves (e.g., sick leaves) are covered by the employer and long-term leaves (e.g., medical leaves) are covered by social insurance. The rationale behind employer mandate is that employers are in much better positions (and have much stronger incentives) to ensure that on-leave employees are indeed sick rather than merely missing work.¹⁸² Because absenteeism-related concerns are

178. See Lester, *supra* note 130, at 75 (“[T]he percentage of wage replacement should be fairly generous, perhaps 70% of pre-leave earnings. Less than full wage replacement is also classic check against moral hazard; a slight but not excessive drop in earnings allows workers to avoid major shocks to their standard of living while also minimizing frivolous leave-taking and maintaining work incentives.”).

179. See Stearns & White, *supra* note 42, at 240 (“[W]e provide the first empirical evidence that [paid sick leave] mandates in the U.S. may actually decrease the aggregate rate of illness related leave-taking.”).

180. See, e.g., Per Johansson & Mårten Palme, *Moral Hazard and Sickness Insurance*, 89 J. PUB. ECON. 1879, 1889 (2005) (“Three separate results on the effects of the reform obtained in this study suggest that there is a moral hazard problem in the Swedish sickness insurance.”); Nicolas R. Ziebarth & Martin Karlsson, *The Effects of Expanding the Generosity of the Statutory Sickness Insurance System*, 29 J. APPLIED ECON. 208, 208 (2014) (“There is no evidence that the increase in sick leave improved employee health, a finding that supports a shirking explanation.”).

181. See also Francesco D’Amuri, *Monitoring and Disincentives in Containing Paid Sick Leave*, 49 LAB. ECON. 74 (2017) (finding that absences from work due to sickness are sensitive to both physician monitoring mechanisms and a 20% cut on wage replacement).

182. See Anke Schliwen et al., *The Administration and Financing of Paid Sick Leave*, 150 INT’L LAB. REV. 43, 48–49 (2011) (noting that some countries employ a two-stage model to control absenteeism).

heightened in the context of paid sick leaves—it is much easier to pretend to have the flu rather than a serious medical condition such as cancer—employer monitoring may be especially preferable compared to public administration with no oversight over on-leave individuals.

Determining the appropriate subsidy level requires attention to two main goals: mitigating costs and reducing unemployment risks (both of which will also contribute to overcoming potential political opposition to paid-sick-leave mandates). As already discussed,¹⁸³ unemployment risks are high where employers cannot pass the costs of mandated benefits to the employees (primarily as a result of wage rigidities and minimum-wage regulations) but diminish as the wage income of the employee rises. Lower-income workers also have the least access to paid sick leaves, perhaps reflecting a greater magnitude of cognitive bias or less robust resources to take those biases into account when they enter into the labor market. An effective cost-reduction strategy, therefore, is to vary the amount of subsidy in accordance with the (hourly or weekly) wage income of the employee. Workers paid at or close to minimum wage should have most of the costs associated with mandated paid sick leaves reimbursed by the government; as the wage income of the employee increases, the rate of reimbursement should decrease, until it completely phases out for highly compensated employees (e.g., as defined by § 414(q) of the tax code).¹⁸⁴ That is, the government would provide the employer a tax credit, equivalent to 100% of the employee's regular wages, for all on-leave employees who make minimum wage, and gradually phase out the amount until it reaches zero for employees who make \$130,000 or more. This sliding scale can minimize the risk of unemployment created by mandated benefits and reduce the tax-expenditure costs to the government. Of course, tax institutions have comparative expertise in administering social programs whose implementation requires income measurement: the Earned Income Tax Credit (EITC) is a good example.

As previously discussed in the Article, mandated paid sick leaves cost more than replacement wages: employers also incur indirect costs, including paying for oversight and disruption to the daily operation of their businesses.¹⁸⁵ These indirect costs may in fact constitute a larger percentage of the total costs associated with providing paid sick leaves for lower-income workers in comparison with higher-income workers.

183. *See supra* text accompanying notes 117–118.

184. I.R.C. § 414(q). The current definition of highly compensated employee is anyone with over \$130,000 of income. I.R.S. Notice 2019-59, 2019-47 I.R.B. 1091 (providing the cost-of-living adjustments for 2020).

185. *See supra* notes 115–116 and accompanying text.

This is because some institutional costs (e.g., oversight) are more or less fixed, and because business disruptions are costlier and more salient for lower-paid service and manufacturing sectors compared to higher-income white-collar work: a Starbucks barista, if sick, must be replaced before sales suffer, whereas a law firm is unlikely to lose a client (or even billable hours) if one of its lawyers catches the flu. Due to these indirect costs, it makes sense to distribute part of the government subsidy to the employer in addition to the employee, especially in the case of lower-income workers.

Implementing this aspect of a paid-sick-leave mandate should not pose serious problems: if the sliding scale for tax credits starts at 100% of *regular* wages for minimum-wage employees, and if the government only mandates a floor of 70% wage replacement rate, this means that 30% of the reimbursement can reimburse employers for the disruption and other indirect costs of providing mandated sick leaves to workers with the lowest wage earnings. As the wage income of the employee increases, the amount of the tax credit decreases, reflecting the more attenuated risks of unemployment and increased ability of the employer to pass the costs, even indirect ones, to the higher-income employees. This aspect of institutional design echoes Professor Issacharoff's earlier proposal to share the funding for paid maternity leaves, with 15% to 40% of the benefits distributed to the employer and the precise amount depending on the income of the employee.¹⁸⁶ My proposal, however, recommends precisely the reverse relationship: Professor Issacharoff suggests increasing the benefit amount to the employer as the income of the employee increases, whereas this Article suggests decreasing the reimbursement level to the employer as the income of the employee increases. This departure stems from fundamental differences in providing paid sick leaves and providing paid maternity leaves: because maternity leaves are of long duration, employers must find substitutes for the on-leave workers, and this process becomes difficult as the employee's work becomes more specialized. For sick leaves, disruption costs dominate and are especially costly for lower-income workers.

The reimbursement can take a variety of forms: payroll tax credits (to the employer or the employee), business tax credits (to the employer), and individual income tax credits (to the employee) are all possibilities. This Article has already addressed the downfalls of payroll-tax funding due to existing deficits of social-insurance programs and the need to spread costs to broader society beyond the workforce.¹⁸⁷ Distributing the

186. See Issacharoff & Rosenblum, *supra* note 127, at 2219 (proposing that a portion of pregnancy benefits be paid to the employer, not just the employee).

187. See *supra* Section III.B.

reimbursement through individual income tax credits is also undesirable: individual workers will not be able to receive the benefit until they file their annual federal tax returns, a time that is often months away, and varying subsidy rates will require the employer to pay different portions of replacement wages depending on the wage income level of the employee, resulting in unnecessary complexity. A business tax credit, therefore, represents the best option: the employer can keep paying the employee (with a minimum wage replacement rate set as the floor) and receive a credit from the government to offset its business taxes. Importantly, the reimbursement should not take the form of a general business tax credit (that § 45S currently provides)—instead, the tax credit should be refundable.¹⁸⁸ Otherwise, employers that do not owe any taxes will not be able to receive the subsidy from the government for providing the mandated paid sick leaves, and there are substantial inefficiencies and transactional costs associated with monetizing nonrefundable business tax credits.¹⁸⁹

IV. IMPLICATIONS AND DIRECTIONS FOR FUTURE RESEARCH

In addition to the specific policy intervention of instituting a federally subsidized mandate of paid sick leaves, this Article’s analysis reveals two broader lessons. This Part details them and articulates paths for future research.

A. The Future of Payroll Taxation

A few facts have informed this Article’s critical assessment of funding paid sick leaves through payroll taxation. First, payroll taxes impose burdens on wage income only, to the exclusion of other forms of income (e.g., investment, dividend, and realized gains from dispositions of property).¹⁹⁰ The economic incidence of payroll taxes also mostly falls on the workers rather than the employers.¹⁹¹ As a result, labor bears the burden of any welfare program or mandated provision of employee benefits funded through payroll taxes. Second, federal payroll taxation in the United States is highly regressive, insofar as lower-income taxpayers pay a higher portion of their income as payroll taxes compared to higher-income taxpayers. Depending on the precise beneficiaries of the

188. See also Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 24 (2006).

189. See, e.g., Thomas W. Giegerich, *The Monetization of Business Tax Credits*, 12 FLA. TAX REV. 709 (2012) (demonstrating the inefficiency of monetizing nonrefundable business tax credits); Michelle D. Layser, *Improving Tax Incentives for Wind Energy Production: The Case for a Refundable Production Tax Credit*, 81 MO. L. REV. 453 (2016).

190. See *supra* Section III.B.

191. See *supra* note 106.

expenditures funded by payroll taxes, this type of revenue-raising structure could produce reverse distribution. Third, when the broader public stands to benefit from the spending funded through payroll taxes—that is, when non-wage-earners as well as workers with wage income benefit from the spending, even if indirectly—a normative basis emerges for funding the spending through general revenue instead. Put differently, it is simply unfair to ask wage-earners to foot the bill when taxpayers without wage income, but who could have substantial income streams from capital investment or other sources, also receive the goodies.

These empirical and normative recognitions should force policymakers to question payroll taxation.¹⁹² As they currently stand, federal payroll taxes impose burdens primarily on labor,¹⁹³ are highly regressive,¹⁹⁴ and arguably fund spending programs that benefit not only workers but also non-wage-earners (in addition to constantly running at deficits for the programs they fund).¹⁹⁵ Economists have demonstrated that unemployment insurance, for example, has large positive externality effects in stimulating aggregate demand, reducing mortgage defaults (which expands access to credit, raises homeownership, and obviously improves the health of our banking system), and improving children's

192. Scholars have already argued that given the current structure of payroll taxation and distribution of tax burdens, additional expenses to pay for the nation's aging population should not be financed solely through increases in payroll taxes. See Michael J. Graetz, *100 Million Unnecessary Returns: A Fresh Start for the U.S. Tax System*, 112 YALE L.J. 261, 270 (2002) ("To be fair, if new taxes become necessary to pay for the aging of the nation's population, they should not be imposed, as payroll taxes are, solely on labor. This implies using general revenues, which include income taxes (and, for now at least, estate and gift taxes) for funding the additional government expenditures required by demographic changes.").

193. See also Linda Sugin, *Payroll Taxes, Mythology, and Fairness*, 51 HARV. J. ON LEGIS. 113, 116 (2014) (arguing that the current structure of payroll and income taxation has resulted in "dramatically heavier tax liabilities on labor compared to capital, producing substantial horizontal and vertical inequity in the tax system," and proposing to "equaliz[e] the tax burdens on labor and capital income").

194. Scholars have well documented the structural inequity imposed by payroll taxes, in particular on the working poor. See, e.g., Michael J. Graetz, *The Troubled Marriage of Retirement Security and Tax Policies*, 135 U. PA. L. REV. 851, 864–74 (1987).

195. Preferential tax treatment of capital (e.g., taxing long-term capital gain at a fixed rate that is usually lower than a taxpayer's marginal tax rate for ordinary income) is often justified by the progressivity of the income tax system. See, e.g., Thomas Piketty & Emmanuel Saez, *Optimal Labor Income Taxation 5* (Nat'l Bureau of Econ. Rsch., Working Paper No. 18521, 2012). But this justification holds only tenuously in the United States after the 2017 tax legislation reduced the top marginal tax rate to 37%, one of the lowest rates since the Great Depression. See TCJA, Pub. L. No. 115-97, § 11001, 131 Stat. 2054, 2054 (2017) (codified in scattered sections of 26 U.S.C.); *Historical Highest Marginal Income Tax Rates*, TAX POL'Y CTR. (Feb. 4, 2020), <https://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates> [https://perma.cc/K2BB-MKJD].

educational attainment.¹⁹⁶ Income from the Social Security program and retirement benefits lift over twenty million Americans from under the poverty line.¹⁹⁷ Poverty exerts substantial negative externalities on broader society,¹⁹⁸ so large-scale reduction of poverty is a public good. These observations suggest that social insurance programs benefit the broader public, which may or may not have wage income, as well as workers. Such a conclusion lines up with our intuitions: poverty and an absence of social safety nets could exacerbate crime and adversely affect human flourishing beyond the poor communities themselves.¹⁹⁹ A robust Medicare program could also lead to improvements in public health and positive externalities like those associated with a mandate of paid sick leaves.²⁰⁰ But at the same time, social insurance is funded almost solely by payroll taxes in the United States. Is it time to overhaul the structure of payroll taxation? There certainly is a normative basis for spreading the costs of social insurance programs over a broader swath of society: if paid sick leaves should be funded through general revenue because a mandate benefits the public at large, why should social insurance be funded through payroll taxes when they similarly benefit the public at large? Again, any resort to political expedience is unpersuasive.²⁰¹

These issues should spark future research: potential questions include more precisely quantifying the extent of positive externalities generated by social insurance programs and considering alternatives to the current structure of payroll-tax funding. Unemployment insurance has been a focus of previous studies because different state implementations of unemployment benefits make empirical studies easier to conduct. We need more data from other forms of social insurance (e.g., retirement and disability benefits) to make informed decisions about how much to spread

196. See Joanne Hsu, David Matsa & Brian Melzer, *Positive Externalities of Social Insurance: Unemployment Insurance and Consumer Credit* 14 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20353, 2014); Lalive, *supra* note 46; Krishna Regmi, *Examining the Externality of Unemployment Insurance on Children's Educational Achievement*, 57 *ECON. INQUIRY* 172, 186 (2019).

197. See Kathleen Romig, *Social Security Lifts More Americans Above Poverty Than Any Other Program*, *CTR. ON BUDGET & POL'Y PRIORITIES* (Feb. 20, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/10-25-13ss.pdf> [<http://perma.cc/WBK7-XUT7>] (describing the positive effects of the Social Security program).

198. See, e.g., Waly Wane, *The Optimal Income Tax When Poverty Is a Public 'Bad'*, 82 *J. PUB. ECON.* 271, 273 (2001) (describing poverty as an "atmosphere[ic]," "aggregate negative externality or public 'bad' that reduces the utility of the individuals").

199. For an illustration of this intuition, see George C. Galster, Jackie M. Cutsinger & Ron Malega, *The Social Costs of Concentrated Poverty: Externalities to Neighboring Households and Property Owners and the Dynamics of Decline*, *HARV. CTR. HOUSING STUD.* (2007), https://www.jchs.harvard.edu/sites/default/files/rr07-4_galster.pdf [<http://perma.cc/WGM5-72ST>] (describing the generalized effects of a lack of social safety nets).

200. See *supra* Section I.B.

201. See *supra* text accompanying notes 156–157.

costs over the general public, as well as whether to disaggregate types of payroll taxes (e.g., funding retirement benefits by general revenue but disability benefits by payroll taxes, *if* empirical results show that the latter do not have a substantial positive externality effect). In this respect, this Article echoes previous calls for social insurance reform,²⁰² including the possibility of integrating payroll and individual income taxes.²⁰³ Further, any plan to overhaul payroll taxes must propose viable replacements for the loss of federal revenues, since payroll taxes form the second largest stream of income (37%) for the federal government.²⁰⁴ Due to potential constitutional difficulties surrounding the Direct Tax Clause, under which a federal property or wealth tax may have to be apportioned among the states,²⁰⁵ the immediate options are likely raising income tax rates or broadening the tax base. Both are viable: income tax rates have been lowered by the 2017 tax legislation, and many tax expenditures—such as exclusion of employer-provided health insurance from income, which costs at least \$150 billion per year²⁰⁶—are ripe for elimination or limitation.

Again, my call is not to eliminate payroll taxes outright and completely replace them with income taxes (or for that matter, wealth or consumption taxes).²⁰⁷ There are many possibilities more moderate than the radical proposal of integrating payroll and income taxes completely.²⁰⁸ For example, we might reduce the current regressivity of payroll taxes (which may already be viewed as unfair regardless of the positive externalities of the social insurance programs funded by them²⁰⁹). This can be done by eliminating the cap on the maximum amount of income subject to

202. *E.g.*, ANNE ALSTOTT, A NEW DEAL FOR OLD AGE: TOWARD A PROGRESSIVE RETIREMENT (2016); DANIEL SHAVIRO, WHO SHOULD PAY FOR MEDICARE? I (2004) (“Everyone agrees about the need for Medicare reform.”).

203. *See, e.g.*, William G. Gale, *Tax Reform Options in the Real World*, in TOWARD FUNDAMENTAL TAX REFORM 42 (Alan J. Auerbach, Kevin A. Hassett & Robert D. Burch eds., 2005).

204. *See supra* note 145.

205. *See supra* note 144.

206. *See* JOINT COMMITTEE ON TAXATION, EXPENDITURE ESTIMATES, *supra* note 104, at 30.

207. Michael Graetz, in the context of proposing a consumption tax (a valued-added tax at ten to fourteen percent on a broad base of goods and services) for the United States, has rightly remarked that we should not abolish the payroll taxes given a large shortfall in funding the social security programs. *See* MICHAEL J. GRAETZ, 100 MILLION UNNECESSARY RETURNS: A SIMPLE, FAIR, AND COMPETITIVE TAX PLAN FOR THE UNITED STATES 83, 128, 148 (2008). Rather, any concrete, promising proposal of reforming payroll taxes should take full account of how to provide sufficient funding for social security.

208. One such proposal might be found in Deborah A. Geier, *Integrating the Tax Burdens of the Federal Income and Payroll Taxes on Labor Income*, 22 VA. TAX REV. 1, 65 (2002), which advocates the government “allow workers a refundable credit for a portion of payroll taxes paid against income tax owed in an amount equal to a reasonable ‘personal exemption’ equivalent.”

209. *See* ALSTOTT, *supra* note 202.

payroll taxes and then lowering the tax rates (or even instituting a progressive structure of tax rates). The broader point is that the three recognitions that underpin this Article's policy intervention—the regressivity of payroll taxes, the almost exclusive burden imposed by payroll taxes on labor, and the potential benefits that the broader public and non-wage-earners stand to receive from payroll-tax-funded spending—counsel rethinking the role of payroll taxation in our government. Given these considerations, it is no surprise that many other advanced economies fund social security programs at least partially by general revenue.²¹⁰

B. The Malleability of Tax Institutions

This Article yields a second theoretical payoff by highlighting the malleability of tax institutions, which could make them attractive, especially in a crisis where time is of the essence and tax institutions present readily available, even if imperfect, mechanisms for effectuating policy ends. Previous scholarship has rightly pointed out the limits of tax institutions in serving as vehicles of welfare and nontax policies—inaccuracy, unresponsiveness, and the tradeoff between noncompliance or underparticipation have emerged as potential comparative disadvantages of tax institutions.²¹¹ Of course, none of these criticisms is fatal—the point is rather to identify ways to adapt to these shortcomings or engage in a reasoned process to see whether integration of tax mechanisms and nontax policies is justified on efficiency-based or normative grounds.

In particular, three features could emerge as comparative advantages for using tax institutions to respond to national emergencies. First, tax institutions allow policymakers to choose the segment of society to spread the costs of a particular policy. The literature on economic incidence, while it does not conclusively quantify the precise burdens imposed by the various taxes, does provide rough guidance that could suffice in a time-sensitive environment. We know that the payroll tax imposes burdens primarily on labor, in particular lower-income households that earn salaries instead of investment proceeds.²¹² The individual income tax imposes burden on a larger swath of society, including all taxpayers without much regard to the sources of their

210. See SOC. SEC. ADMIN., SSA PUB. NO. 13-11801, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: EUROPE, 2016 (2016) (showing that Austria, Belgium, France, Germany, Spain, Sweden, Switzerland, and the United Kingdom are among the countries that fund or subsidize their social security programs through general revenue, e.g., by income taxes or value-added taxes).

211. See Alstott, *supra* note 80, at 570–89.

212. See *supra* note 106 and text accompanying notes 144–148.

income, which can come from wages, sales of property, interests, and dividends, to name a few.²¹³ The corporate income tax distributes at least a substantial portion of the burden on shareholders (i.e., those with capital),²¹⁴ and historical evidence suggests that tariff reductions generally increase consumer welfare, whereas tariff increases impose burdens on foreign exporters.²¹⁵ If a federal wealth tax comes into existence and survives constitutional scrutiny, it would impose burden primarily on ultra-high-net-worth households and accumulated wealth. These tax mechanisms provide policymakers with readily available implementation methods and a wide latitude in choosing the segment of society to spread the costs associated with an emergency measure. If a policy benefits the general public, income-tax (general-revenue) funding might make sense—this Article’s proposal for a mandate of paid sick leaves is a good example. If a policy benefits primarily corporations, then corporate-income-tax funding might be appropriate. Such flexibility is particularly desirable in emergency situations that do not give the government the time to design tailored institutions for funding time-sensitive policies.

Second, tax institutions enable policymakers to choose from a variety of implementation methods that present different advantages (and of course, challenges) with respect to costs, compliance, and cognitive biases. In particular, the government can decide to *what subset* of taxpayers and the public to administer a particular policy that nevertheless has a broader impact beyond those directly involved in implementing it. At the broadest level, the government can administer a subsidy through the individual income tax system, which interfaces with over 150 million Americans each year (more people file taxes than vote), thus reaching a substantial portion of the population.²¹⁶ Certain wealth-transfer programs have been administered in this way, including the EITC, which represents one of the largest subsidies that the federal

213. I.R.C. § 61(a).

214. See Alan J. Auerbach, *Who Bears the Corporate Tax? A Review of What We Know*, 20 TAX POL’Y & ECON. 1, 1 (2006).

215. See Douglas A. Irwin, *Tariff Incidence: Evidence from U.S. Sugar Duties, 1890–1914*, 72 NAT’L TAX J. 599, 599 (2019) (attributing this phenomenon to “the asymmetric response of demand: imports collapse upon a tariff increase, but fail to surge after a tariff reduction”); see also Douglas A. Irwin, *Tariff Incidence in America’s Gilded Age*, 67 J. ECON. HIST. 582 (2007) (concluding that the high tariffs in late nineteenth century America redistributed large amounts of income but had a neutral effect on consumers).

216. See *Filing Season Statistics for Week Ending December 27, 2019*, INTERNAL REVENUE SERV. (Jan. 16, 2020), <https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-december-27-2019> [<http://perma.cc/53ME3WCV>] (showing that 154,865,000 and 155,798,000 individual income tax returns were received by the IRS in 2018 and 2019, respectively).

government provides to low-income working families.²¹⁷ But scholars have criticized this implementation method for (1) unresponsiveness: taxpayers receive the benefits annually when they file tax returns, and annual payout does not help families that face constant budgetary shortfalls or experience a sudden loss of income; and (2) the tradeoff between underparticipation and compliance: taxpayers have limited knowledge, and governmental advertisement or sanctions often lead to either compliance issues where taxpayers receive more than they qualify for or under-participation issues where taxpayers do not even request the credit.²¹⁸ This Article's analysis of paid sick leaves reveals another possible disadvantage: cognitive bias. If paid sick leaves are administered through the individual income tax system, workers will see on their pay slips that they received no wage income from the employer but would receive either a tax credit at the end of the year or a reduction in their withholding taxes. Because taxpayers have limited knowledge of how withholding taxes or income taxes are computed, they may perceive a reduction in withholding taxes as worth less than wage income in the same amount, thus exhibiting salience bias.²¹⁹

Tax institutions, however, provide other means of administration that may have a narrower reach but ameliorate issues of cognitive bias, unresponsiveness, and the tradeoff between compliance and underparticipation. We know that employers tend to have better knowledge of the tax system and take steps to limit their cognitive biases more effectively than employees, so administering a subsidy through reimbursing the employer for replacement wages sidesteps the issues of bias and compliance, while also enabling the employee to get paid on a more regular basis. This is not to say that we should never administer a welfare or nontax policy through the individual income tax system: sometimes the broad reach of individual income taxes may outweigh their associated comparative disadvantages. Indeed, privacy concerns and antidiscrimination goals may often outweigh the administrability gains associated with employer implementation: in order to implement the EITC from the employer's side,²²⁰ employees will have to report their marital status, number of children, and spousal income to their

217. E.g., Jacob Bastian & Katherine Micheltore, *The Long-Term Impact of the Earned Income Tax Credit on Children's Education and Employment Outcomes*, 36 J. LAB. ECON. 1127, 1127–28, 1130 (2018).

218. Alstott, *supra* note 80, at 570–89.

219. Scholars have theorized exploiting the salience bias in designing taxes. See Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253 (2011).

220. For example, the federal government may mandate employers to increase the wages of low-income workers and reimburse businesses for excess wages, instead of granting individual workers the credits when they file individual income tax returns.

employers.²²¹ While the tax code and employment law can penalize businesses for retaliating against employees for claiming an employer-administered EITC, individual-income-tax administration is preferable because it obviates these concerns with respect to privacy and implicit bias in the workplace. My point here is that tax institutions provide flexibility in choosing which segment of the public to engage for implementing a policy: employers (businesses), employees (individual taxpayers), large corporations, etc., are all readily available options.

Third, tax institutions provide various mechanisms to limit and tailor the costs of implementing a policy. These mechanisms include varying the amounts of subsidies (e.g., by creating a sliding scale in accordance with the wage income of an employee, as suggested by this Article's proposal of a paid-sick-leave mandate).²²² Another option is to vary the form that the subsidy takes: the federal government can distribute a subsidy as a deduction or an exclusion from income (where the subsidy amount is a portion of the taxpayer's expenses depending on tax rates),²²³ a general business credit (which is nonrefundable and provides limited to no subsidy to businesses operating at a loss, since they have no tax liability),²²⁴ or a refundable tax credit (where every taxpayer receives exactly the same benefits assuming a fixed amount of credit).²²⁵ The COVID-19-related payroll tax deferral (provided by the CARES Act) is a further example: the government can, instead of eliminating tax liability or granting a deduction, simply defer the payment of taxes so that taxpayers experiencing temporary shortfalls receive the time value of money.²²⁶ Both the Treasury Department and the Joint Committee on Taxation provide accurate measurements of these tax expenditures and have the institutional capacity to assess the estimated costs of such a policy in a timely manner.

This theory both descriptively explains and normatively grounds the

221. This is because the amount of EITC credit to which an individual is entitled depends on the income and the size of her household. *See* I.R.C. § 32.

222. Other prominent examples of phasing out a subsidy include the EITC and the direct payments administered by the IRS as part of the COVID-19 economic stimulus package—the amount of the stimulus checks phases out starting at \$75,000 of income for individual taxpayers. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2201, 134 Stat. 281, 335 (2020).

223. Precisely for this reason, deductions and exclusions from income have been criticized for being upside-down subsidies that give a larger tax good to high-income taxpayers (because they have higher marginal tax rates in a progressive tax system). *See generally* Boris I. Bittker, *Income Tax Deductions, Credits, and Subsidies for Personal Expenditures*, 16 J.L. & ECON. 193 (1973); Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1159 (1988).

224. *See* I.R.C. § 38.

225. *See* Batchelder, Goldberg & Orszag, *supra* note 188, 24–25 (advocating for a refundable tax credit).

226. Coronavirus Aid, Relief, and Economic Security Act, § 2302, 134 Stat. at 351.

federal government's policymaking during crises. From year to year, we see that the federal government immediately turns to tax institutions in responding to emergencies and providing time-sensitive relief to the economy. During the Great Recession, the government both reduced the payroll tax rate and sent recovery rebates to taxpayers, the latter of which alone cost over \$100 billion.²²⁷ During the current COVID-19 pandemic, Congress has sent out direct payments (which are, in essence, tax credits that are immediately refunded to the taxpayer) through the IRS and deferred payroll taxes.²²⁸ Tax institutions have proven popular time and again during national emergencies precisely because they are malleable with respect to the three features I have described—funding, administrability, and costs. A path for further research is to examine these comparative advantages associated with using tax institutions in emergencies in conjunction with other available institutional apparatuses.

CONCLUSION

This Article identifies the need for a federal policy of paid sick leaves, analyzes the current approach embodied in the FFCRA, and proposes an alternative institutional design to tackle the various problems associated with mandated employee benefits, including costs and unemployment risks. As states and localities lift their stay-at-home orders even as COVID-19 continues to infect thousands of Americans every day, it is more important than ever for Congress to consider the possibility of enacting a permanent, subsidized paid-sick-leave mandate.

Beyond the specific policy intervention of paid sick leaves, this Article also yields two insights on tax institutions. It questions the role of payroll taxes due to their regressivity, burdens on labor, and capacity to fund spending that benefits the broader public. It then discusses the malleability of tax institutions with respect to funding, administrability, and costs. These features make tax institution perennially popular in times of crisis to effectuate nontax policies.

227. See Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (providing recovery rebates to taxpayers); see also *supra* note 111 and accompanying text.

228. See *supra* note 114.