Saving *Seaborn*: Ownership Not Marriage as the Basis of Family Taxation†

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One of the most famous Supreme Court tax cases celebrated its eightieth birthday last year. In Poe v. Seaborn*, the Court reified two principles of the federal income tax: ownership determines tax liability and state law determines ownership. This Article affirms that family taxation continues to follow ownership, not marriage, despite the federal government's position that the "ownership equals taxability" rule applies almost exclusively to heterosexual spouses. Verifying the vitality of this principle carries significant implications for all families, particularly nontraditional families. Under the aegis of* Seaborn*, the principle authorizes certain members of state-recognized relationships—marriages, domestic partnerships, civil unions—to file federal income taxes based on ownership interests under state law and to split combined income in half, an outcome largely at odds with current treatment. Indeed,* Seaborn *provides legally recognized same-sex couples a way around the tax filing restrictions and disadvantages imposed on them by the Defense of Marriage Act, which does not consider them spouses under federal law.* Seaborn *empowers these families to take advantage of tax savings associated with income splitting.*

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To prove that ownership of income and property, rather than marriage, determines family tax liability, this Article traces the "ownership equals taxability" principle from the late nineteenth century to after World War II; that is, from the decades leading up to ratification of the Sixteenth Amendment to the Supreme Court's landmark decision in Seaborn *and beyond. It is a story of the early federal income tax, of tax avoidance opportunities for families, of the nature of spouses' legal interests as defined by state property law, and of early tax enforcement efforts by the Treasury Department and Congress. It is also a story of how the Supreme Court protected Congress's taxing power and the federal purse by articulating an expansive definition of ownership for tax purposes, particularly in the context of the family.*

INTRODUCTION

Late last year, one of the most famous U.S. Supreme Court tax cases celebrated its eightieth birthday. In *Poe v. Seaborn*, the Court reified two principles of the federal income tax: ownership determines tax liability[1] and state law determines ownership.[2] For eight decades, federal courts[3] and the Internal Revenue

1. 282 U.S. 101, 109–10 (1930) (holding federal income tax assesses a levy "upon the net income of every individual" and that "the word 'of' denotes ownership").

2. *Id.* at 110 (explaining that, in determining ownership of income and property to be taxed under the federal income tax, the "answer is found in the statutes of the State").

3. *See, e.g.*, United States v. Mitchell, 403 U.S. 190, 197 (1971) ("[F]ederal income tax liability follows ownership. In the determination of ownership, state law controls."); Helvering v. Stuart, 317 U.S. 154, 161 (1942) ("When Congress fixes a tax on the possibility of . . . the distribution of income, the 'necessary implication,' we think, is that the possibility is to be determined by the state law."); Morgan v. Comm'r, 309 U.S. 78, 82 (1940) ("[I]n the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property or income sought to be reached by the statute."); Comm'r v. Dunkin, 500 F.3d 1065, 1069 (9th Cir. 2007) (finding ownership determines taxability and state law determines ownership); Raymond v. United States, 355 F.3d 107, 112 n.8 (2d Cir. 2004) ("[A] married couple could 'split' income derived from property co-owned by operation of law in a community property state." (citing Poe v. Seaborn, 282 U.S. 101 (1930))); United States v. Goodyear, 99 F.2d 523 (9th Cir. 1938) (finding that taxability follows ownership, and California property law provides spouses equal 50% interest in all marital income and property); Simmons v. Cullen, 197 F. Supp. 179, 181 (N.D. Cal. 1961) (arguing that "the incidence of the tax follows ownership of the income" and ownership "is governed by local rather than Federal law" (citing Poe v. Seaborn, 282 U.S. 101 (1930))); Mitchell v. Comm'r, 131 T.C. 215, 218 (2008) (stating that "tax liability for income from property attaches to the owner of the property" and "[s]tate law determines the nature of a property interest"); Dotson v. Comm'r, T.C. Summary Opinion 2004-164, at 4–5 (2004) (noting that it is a "well-established principle that income from property is taxed to the owner of the property" and asserting that "State law controls in deciding . . . property interests"); Witcher v. Comm'r, T.C.M. (CCH) 2002-292, at 6 (2002) (finding that "income from property is taxed to the owner of the property"); Westerdahl v. Comm'r, 82 T.C. 83 (1984) (stating that federal income tax liability is based on ownership under state property law); Bagur v. Comm'r, 66 T.C. 817, 819 (1976) (stating that federal income taxation follows ownership and "State law determines the ownership of income" to be taxed); Bishop v. Comm'r, 4 T.C. 588, 592 (1945) (referring to the proposition from *Poe*

Service[4] have cited *Seaborn*'s "ownership equals taxability" holding, both with respect to family income and other income as well.[5] Its application is so extensive that every April 15, tens of millions of taxpayers attest to their tax liability by applying *Seaborn* whether they realize it or not.[6]

Despite *Seaborn*'s pervasiveness, the IRS ruled in 2006 that the "ownership equals taxability" rule applies exclusively to married couples and, more pointedly, to heterosexual married couples.[7] In particular, the IRS refused to apply *Seaborn* to registered domestic partners (RDPs) in California, even though that state's property law holds that RDPs "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses."[8] The government's primary argument was that case law relating to *Seaborn* "has always arisen solely in the context of spouses"[9] and did not attach to other legally recognized relationships. Even though domestic partners, like spouses, each owned one half of all community income under California property law, *unlike* spouses, they could not each report one half of the community income for purposes of filing federal income taxes. The government's argument was both false and unavailing. Courts had in fact applied *Seaborn* in contexts outside of marriage.[10] Equally important, even though *Seaborn* involved the allocation of taxable income and property between two taxpayer spouses, nothing in the Court's decision limited its application to husbands and wives.

In 2010, the IRS revised its position,[11] but once more missed the mark. In response to a request for guidance from a California taxpayer, the IRS ruled that the taxpayer and his domestic partner "*must* report one-half of the community income."[12] In so doing, the government applied *Seaborn*'s "ownership equals taxability" principle to RDPs for the first time. But its reasoning was flawed, as it was grounded in a 2006 change to California's domestic partnership law that had

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v. Seaborn, 282 U.S. 101 (1930), that "ownership is the test of taxability" and finding that state property law determines ownership).

4. *See, e.g.*, Rev. Rul. 2002-22, 2002-1 C.B. 849; I.R.S. Notice 96-19, 1996-1 C.B. 371; Rev. Rul. 87-13, 1987-1 C.B. 20; Rev. Rul. 69-471, 1969-2 C.B. 10; Rev. Rul. 63-168, 1963-2 C.B. 9; Rev. Rul. 55-597, 1955-2 C.B. 15; *see also* IRM § 25.18.1.1 (Feb. 15, 2005), *available at* http://www.irs.gov/irm/part25/irm_25-018-001.html ("Federal law determines how property is taxed, but state law determines whether, and to what extent, a taxpayer has 'property' or 'rights to property' subject to taxation.").

5. *Mitchell*, 403 U.S. at 197.

6. For married couples, the administrative convenience of joint filing, 26 U.S.C. § 1(a)(1) (2006), which assumes equal ownership of marital income and property, may obscure *Seaborn*'s salience, but it does not nullify its application.

7. I.R.S. Chief Couns. Mem. 200608038 (Feb. 24, 2006).

8. CAL. FAM. CODE § 297.5(a) (West 2004).

9. I.R.S. Chief Couns. Mem. 200608038, *supra* note 7, at 3.

10. *See, e.g.*, Hogan v. United States, No. 85-0041, 1985 WL 6395 (D. Me. 1985) (involving tax treatment of earnings of a Jesuit priest who had taken a vow of poverty); Teschner v. Comm'r, 38 T.C. 1003 (1962) (involving allocation of income from contest winnings between father and daughter); *see also infra* Parts V.A.1–2 examining cases involving trusts and assignments.

11. I.R.S. Chief Couns. Mem. 201021050 (May 5, 2010).

12. *Id.* at 2 (emphasis added).

prohibited RDPs from treating earned income as community property for state income tax purposes.[13] The earlier prohibition never affected the shared, vested, and equal ownership interests of RDPs in all community income and property. Nor did repealing the prohibition suddenly grant such interests to RDPs under the state's community property law. Each member of a domestic partnership in California owned one-half the community's income and property both before and after the 2006 amendment regardless of its characterization on state tax returns. State tax law is largely irrelevant for purposes of determining federal income tax liability.[14]

Instead, as this Article demonstrates, ownership of income and property is the lodestar of family taxation under the federal income tax. California community property law grants equal ownership to domestic partners and opposite-sex spouses in precisely the same way. Similarly, equal ownership attaches to domestic partners in the community property states of Nevada and Washington.[15] More generally, equal ownership can attach to income and property of couples resident in any state with legally recognized domestic relationships so long as the state provides distinct ownership interests within those relationships by operation of general property law.[16] *Seaborn* treats all these couples equally, allocating federal tax liability within the family by ownership interest under state property law. If the interests are equal, *Seaborn* further authorizes the couple to split combined income in half when reporting federal income taxes.

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As already noted, this Article establishes that taxability follows ownership, not marriage. Verifying the broad application of this principle carries significant implications for taxpayers and taxpaying families nationwide. Most immediately, it would affect the vast majority of the 581,300 same-sex couples that the federal tax

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13. For the enacted law, see S.B. 1827, 2005–2006 Sess. (Cal. 2006). For the repealed provision, see former CAL. FAM. CODE § 297.5(a) (West 2004).

14. Law professor Patricia Cain makes this point in commenting on the 2010 IRS guidance: "States like Washington and Texas [both community property states] do not tax the income of their residents. The IRS would never accept an argument that because state law treats income as a non-taxable item, the federal law should do the same." Patricia Cain, *Same-Sex Couples in Community Property States*, SAME SEX TAX L. BLOG (Nov. 23, 2010, 7:23 PM), http://law.scu.edu/blog/samesextax/same-sex-couples-in-community-property-states.cfm. For more discussion of the 2010 ruling, see *infra* notes 477–96 and accompanying text.

15. *See* NEV. REV. STAT. § 122A.010–.510 (2010); WASH. REV. CODE ANN. § 26.60.010–.901 (West 2007). The IRS recognized this reality subsequent to its 2010 ruling pertaining to California. *See* I.R.S., TAX GUIDE 2010: YOUR FEDERAL INCOME TAX FOR INDIVIDUALS, Publication 17, at 5, *available at* http://www.irs.gov/pub/irs-pdf/p17.pdf (stating that registered domestic partners in California, Nevada, and Washington "must report half the combined community income earned by the individual and his or her domestic partner"); I.R.S., 1040EZ INSTRUCTIONS 2010, at 10 (2010) (extending treatment to same-sex spouses in California as well); *infra* notes 497–501 and accompanying text.

16. *See infra* notes 502–07 and accompanying text.

system does not currently recognize as constituting family units,[17] as well as the 8.8 million remaining members of the gay, lesbian, and bisexual population who may also form committed relationships.[18] These families, many of which are recognized under state law as possessing rights similar or equivalent to opposite-sex married couples,[19] are prohibited from filing joint tax returns like traditional spouses, a prohibition that creates undue complexities, including the application of differential tax rates, conflicting state and federal tax rules for the same transaction or form of income, and expensive tax planning designed to formalize rights and obligations that occur naturally for married taxpayers (such as rights of survivorship). Applying the "ownership equals taxability" principle universally under the federal income tax could also affect the 6.7 million opposite-sex couples currently living with partners outside of marriage[20] and the remaining single population in committed relationships.

This Article contributes to the vigorous and increasingly salient debate over how to tax traditional and nontraditional families.[21] Its conclusions implicate all forms

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17. Press Release, The Williams Institute, New Census Bureau Data Show Annual Increases in Same-Sex Couples Outpacing Population Growth; Same-Sex Couples Affected by Recession (Oct. 4, 2010). This figure represents a 3% jump from 2008, when the Census Bureau estimated 565,000 same-sex couples. *See* GARY J. GATES, THE WILLIAMS INST., SAME-SEX SPOUSES AND UNMARRIED PARTNERS IN THE AMERICAN COMMUNITY SURVEY, 2008, at 2 (2009). The actual number of same-sex spouses is probably even larger according to researchers. Indeed, approximately one in seven same-sex couples are not identified as such by current Census Bureau data collections methods. *See* GARY J. GATES, THE WILLIAMS INST., SAME-SEX COUPLES IN U.S. CENSUS BUREAU DATA: WHO GETS COUNTED AND WHY 3 (2010).

18. GARY J. GATES, WILLIAMS INST., SAME-SEX COUPLES AND THE GAY, LESBIAN, BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY 4 (2006).

19. These families include members of same-sex marriages, domestic partnerships, civil unions, and other legal relationships formalized by a state. *See infra* notes 498–516 and accompanying text.

20. Press Release, U.S. Census Bureau, Census Bureau Reports Families with Children Increasingly Face Unemployment (Jan. 15, 2010), *available at* http://www.census.gov/newsroom/releases/archives/families_households/cb10-08.html.

21. *See, e.g.*, Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000); Patricia A. Cain, *Relitigating* Seaborn*: Taxing the Community Income of California Registered Domestic Partners*, 111 TAX NOTES 561 (2006); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2008) [hereinafter Cain, *Taxing Families Fairly*]; Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471 (1997); Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757 (2004); Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605; Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 TAX LAW. 407 (2008); Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191 (2008); Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004); Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651 (2010); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993); Shari Motro, *A New*

of legally formalized relationships, however, personal as well as business. For purposes of focusing the discussion, this Article applies the "ownership equals taxability" principle exclusively to the family setting.

Proving that ownership of income and property rather than marriage determines family tax liability requires a historical examination. Notwithstanding *Seaborn*'s importance in establishing one of the bedrock principles of the federal income tax, we know next to nothing of the historical and jurisprudential developments that culminated in the decision. This Article remedies that deficiency. It traces the "ownership equals taxability" principle from the late nineteenth century to 1930—that is, from the decades leading up to ratification of the Sixteenth Amendment to the U.S. Supreme Court's landmark decision in *Seaborn*. It is a story of the early federal income tax, of tax avoidance opportunities for families, of the nature of spouses' legal interests as defined by state property laws, and of early tax enforcement efforts by the Treasury Department and Congress. It is also a story of how the Supreme Court protected Congress's taxing power and the federal purse by articulating an expansive definition of ownership for tax purposes that relied on indicia of ownership such as control, management, dominion, beneficial and equitable interests, and enjoyment of rights constituent of ownership.

Seaborn illuminates these legal, political, and sociological storylines. But its legacy is as important to this Article as the events leading up to the Court's decision. In the aftermath of *Seaborn*, the Court continued to articulate an expansive definition of ownership and income to curb taxpayers' insatiable appetite for tax avoidance. In its most well-known trust case, the Court wrote, "Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue," which in the case at hand involved artificially shifting income within the family unit.[22] But while the Court scrutinized private law for contrivances (including instruments such as trusts, contracts, assignments, and gifts), it respected, without exception, how states' general law allocated ownership interests within families (both with respect to community property and common law regimes).[23] It even looked the other way when Congress enacted the income-splitting joint return in 1948—an administrative device that treated all spouses' income and property as owned "fifty-fifty" for federal tax purposes—

"I Do": Towards a Marriage-Neutral Income Tax, 91 IOWA L. REV. 1509 (2006); Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008); Keeva Terry, *Separate and Still Unequal?: Taxing California Registered Domestic Partners*, 39 U. TOL. L. REV. 633 (2008).

22. Helvering v. Clifford, 309 U.S. 331, 334 (1940).

23. As this Article demonstrates, the distinction between private law and general law animated the Supreme Court's jurisprudence in family taxation. In particular, the Court saw tax avoidance and artificiality behind "voluntary" or "consensual" private law arrangements that reduced tax liability, while it attached legitimacy to "involuntary" and "legal" general property law regimes that applied uniformly and without an eye toward tax reduction. *See* Comm'r v. Harmon, 323 U.S. 44, 46–48 (1944) (invalidating Oklahoma's optional community property law on grounds that it created a "consensual" rather than a "legal" community, enacted solely for federal tax purposes).

because the legal fiction of income splitting did not disturb ownership interests as defined by state property law.[24]

Eighty years after *Seaborn* and sixty years after passage of the income-splitting provision, ownership of income and property remains the guidepost of family taxation. Indeed, taxability follows ownership defined by state property law and not the presence or absence of a marriage license. This Article removes the false barometer of marriage between a man and woman as the basis of family taxation and reestablishes ownership principles grounded in longstanding Supreme Court jurisprudence as the historically and legally accurate gauge for taxing families. In so doing, it argues that *Seaborn* authorizes members of *all* state-recognized families—marriage, common law marriage, domestic partnership, civil union—to file federal income taxes according to ownership interests as determined by state law. For those legally recognized families currently prohibited from filing joint returns—particularly those restricted by virtue of the Defense of Marriage Act (DOMA), which prohibits same-sex couples from being treated as spouses under federal law[25]—*Seaborn* entitles them to file two federal tax returns each reflecting one-half total family income.

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24. Stephanie Hunter McMahon, *To Save State Residents: States' Use of Community Property for Federal Tax Reduction, 1939–1947*, 27 LAW & HIST. REV. 585, 621–22 (2009) (stating that the split-income provision "did not affect state-defined property rights in any way" but merely extended to all married couples "the benefit of income splitting without having to divide the ownership of family property between spouses").

25. *See* 1 U.S.C. § 7 (2006) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."). On February 23, 2011, the U.S. Department of Justice announced that the Obama Administration was taking the position that Section 3 of DOMA as applied to same-sex couples legally married under state law violated the equal protection clause of the Fifth Amendment and thus was unconstitutional. As a result, the U.S. Attorney General directed the Department of Justice to stop defending Section 3 of the statute. *See* Letter from Eric Holder, Jr., U.S. Att'y Gen., to John Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html. The policy change with respect to defending DOMA does not mean that same-sex taxpayers in legally recognized relationships are now treated the same as opposite-sex couples for purposes of the federal income tax. Indeed, it could take years before we understand the full extent of the Attorney General's directive (specifically, until cases challenging Section 3 navigate through the courts). And even if the government is not willing to defend DOMA, individual members of Congress have indicated they intend to defend the law in court in place of the Department of Justice. *See* Frank James & Liz Halloran, *Boehner: House Will Defend DOMA; Courts, not Obama, Should Decide*, NPR.ORG (Mar. 4, 2011, 3:52 PM), http://www.npr.org/blogs/itsallpolitics/2011/03/04/134268656/boehner-house-will-defend-doma-courts-not-obama-should-decide.

I. FAMILY TAXATION AND AVOIDANCE UNDER THE NASCENT FEDERAL INCOME TAX

The modern federal income tax was born in 1913 after three-quarters of the states ratified the Sixteenth Amendment.[26] Within months of ratification, Congress enacted an income tax law that was modest by any standard. The new levy assessed a "normal" tax of 1% on incomes above $3000 for single individuals and $4000 for married couples as well as a progressive "surtax" ranging from 1% to 6% on incomes above $20,000.[27] All taxpayers—single, married, with or without dependents—were subject to the same rate schedule.[28] As its Progressive Era advocates had envisioned,[29] the tax fell disproportionately on the rich. Adjusted for inflation, the exemption levels created a tax-free threshold for singles and married couples, respectively, of $67,000 and $90,000.[30] Meanwhile, only taxpayers with incomes exceeding $445,000 (adjusted) were subject to the surtax rates, with the top marginal rate only affecting incomes above $11 million (adjusted).[31] The class-based federal income tax with its generous zero-bracket levels exempted 98% of all households.[32]

Under the 1913 statute, married taxpayers could file separate or joint returns at their discretion. Families in which one spouse earned all the taxable income filed

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26. *See* W. ELLIOT BROWNLEE, FEDERAL TAXATION IN AMERICA: A SHORT HISTORY 36–46 (1996).

27. Revenue Act of 1913, ch. 16, 38 Stat. 114, 166–68. The flat "normal" tax rate was assessed on taxable income above exemption levels and below an income ceiling of $20,000, while the graduated "surtax" rates were assessed on all taxable income above the ceiling. *Id*.

28. By comparison, since 1969, the federal income tax has contained four different rate schedules for individual taxpayers: married individuals filing joint returns and surviving spouses; heads of households; single individuals; and married individuals filing separate returns. 26 U.S.C. § 1 (2006).

29. *See generally* CORDELL HULL, 1 THE MEMOIRS OF CORDELL HULL 71 (1948) (primary author of the 1913 Revenue Act calling income tax "the one great equalizer of the tax burden and therefore a tremendous agency for the improvement of social conditions"); ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861–1913 (1993) (arguing wealthy Americans and business groups supported the progressive income tax to stave off more radical calls for industrial democracy); Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive-Era Economists and the Intellectual Foundations of the U.S. Income Tax*, 52 UCLA L. REV. 1793 (2005) (exploring historical shifts in legal and economic thought among academic economists that justified redistributive, ability to pay taxation); Ajay K. Mehrotra, *"Render Unto Caesar . . .": Religion/Ethics, Expertise, and the Historical Underpinnings of the Modern American Tax System*, 40 LOY. U. CHI. L.J. 321, 328–33, 345–65 (2009) (examining role of "ethical political economists" in the religious and social justice foundations of the federal income tax).

30. All inflation-adjusted figures are derived from the "CPI Calculator" maintained by the Bureau of Labor Statistics, Databases, Tables & Calculators by Subject, BUREAU OF LABOR STATISTICS, http://www.bls.gov/data/inflation_calculator.htm.

31. The top marginal rate of 7% began at $500,000, unadjusted. *Supra* note 27.

32. W. Elliot Brownlee, *Historical Perspective on U.S. Tax Policy Toward the Rich*, *in* DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 29, 41–42 (Joel B. Slemrod ed., 2000).

joint returns, while families with two earners filed either jointly or separately. Separate filing produced tax benefits because the statute allocated a higher exemption to spouses remitting taxes on separate returns versus joint returns. When filing separately, each spouse was allowed one personal exemption of $3000, while one of the spouses received an additional $1000 exemption reserved for married taxpayers, resulting in a total exemption of $7000.[33] If the spouses aggregated family income on a single return, the statute only exempted $4000 from income.[34] Thus, if a couple's income exceeded $4000, it paid higher taxes based simply on whether they filed separately or jointly.

The potential tax saving associated with filing separately remained small in the early years of the federal income tax due to low tax rates. The additional $3000 exemption for couples filing separately saved taxpayers with $7000 in taxable income just $30 because the extra $3000 in income would otherwise be subject to a tax rate of only 1%. Even taxpayers at the highest income levels, subject to the top marginal rate of 7%, paid just $210 more on $3000 of income if they filed jointly rather than separately. And since these taxpayers would have to report exceedingly high incomes ($500,000 unadjusted, $11 million adjusted) to be subject to the full $210 "penalty," it was unlikely that filing jointly would motivate them to seek tax avoidance devices.

The number of separate returns comprised only a fraction of all returns among married taxpayers in the early years of the income tax. In 1919, only 58,500 spouses out of 2.9 million married taxpayers (i.e., 2%) filed separate returns.[35] This figure is significantly lower than the number of married couples statistically eligible to file separately. In 1920, 9% of wives participated in the paid labor force,[36] a participation rate that economic historians recognize as significantly under-representing the number of working women.[37] Even white married women, the female cohort with the highest levels of family income and the most to gain from separate filing, achieved a participation rate of 6.5%.[38]

The low number of separate filers relative to the percentage of families with two incomes may have reflected taxpayers' confusion over the new income tax. We know that the government had yet to work out the kinks in applying separate versus joint filing. In a study on the early years of the federal income tax, the Bureau of Internal Revenue (BIR), predecessor to the Internal Revenue Service, acknowledged that it struggled with "the baffling problem of whether the income of husbands and wives living together should be viewed as a unit or as separate

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33. Revenue Act of 1913, ch. 16, 38 Stat. 114, 168.

34. *Id.*

35. Miss Coyle, *Joint Returns of Income of Husbands and Wives* (Apr. 15, 1941) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Record Group 56, Box 54), *available at* http://taxhistory.tax.org/Civilization/Documents/marriage /hst28695/28695-7.htm.

36. Claudia Goldin, *The Gender Gap in Historical Perspective*, *in* QUANTITY & QUIDDITY: ESSAYS IN U.S. ECONOMIC HISTORY 135, 142 (Peter Kilby ed., 1987).

37. *See* CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN 43–46 (1990) (identifying biases in early Census procedures dampening reported female labor force participation).

38. Goldin, *supra* note 36, at 142.

incomes regardless of whether they chose to make joint or separate returns."[39] Levying surtaxes created special confusion. If a married couple filed a joint return, the BIR almost always accepted the couple's reporting position and assessed graduated surtaxes on aggregate family income.[40] If a couple filed separate returns, however, the agency often rejected the couple's reporting position, and assessed surtaxes on aggregate income as if the couple had filed jointly in the first place. The policy "did not seem to derive from any clear conception" of how to tax married versus single taxpayers, but simply because it was "more convenient in some instances."[41] Taxpayers, too, may have preferred filing jointly rather than separately for the convenience.[42] So long as rates remained low and exemptions high, there was little economic incentive to divide income on separate returns.

World War I changed everything. The Wilson administration relied heavily on the income tax to prosecute the war.[43] In the process, it made paying taxes considerably more painful for wealthy Americans. The Revenue Act of 1916 more than doubled existing rates, raising the top marginal rate from 7% to 15%,[44] while preserving the personal exemption levels.[45] The statute also provided a graduated

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39. Louis Shere, *Tax Revision 1937—Project No. 3, Miscellaneous and Administrative Tax Changes*, 4–5 (Nov. 19, 1937) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/36.1).

40. *But see infra* note 42.

41. Shere, *supra* note 39. The policy seemed to conflict with official Treasury guidance. *See* T.D. 2090, 16 Treas. Dec. Int. Rev. 259, 268 (1914) (instructing revenue agents to aggregate income "for the purpose of the *normal tax only*. The additional, or surtax, imposed by the act will be computed on the basis of the separate income of each individual." (emphasis in original)); *see also* T.D. 2137, 17 Treas. Dec. Int. Rev. 48, 49 (1915).

42. For this reason, the BIR attempted to glean married taxpayers' intent when examining joint returns. The Treasury instructed its revenue agents:

> Where husband and wife clearly indicate on a single return form the net income of each, such a return does not necessarily constitute a joint return. It is a matter of intent. Having separated their respective incomes, in the absence of a showing to the contrary the presumption is that they intended to file separate returns of income, but that for convenience they have used one form. In such case both the normal and surtax should be computed on the separate income of each. This presumption is, however, overcome if the tax has been computed by the taxpayer on the combined net income; in which case, even though their incomes have been separated and can be identified, the return is held to be a joint return, and both the normal and surtax should be assessed on the basis of combined net income.

O.D. 960, 4 C.B. 255 (1921); *see also* O.D. 881, 4 C.B. 254 (1921) (allocating wartime excess profits tax exemption between spouses); O.D. 909, 4 C.B. 254 (1921) (allocating deductions between spouses in community property states versus common law states); T.D. 3110, 4 C.B. 255 (1921) (allocating income of minor children).

43. For the federal income tax during World War I, see W. Elliot Brownlee, *Economists and the Formation of the Modern Tax System in the United States: The World War I Crisis*, *in* THE STATE AND ECONOMIC KNOWLEDGE: THE AMERICAN AND BRITISH EXPERIENCES 401, 406–07 (Mary O. Furner & Barry Supple eds., 1990).

44. Revenue Act of 1916, ch. 463, 39 Stat. 756, 756–57.

45. *Id.* at 761.

tax on estates exceeding $50,000 ($1 million adjusted) with a top rate of 10% on estates above $5,000,000[46] ($100 million adjusted).

High-income taxpayers charged the Wilson administration with pursuing a "soak-the-rich" program.[47] They were right. In 1917, Congress gave the administration what it wanted, raising rates across the board, more than quadrupling the top marginal rate from 15% to 67%, and exposing lower levels of income to significantly higher taxes.[48] In addition, it reduced personal exemption levels for individuals as well as married taxpayers,[49] creating more than 100,000 new income taxpayers. Despite lower exemptions, the levy remained a class-based tax, affecting only 15% of all households.[50] The richest 1% of Americans, moreover, accounted for 80% of federal income tax receipts in 1918 and were subject to effective tax rates (i.e., including exemptions and deductions) exceeding 15%, up from 3% in 1916.[51] The Revenue Act of 1918 raised rates again, such that by war's end, personal income tax rates ranged between 12% and 77%,[52] while estate tax rates reached 25%.[53]

In five short years, the income tax was transformed from a "rather tentative" revenue instrument into "the foremost instrument of federal taxation."[54] It went from imposing a modest 1% tax of $200 on taxable income of $20,000 to subjecting that income to ten different tax rates, ranging from 12% to 21%, for a total tax of $3,300, a jump of more than 1,600%.[55] Increases at higher income levels were equally staggering. On $100,000 of income, a taxpayer paid $2,500 in 1915 and $36,500 in 1918, while at $1,000,000, he paid $60,050 in 1915 and $704,530 in 1918.[56]

Very quickly, taxpayers faced significant economic incentives to seek tax avoidance. Some of the early techniques included gifts of income and property (during both life and at death), joint ownership of property, assignments of income and property, family partnerships, and a multiplying array of trusts. For taxpaying husbands and wives, opportunities to shift taxable income and property within the family unit abounded, and increased exponentially in the presence of children. The simple act of filing separately rather than jointly could produce significant tax savings. In 1918, a husband and wife with $100,000 of taxable income filing two separate returns of $50,000 paid $12,000 on each return for a total tax bill of

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46. *Id.* at 777–80.

47. The term "soak-the-rich" taxation was used widely in the United States to describe progressive taxation. *See* Brownlee, *supra* note 32, at 44 n. 27.

48. Revenue Act of 1917, ch. 63, 40 Stat. 300, 300–01.

49. *Id.* at 301.

50. Brownlee, *supra* note 32, at 44.

51. *Id.* These figures do not account for the incidence of the corporate income tax, which would raise effective rates.

52. Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1062–64.

53. *Id.* at 1096–97.

54. Brownlee, *supra* note 32, at 44.

55. Between 1913 and 1915, the first $20,000 of taxable income was subject to a single rate of 1%. *See* Revenue Act of 1913, ch. 16, 38 Stat. 114, 166; Revenue Act of 1918, 40 Stat. at 1062–64.

56. Calculated using sources cited *supra* note 55.

$24,000. If the same couple filed jointly, it owed $36,500 with the last $50,000 of income subject to marginal rates ranging from 36% to 64%, resulting in a tax penalty of $12,500 and a tax bill more than 50% higher. The discrepancy was even greater if the couple could split its income not just twice, but three, four, or six times by also shifting income to other family members.

Tax authorities and policy makers were acutely aware of these opportunities, and began to track and quantify the tax avoidance. "Taxpayers on large incomes and businesses are finding a hundred different methods of legally reducing their obligations to the Government," Treasury Secretary Andrew Mellon reported.[57] Wartime surtaxes had "greatly stimulated avoidance, not to say, evasion of the tax," concluded economist Thomas Adams, chair of the Treasury's Tax Advisory Board.[58] "Revenues have been falling off, particularly the collections from richer taxpayers."[59] In fact, Adams found that taxpayers with incomes over $100,000 reported net income of $1.6 billion in 1917, but only $600 million in 1920.[60] Part of the falloff was due to reductions in rates and increases in the personal and dependency exemptions.[61] But most of the reduction was attributable to high-income taxpayers incorporating personal property, disposing of income and property through gifts, and shifting investments from taxable to tax-free securities. Adams was particularly critical of tax avoidance through gifting. He railed that "rich men have recently divided their property by gift, conveying it usually to members of the family and so dividing the former income into several parts."[62]

Adams likened the harmful practice of gifting among family members to married couples in community property states who divided family income in half on two separate tax returns. "Practically the same result," Adams noted, "is reached in a number of southern and western states by the community-property laws which bring about a division of the ordinary family income."[63] Both practices were "major evils" that the government could remedy "rather easily."[64] "Gifts could be made subject to the income or estate tax,"[65] and Congress could tax the donor at the time of transfer on appreciated property or require the donee to assume the donor's basis.[66] With respect to the "community-property problem," Congress could prohibit separate filing and require all married couples to combine family income for tax purposes.[67] Adams commented favorably on the Wisconsin state income tax statute, which required husbands and wives to aggregate taxable income and

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57. 65 CONG. REC. 8095 (1924) (statement of Sen. Walsh, quoting Treasury Secretary Mellon).

58. Thomas S. Adams, *Fundamental Problems of Federal Income Taxation*, 35 Q. J. ECON. 527, 528 (1921).

59. *Id.*

60. *Id.*

61. *See* Revenue Act of 1921, ch. 136, 42 Stat. 227, 233, 243.

62. Adams, *supra* note 58, at 533.

63. *Id.* at 533–34.

64. *Id.* at 534.

65. *Id.* at 534. In 1924, Congress enacted a gift tax to curb avoidance through inter vivos transfers. *See* Revenue Act of 1924, ch. 234, 43 Stat. 253, 313–16 (1924).

66. Adams, *supra* note 58, at 534.

67. *Id.*

property on a joint return.[68] He recommended that Congress take "action along these lines,"[69] a position also advocated by Secretary Mellon.[70] Permitting spouses in community property states to file separate returns reflecting half the family income represented one of the "deeper defects"[71] of the income tax and threatened the levy's revenue capacity.

As part of its crackdown on family tax avoidance, the Treasury persuaded Congress to revise the personal exemptions by allocating a single exemption to husbands and wives whether filing jointly or separately. Under prior law, spouses filing jointly took the exemption for married couples, while husbands and wives filing separately were allowed one exemption for married couples and another for single individuals. Beginning in 1918, spouses were allocated the same total exemption no matter how they filed.[72]

The most lucrative tax avoidance opportunities remained available to married couples despite Treasury's best efforts. Husbands and wives could avoid the sting of steeply progressive rates by dividing family income on separate returns. They accomplished income shifting in a variety of ways, including through gifts of income and property, family trusts, joint ownership of property, assignments of income and property, and family partnerships. Married couples living in a minority of states enjoyed additional income-splitting opportunities by virtue of their property law regimes. The eight states that operated under community property law treated income and property acquired during marriage as presumptively owned equally between husband and wife.[73] Thus, under general property law precepts, marital income and property was already split in half such that, for purposes of reporting federal tax liability, a community property married couple could file two separate returns each reflecting exactly half the family's taxable income. If the Treasury Department wanted to eliminate this form of tax saving, it would have to abolish separate returns and require compulsory joint filing. In so doing, it would have to challenge determinations of property ownership and the nature of spouses' interests in marital partnerships, a determination that had traditionally been the exclusive province of state governments.

II. THE NATURE OF SPOUSES' INTEREST IN MARITAL INCOME AND PROPERTY

Under traditional common law, marriage resulted in a unified rather than a shared property interest with nearly all incidents of ownership and control located in the husband. The reality was not far from Blackstone's aphorism that the act of marriage consolidated the spouses' otherwise individual interests into a single unity—the husband.[74] Upon marriage, a wife's personalty merged with that of her

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68. *Id.*

69. *Id.*

70. *See infra* notes 202–03 and accompanying text.

71. Adams, *supra* note 58, at 528.

72. Revenue Act of 1917, ch. 63, 40 Stat. 300, 301.

73. The eight states included Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. The other forty states operated under common law. Alaska and Hawaii would not become states until 1959.

74. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives'*

husband such that all her personal property—including clothes, jewelry, furniture—were owned by her spouse, whose power over them was absolute. He could literally sell the clothes off her back. And while she did not necessarily lose rights in her real property upon marriage, a married woman lost the ability to manage and control her realty. Her list of disabilities under the common law was long: she could neither enter into nor enforce a contract, neither file lawsuits nor be sued in her own name, and she was prohibited from executing wills, holding property in her name, controlling her earnings (both in market and home production), or enjoying any rights in income, crops, or manufactured goods flowing from her realty. And although some early colonial statutes extended rights to married women, none of them seriously challenged traditional marital status under coverture.[75]

Over the course of the nineteenth century, traditional common law underwent a revolution. Beginning in the 1830s, states adopted married women's property statutes that chipped away at common law marital precepts by providing wives legal rights independent of husbands.[76] The first wave of statutes protected certain kinds of property that married women brought into marriage from their husbands and their husband's creditors.[77] Later statutes granted married women additional

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Rights to Earnings, 1860–1930, 82 GEO. L.J. 2127, 2127 (1994) ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything." (emphasis in original) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *442)).

75. *See, e.g.*, NORMA BASCH, IN THE EYES OF THE LAW: MARRIED WOMEN'S PROPERTY RIGHTS IN NINETEENTH-CENTURY NEW YORK 15–112 (1979); JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 80–124 (1991); ELIZABETH BOWLES WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800–1861, at 1–136 (1987); Richard H. Chused, *Married Women's Property Law, 1800–1850*, 71 GEO. L.J. 1359, 1384–97 (1983).

76. Most scholars identify Mississippi as the first state to enact a married woman's property act. The statute provided wives limited property rights, largely in connection with protecting from her husband's creditors any slaves she brought into marriage. *See* Sandra Moncrief, *The Mississippi Married Women's Property Act of 1839*, 47 J. MISS. HIST. 110 (1985). Four years before enactment of the Mississippi statute, the territorial legislature in Arkansas adopted a law protecting a wife's property from her husband's debts. *See* WARBASSE, *supra* note 75, at 159; Chused, *supra* note 75, at 1399.

77. *See, e.g.*, PEGGY A. RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION (1980) (finding statutory changes in women's legal status were motivated by fathers' desire to protect their daughters' inheritance from husbands and husbands' creditors); WARBASSE, *supra* note 75, at 160 (concluding "legislators appear to have been primarily concerned with keeping the wife's property from being taken for the husband's debts" and "were really seeking to protect planters from financial disaster as much as to defend married women's rights"); Linda E. Speth, *The Married Women's Property Acts, 1839–1865: Reform, Reaction, or Revolution?*, *in* 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 69, 74 (D. Kelly Weisberg ed., 1982) ("By leaving the husband with the common-law right of management and control of his wife's property, yet preventing that property from being seized for his debts, the early married women's property acts left the husband in a better position to withstand the hazards of the nineteenth-century economy."); Chused, *supra* note 75, at 1361, 1400–04 (arguing economic panic of the 1830s prompted "legislatures to codify a portion of the equitable separate estate tradition by

separate ownership interests in property, such as the ability to manage and control personal and real property acquired prior to marriage and by gift, inheritance, or bequest; to enjoy the profits from that property; to will, sell, or otherwise convey property to third parties; to control their own wages; to establish separate estates; and to have access to their deceased husband's personal property.[78] Scholars have shown that the statutory changes neither "fully emancipate[d] wives from the common law of marital status"[79] nor reified legal patriarchy.[80] The truth lies somewhere in between. Given prevailing gender norms, statutory reforms to traditional common law never embraced equality between the sexes or shared ownership principles.[81] Instead, they granted married women limited legal rights to separate property and earnings that may have hardened rather than softened

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insulating wives' property from their spouses' creditors"). *Contra* Carole Shammas, *Re-Assessing the Married Women's Property Acts*, 6 J. WOMEN'S HIST. 9, 24 (1994) ("In all the acts, pre-1848 and post, the common concern was for the fate of the woman's patrimony, not for male bankrupts.").

78. *See, e.g.*, HOFF, *supra* note 75, at 117–35 (Hoff outlines six phases of women's property law reform on page 128.); B. Zorina Kahn, *Married Women's Property Laws and Female Commercial Activity: Evidence from United States Patent Records, 1790–1895*, 56 J. ECON. HIST. 356, 360–65 (1996) (identifying three waves of women's property law reform).

79. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L. J. 2127, 2127 (1994); *see also* BASCH, *supra* note 75, at 4 (concluding that "[f]ull legal equality for married women loomed as a threat to the entire economic structure"); Richard H. Chused, *Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3, 5 (1985) (reporting a "*loss* of special status for property owned by married women" in Oregon (emphasis in original)); Chused, *supra* note 75, at 1361–62 (concluding married women's acts "did not legitimate any radical shifts in the economic status of women" and "confirmed rather than confronted prevailing domestic roles of married women"); Michael Dougan, *The Arkansas Married Women's Property Law*, 46 ARK. HIST. Q. 3 (1987) (finding restrictive judicial interpretation of married women's property laws in Arkansas); Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471 (1988) (examining limitations of later earnings statutes on women's claim to wages); Sara L. Zeigler, *Uniformity and Conformity: Regionalism and the Adjudication of the Married Women's Property Acts*, 28 POLITY 467, 469–70 (1996) (finding "judicial intransigence" and strict common law principles "guaranteed the ancient protections and disabilities of wives and limited the legislatures' ability to remove those disabilities and protections").

80. *See, e.g.*, Kahn, *supra* note 78 (finding statutes encouraged wives' entrepreneurialism as measured by the filing of federal patents); Shammas, *supra* note 77, at 15, 23 ("When viewed from the perspective of the early American period . . . the acts appear to be a more important turning point in female status" and paved the way for women "to make some decisions about their and their family's own consumption, investments, and wealth transmission.").

81. *See* Donna C. Schuele, *Community Property Law and the Politics of Married Women's Rights in Nineteenth-Century California*, 7 WEST. L. HIST. 245, 266 (1994) (under reformed common law "any discussion of equal treatment had to proceed from that system's gendered, individualistic notions"); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1116 (1994) (describing failed efforts to "empower[] economically productive women to participate equally with men in managing assets both had helped to accumulate").

traditional gender roles, with the wife responsible for home production and the husband responsible for market production.[82]

While reformed common law emphasized spouses' separate interests, community property law presumed shared interests in common property.[83] Community property law in the United States was patterned primarily off the Spanish system of marital property[84] and recognized both common and separate property.[85] All property acquired during marriage (unless acquired by gift, bequest, devise, or descent) was presumptively common property and was shared equally by husband and wife regardless of which spouse "earned" the property in the traditional market sense. Indeed, according to commentators at the time, "[t]he single common element" present in all community property statutes "is the notion of co-ownership, and it is submitted that husband and wife may best be considered as co-owners of the community property and as such to have 'equal' interests therein."[86] All "proprietary interests of the spouses are not merely united but unified; not mixed or blent, but identical."[87] Under community property law, "dependence of the wife" gave way to "conjugal interdependence."[88]

During marriage, the husband acted as manager of the common property for the benefit of the community.[89] His management powers, however, did not entitle him to a larger share of the marital partnership, and the nonmanaging wife had the right to disturb her husband's management in the event he shirked his obligations to the

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82. *See, e.g.*, Siegel, *supra* note 79, at 2131 (describing how the "movement for egalitarian law reform . . . work[ed] to modernize and so naturalize an antiquated body of status law").

83. *See, e.g.*, WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY (2d ed. 1971); WILLIAM A. REPPY, JR. & WILLIAM Q. DE FUNIAK, COMMUNITY PROPERTY IN THE UNITED STATES (1975). Traditional common law shared with community property law an emphasis on unity of interest. But while the unity under traditional common law was contained within the husband, the unity under civil law was shared under the marital partnership in which each spouse possessed equal property interests. *See, e.g.*, Susan Westerberg Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849–1975*, 24 UCLA L. REV. 1, 6–7 (1976).

84. The only potential outlier is Louisiana. Scholars debate the origins of Louisiana community property law and whether it originated from French or Spanish law. *See, e.g.*, Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971); Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972). While Louisiana property law contains elements of both systems, its most salient provisions derive from Spanish law. *See, e.g.*, HARRIET SPILLER DAGGETT, THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 6 (1945).

85. For Spanish civil law, see DE FUNIAK & VAUGHN, *supra* note 83, at 126–29; RICHARD A. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OR GANANCIAL SYSTEM § 5 (1895).

86. M.R. Kirkwood, *The Ownership of Community Property in California*, 7 S. CAL. L. REV. 1, 16 (1933).

87. Alvin E. Evans, *The Ownership of Community Property*, 35 HARV. L. REV. 47, 65 (1921) (emphasis omitted).

88. *Id.* at 67.

89. *See infra* notes 103–12 and accompanying text.

community.[90] Spouses managed their own separate property during marriage, not because of any influence of common law ownership principles, but because separate property was deemed to be acquired by "lucrative" sources of gratuitous transfer rather than through "onerous" activity for the benefit of the community.[91]

Though co-ownership undergirded community property law in the United States, the eight community property regimes reflected variations of shared ownership. In particular, each state differed in important respects as to the nature of the wife's interest in common property.

Washington practiced the purest form of community property, reflecting strong partnership and equality principles.[92] The husband and wife formed a single entity under Washington law,[93] and the entity (rather than one or both spouses) owned all community property in which husband and wife enjoyed equal rights and interests.[94] The Washington statute made the husband the managing agent of the marital entity, but his absolute power of disposition over the entity's property did not create in him a larger ownership share.[95]

In Arizona, Idaho, Nevada, and New Mexico, the community property statutes emphasized equality of interests between spouses rather than the partnership model. Instead of the marital entity owning common property, husband and wife owned an undivided, indivisible, vested one-half of the community as individuals. It did not matter which spouse held record title in the property.[96] Thus, upon the death of either spouse, the surviving member of the community took one-half of community income and property by right of survivorship rather than by right of succession and

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90. *See infra* notes 103–12 and accompanying text; *see also* Evans, *supra* note 87, at 65 ("Management and disposition may be vested in one or both, but that does not affect the proprietary interests."); Kirkwood, *supra* note 86, at 16 (stating that "the superior powers of management vested in the husband are to be looked upon . . . as held by him in a representative, rather than a proprietary, capacity").

91. *See* DE FUNIAK & VAUGHN, *supra* note 83, at 126–29; REPPY & DE FUNIAK, *supra* note 83, at 129.

92. *See, e.g.*, Holyoke v. Jackson, 3 P. 841, 841–42 (Wash. 1882) (describing the "legal community" of husband and wife as "a partnership, in that some property coming from or through one or other or both of the individuals forms for both a common stock, which bears the losses and receives the profits of its management, and which is liable for individual debts" (emphasis omitted in first quotation)).

93. *See, e.g.*, Ostheller v. Spokane & I. E. R. Co., 182 P. 630 (Wash. 1919); Wasmund v. Wasmund, 156 P. 3 (Wash. 1916); Miller v. Maddocks, 107 P. 1036 (Wash. 1910); Stockand v. Bartlett, 31 P. 24 (Wash. 1892).

94. *See, e.g.*, *Ostheller*, 182 P. at 633; Marston v. Rue, 159 P. 111 (Wash. 1916); Mabie v. Whittaker, 39 P. 172 (Wash. 1895); *Holyoke*, 3 P. at 841.

95. *See, e.g.*, *Holyoke*, 3 P. at 842 ("Management and disposition may be vested in either one or both" spouses, and "[i]f in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community.").

96. *See, e.g.*, La Tourette v. La Tourette, 137 P. 426, 429 (Ariz. 1914); Ewald v. Hufton, 173 P. 247 (Idaho 1918); *In re* Williams' Estate, 161 P. 40 741 (Nev. 1916); Beals v. Ares, 185 P. 780 (N.M. 1919).

paid state inheritance tax or federal estate tax, if any, on the portion that passed under the deceased spouse's will or by intestacy.[97]

Texas and Louisiana practiced yet another brand of community property.[98] In these states, the husband held legal title to community income and property, but the interests of the spouses were beneficially equal. The wife's interest was vested, but it was equitable rather than legal.[99] Moreover, if record title to community property was in the wife's name, the law considered her the legal owner rather than the husband.[100] In either case, whoever enjoyed legal title held the property as well as the other spouse's interest in the property as trustee.[101] Thus either spouse, as trustee for the community, could convey good title to a bona fide purchaser even in fraud of the other member of the community.[102]

Not all community property laws were created equal. But California's was the most conspicuous outlier. Unlike the other seven community property regimes, California law embodied reformed common law principles of *separate* interests more than community property law principles of *shared* interests.[103] It protected the wife by giving her the right to manage her own separate property and to prevent her husband from mismanaging her contingent interests in the community. But it did not make her an immediate co-owner. Because her interests ripened only upon termination of the marriage by death or divorce, the wife resembled an expectant heir rather than an equal partner during the existence of the marriage.

To complicate matters, California community property law suffered from statutory and judicial schizophrenia. By statute, the husband was granted "absolute ownership" of all community income and property,[104] which he was free to manage and control "with the like absolute power of disposition as of his own separate

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97. *See, e.g.*, Kohny v. Dunbar, 121 P. 544 (Idaho 1912). By statute, the surviving spouse was heir to the predeceasing spouse. In the event the husband predeceased the wife, her vested interest was freed from the limited control that he exercised over it during marriage.

98. Commentators at the time noted that although Louisiana community property law contained aspects of several U.S. community property regimes, it most closely resembled that of Texas. *See* Evans, *supra* note 87, at 63.

99. *See* Burnham v. Hardy Oil Co., 195 S.W. 1139 (Tex. 1917).

100. *See* Mitchell v. Schofield, 171 S.W. 1121 (Tex. 1915); Houston Oil Co. v. Choate, 232 S.W. 285 (Tex. Comm'n App. 1921).

101. Compare this to the treatment under California law, where the husband was considered the legal rather than the equitable owner of property even if property was held solely in the wife's name. *See* Mitchell v. Moses, 117 P. 685 (Cal. Ct. App. 1911).

102. *See, e.g.*, Edwards v. Brown, 4 S.W. 380 (Tex. 1887); Zimpelman v. Robb, 53 Tex. 274 (1880); Johnson v. Masterson Irr. Co., 217 S.W. 407 (Tex. Civ. App. 1919).

103. Susan Prager has documented the "constant tension" in California's community property law "between reformed common law and community property philosophies." Prager, *supra* note 83, at 1. Between 1850 and 1891, Prager reports that California community property law functioned "closely akin to that of a common law state which had adopted a married women's property act. . . . As the husband came to be thought of as full and complete owner of the community property, the wife's earnings began to be treated as if they were her separate property." *Id.* at 46.

104. CAL. CIV. CODE § 172 (approved Mar. 21, 1872).

estate."[105] Yet his absolute ownership did not allow him to defraud his wife of her interest in the community, which, again, only ripened upon dissolution of the marriage.[106] If she were merely an expectant heir, with no interest in the community,[107] how could she also be said to circumscribe her husband's management of property that by statute he owned absolutely? How, for example, could she prevent him from assigning her contributions to community income?[108] Or stop him from conveying, selling, leasing, or encumbering the community's real property?[109] Or from conveying or encumbering household items without her written consent?[110] Or from making a gift of community property without valuable consideration or her written consent?[111] The same statutory framework that granted the husband absolute ownership of community property and that removed from the wife all present interest in the community also provided the wife immediate interests and negative rights that materially qualified the husband's dominion.[112]

Not surprisingly, California courts rendered decisions reflecting the statutory contradictions. Charged with determining the nature of the wife's interest in community property, one line of California Supreme Court cases held that the wife possessed a "mere expectancy" interest,[113] while another held she possessed an

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105. Act of April 17, 1850, ch. 103, § 9, 1850 Cal. Stat. 254.

106. *See, e.g.*, Lord v. Hough, 43 Cal. 581, 585 (1872); Payne v. Payne, 18 Cal. 291, 301 (1861); Scott v. Ward, 13 Cal. 458, 469 (1859); Beard v. Knox, 5 Cal. 252, 256 (1855).

107. *See* CAL. CIV. CODE § 700 (approved Mar. 21, 1872).

108. *See* Act of June 7, 1913, ch. 287, 1913 Cal. Stat. 537 (invalidating assignments of wages or salary of either spouse absent written consent).

109. *See* Act of May 23, 1917, ch. 583, 1917 Cal. Stat. 829–30 (adopting § 172a).

110. *See* Act of March 23, 1901, ch. CXC, 1901 Cal. Stat. 598.

111. Act of March 31, 1891, ch. 220, 1891 Cal. Stat. 425 (restricting husband's absolute management and control of community property).

112. One might even say that the statute provided the wife present and equal ownership interests in community property. *See* CAL. CIV. CODE § 682 (West 2007) (enacted in 1872) ("The ownership of property by several persons is either: 1. Of joint interests; 2. Of partnership interests; 3. Of interests in common; 4. Of community interest of husband and wife."). Inexplicably, California courts relied infrequently on this statute to deny the wife a present interest in the community. *See, e.g.*, Moore v. Neighbours, 273 P. 36, 36 (Cal. Ct. App. 1928) (statute defined "community interest of husband and wife" as implying co-ownership, but married women received co-ownership only upon dissolution of the marriage by death or divorce).

113. *See* Roberts v. Wehmeyer, 218 P. 22, 27 (Cal.1923) (wife possesses no existing ownership in the community); Spreckels v. Spreckels, 158 P. 537, 539 (Cal. 1916) ("heir"); Cunha v. Hughes, 54 P. 535, 535 (Cal. 1898) ("by succession" rather than as survivor); Sharp v. Loupe, 52 P. 134, 136 (Cal. 1898) (wife taking interest in the community not as survivor or co-owner but as "heir"); Spreckels v. Spreckels, 48 P. 228, 231 (Cal. 1897) ("mere expectancy"); *In re* Estate of Burdick, 44 P. 734, 735 (Cal. 1896) (finding wife takes interest in community property by succession rather than right of survivorship due to "mere expectancy" interest); *In re* Roland's Estate, 16 P. 315, 316–17 (Cal. 1888) (finding "*estate in expectancy* of the wife in the community property is dependent upon her survivorship; and in the event of her death before her husband, it is deemed never to have existed." (emphasis in original)); Packard v. Arellanes, 17 Cal. 525, 538 (1861) ("mere expectancy"); Van Maren v. Johnson, 15 Cal. 308, 311 (1860) (holding "interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor").

"existing, vested" interest.[114] The statutes were not solely to blame for the disparate though parallel holdings. Judges reared in the common law tradition awkwardly grafted foreign property law concepts onto California's civil law system, resulting in imperfect analogies and inconsistent rulings.[115] These jurists were slow to confer equal authority on law developed by legislative grace rather than by judicial deliberation and precedent.[116] They were slower still, to embrace a property law

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114. *See In re* Brix's Estate, 186 P. 135, 138 (Cal. 1919) (finding wife could "be awarded . . . the whole" of community property upon husband's death, her half plus his); *In re* Rossi's Estate, 146 P. 430, 431 (Cal. 1915) (wife takes possession of her interest "by virtue of survivorship"); Dirs. of Fallbrook Dist. v. Abila, 39 P. 794, 795–96 (Cal. 1895) (wife's interest "no doubt, more tangible" than the right of an expectant heir); King v. Lagrange, 50 Cal. 328, 333 (1875) (wife takes possession of her interest as "survivor"); De Godey v. Godey, 39 Cal. 157, 164 (1870) (stating community property "belongs to the matrimonial community, and not less to the wife than to the husband"); Galland v. Galland, 38 Cal. 265, 271 (1869) (finding wife possessed "a joint and equal interest with the husband in all property acquired during the marriage"); Payne v. Payne, 18 Cal. 291, 301 (1861) (wife possesses "undivided" interest in the community); Smith v. Smith, 12 Cal. 216, 225 (1859) (emphasizing wife's "half interest in the common property"); Meyer v. Kinzer, 12 Cal. 247, 251 (1859) (finding both spouses "possess[] an equal right to succeed to the property after dissolution"); *In re* Buchanan's Estate, 8 Cal. 507, 510 (1857) (holding property acquired during marriage "belonged to the community, and upon the death of the husband the widow took one half" as survivor); Beard v. Knox, 5 Cal. 252, 256 (1855) (finding spouses "jointly seized of the property," and wife's interest "present, definite, and certain").

115. *See* Cmty. Prop. in Cal.—Estate Tax, 34 Op. Att'y Gen. 395, 402 (1924) (attributing "confusion in the decisions of the California courts" to "the fact that the courts have been attempting, in their opinions, to apply the terminology of the common law to community property, which embodies a legal concept wholly foreign to the common law, and to which the terminology of the common law cannot be applied with accuracy and precision"); Robert G. Hooker, Jr., *Nature of Wife's Interest in Community Property in California*, 15 CALIF. L. REV. 302, 302 (1927) (attributing "confusion" to "minds trained to the common law"); William A. Reppy, Jr., *Retroactivity of the 1975 California Community Property Reforms*, 48 S. CAL. L. REV. 977, 1055–59 (1975) (exploring inability of common law trained lawyers to comprehend and embrace co-ownership under marital property law); Schuele, *supra* note 81, at 251 (describing "a strong allegiance to Anglo-American common law culture that was quite at odds with the prevailing legal culture"); J. Emmett Sebree, *Federal Taxation of Community Property*, 12 TEX. L. REV. 273, 275, 281 (1934) (stating "wife's interest is hard to define in terms of the common law and any theory which regards the interest of the spouses as 'equal, present and vested' is difficult to apply").

116. In the first U.S. Supreme Court case interpreting community property law, the Court acknowledged the difficulty in applying common law principles to civil law systems. In *Warburton v. White*, 176 U.S. 484, 497 (1900), involving Washington community property law, the majority wrote that, unlike common law, it was a "misconception" of the civil law system "to suppose that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband." The husband was given management and control over marital property "not because he was the exclusive owner, but because by law he was created the agent of community." *Id.* at 494. In *Arnett v. Reade*, 220 U.S. 311, 320 (1911), applying New Mexico law, Justice Holmes explained why courts may have viewed the husband as the sole owner of the community: "The notion may have been helped by the subjection of the woman to marital power . . . and in this country by confusion between the

system that conferred equal rights on married women and that replaced legal patriarchy with marital co-ownership.[117]

Divining a wife's property interests in California and elsewhere proved exceedingly difficult. In fact, the same court that termed a wife's interest "a mere expectancy" expressed in the same judicial term "no doubt" that upon a husband's death, the wife "took one undivided half of the common property in her own right by virtue of the community existing between herself and husband."[118] Heirs did not usually take by right of survivorship. No wonder the U.S. Attorney General,[119] the Treasury Department,[120] and members of Congress[121] found community property law difficult to understand. So did judges.

III. CO-OWNERSHIP AND THE TAX CONSEQUENCES OF COMMUNITY PROPERTY LAW

The federal government first examined the nature of a wife's interest under California community property law in 1920. As part of an effort to crack down on tax avoidance through income shifting arrangements, the Commissioner of Internal Revenue requested an opinion from the Attorney General on the federal tax treatment of income and property reported by spouses living in community property states. In particular, the Commissioner wanted to know, first, whether community property spouses, based on their ownership of community income and property, were permitted to make separate returns reflecting one-half the community income, and, second, whether the gross estate of a decedent spouse in community property states should include "one-half and only one-half of the community property of husband and wife domiciled therein" on the theory that the surviving spouse took the property as co-owner rather than heir.[122] The Treasury previously examined these questions with respect to Texas community property law and concluded that Texas spouses could render separate income tax returns reflecting one-half the community's income from earnings and property,[123] and, furthermore, that a surviving spouse in Texas could be taxed, if at all, on only one-half the gross estate of the decedent spouse, because she already owned the other

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practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like *domino*." *Id.* (emphasis in original).

117. Prager, *supra* note 83, at 34–39; Schuele, *supra* note 81, at 262 ("Legislators appear to have been unable to ignore their common-law heritage and may even have been hostile toward the property rights of married women.").

118. *Payne*, 18 Cal. at 301.

119. *See infra* notes 122–57 and accompanying text.

120. *See infra* notes 158–63, 201–07 and accompanying text.

121. *See infra* notes 170–200 and accompanying text.

122. Cmty. Prop.—Income and Estate Taxes, 32 Op. Att'y Gen. 435, 436 (1921); T.D. 3138, 4 C.B. 238 (1921).

123. Income Tax—Cmty. Prop., 32 Op. Att'y Gen. 298, 307–08 (1920); T.D. 3071, 3 C.B. 221 (1920). The opinion concluded that marriage in Texas was a "conjugal partnership[]," Income Tax—Cmty. Prop., 32 Op. Att'y Gen. 298, 303 (1920), in which "the earnings of the husband and wife belong to them jointly in equal shares," and where "the community interest attaches as soon as the right to the wages comes into existence," *id.* at 306.

half.[124] The Attorney General now sought to determine the federal tax treatment of married couples in the remaining seven community property states.

Ownership interest in income and property determined taxability of these couples, the Attorney General said,[125] and state property law would determine ownership.[126] As early as 1812, the U.S. Supreme Court was "clearly of opinion" that ownership of land "can be acquired and lost only in the manner prescribed by the law of the place where such land is situate[d]."[127] Moreover, the Court followed "a principle firmly established" that it must look to state law "for the rules which govern [property's] descent, alienation and transfer, and for the effect and construction of wills and other conveyances."[128] Also, where state courts "have interpreted state laws governing real property or controlling relations which are essentially of a domestic and state nature," the Supreme Court would "if it is possible to do so . . . adopt and follow the settled rule of construction affixed by the state court of last resort to the statutes of the State, and thus conform to the rule of property within the State."[129] As such, the government was careful to emphasize that it was conforming to longstanding practice and "adopt[ing] the rules laid down by the highest courts of the various States."[130]

The Attorney General examined each community property state in turn. In Washington, the wife possessed during "coverture" as well as upon dissolution of the marriage "a vested and definite interest and title in community property, equal in all respects to the interest and title of her husband."[131] In Arizona, wives also enjoyed "an equal interest" with husbands in community property.[132] According to the Arizona Supreme Court, the law "gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. Its policy plainly expressed is to give the wife in this marital community an equal dignity, and make her an equal factor in matrimonial gains."[133] The interest of the wife was "not a mere possibility—not the expectancy of an heir."[134] Similarly, the Attorney General found equal ownership interests in the marital communities of Idaho,[135] Louisiana,[136] New Mexico,[137] and Nevada.[138] Only in California did the wife suffer less than co-ownership in community property. Rather than viewing the wife as owner of the community, "the highest courts of that State" held that "during coverture the wife has no vested interest in the community property, her interest

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124. *See* T.D. 2450, 19 Treas. Dec. Int. Rev. 38 (1917).
125. *See* Cmty. Prop.—Income and Estate Taxes, 32 Op. Att'y Gen. 435, 462 (1921).
126. *Id.* at 461–62.
127. United States v. Crosby, 11 U.S. (7 Cranch) 115, 116 (1812).
128. De Vaughn v. Hutchinson, 165 U.S. 566, 570 (1897).
129. Warburton v. White, 176 U.S. 484, 496 (1900).
130. Cmty. Prop.—Income and Estate Taxes, 32 Op. Att'y Gen. 435, 462 (1921).
131. *Id.* at 454.
132. *Id.* at 438.
133. *Id.* (quoting La Tourette v. La Tourette, 137 P. 426, 428 (Ariz. 1914)).
134. *Id.* (quoting La Tourette v. La Tourette, 137 P. 426, 428 (Ariz. 1914)).
135. *Id* at 440.
136. *Id.* at 445.
137. *Id.* at 449.
138. *Id.* at 452.

therein being a mere expectancy."[139] Recent changes to the California statute, the opinion noted, did not alter the wife's unequal interest in community property.[140]

The Attorney General concluded that for married residents in all community property states except California, "the ownership in one-half of all community property vests in each spouse."[141] For federal income tax purposes, spouses in those states could file separate returns each reporting one-half the community income, and for federal estate tax purposes, only one-half of the community property should be included in the decedent's gross estate.[142] In other words, equal ownership under community property law was not a tax avoidance device.

A. The Treasury Department and California Tax "Evaders"

Subsequent events in California prompted the federal government to reconsider its 1921 ruling only a few years later. In 1923, the Treasury Department requested that the Attorney General reexamine the nature of a wife's interest in California as a result of recent amendments to the state's community property statute as well as judicial interpretations finding the wife's interest in the California community to be greater than a mere expectancy. The Attorney General conducted a careful review of the evolving California community property law from the 1849 constitution to the latest amendments of the codified statute.

Even just considering "the restrictions placed on the husband's control of community property" by recent statutory changes, the Attorney General found it "difficult to see how the judicial mind can conceive of his possessing the elements of absolute ownership over the community estate."[143] It was clear to the Attorney General that the husband's interest was "only qualified and partial."[144] One line of California decisions may have described the wife as an "heir expectant," but another "recognize[d] her property interest in community gains."[145] More importantly, the "heir expectant" line of cases got it wrong, according to the Attorney General, particularly given the "numerous amendments" to California's community property law since 1917 revealing "the intent of the legislature to protect what [those] California decision[s] had failed to recognize—the vested interest of the wife in community estate."[146]

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139. *Id.* at 456.

140. The Attorney General found that these amendments failed "to make so revolutionary a change in the existing rule of property in California as to devest [sic] the husband of his ownership in the community property" or "vest in the wife any interest thereto prior to the dissolution of the community." *Id.* at 458.

141. *See id.* at 462.

142. *Id.* at 463.

143. Cmty. Prop. in Cal.—Fed. Estate Tax, 34 Op. Att'y Gen. 376, 383–84 (1924); T.D. 3569, III-1 C.B. 91, 96 (1924).

144. Cmty. Prop. in Cal.—Fed. Estate Tax, 34 Op. Att'y Gen. 376, 385 (1924).

145. *Id.* at 379.

146. *Id.* The California community property statute was "clear, and plainly bottomed upon a recognition of a property interest in the wife." *Id.* at 385. Legal scholars agreed with this conclusion. *See, e.g.*, Hooker, *supra* note 115, at 308 ("If the wife can get half the community property on divorce; if she gets that half by operation of law where the decree

The "expectant heir" line of cases lost further precedential value in light of federal court decisions determining "the real nature of a wife's interest" in California.[147] In *Wardell v. Blum*, the Ninth Circuit held that a California widow, in the words of the Attorney General, "comes into possession of her half of the community property, not as his heir, but by virtue of her valid vested interest in the community estate."[148] The Ninth Circuit further held that recent changes to the California inheritance tax law reflected "manifestly . . . a clear statutory declaration that the wife's half of the community property is not part of the property of the deceased husband," and "even if the case was not controlled by the California statute . . . applying to it the rule of law announced by the Supreme Court of the United States . . . the result, it seems to us, must be the same," namely, "'[i]t is very plain that the wife has a greater interest than the mere possibility of an expectant heir.'"[149] The district court had condemned even more strongly the "expectant heir" line of cases. In finding the amendments to the inheritance tax law retroactive, the district court opined, "[I]f that act does not recognize in the wife a valid, subsisting, vested interest and estate in the community property during the life of the husband, language is without meaning and legislation without avail."[150]

Based on the *Blum* decision and a thorough review of California community property law, the Attorney General concluded that its 1921 opinion "can not stand."[151] It "must be modified to harmonize" with the *Blum* decision to reflect the "true rule" of law in California that the wife enjoys a greater interest in the community than a mere expectancy, which "clearly recognize[s] that the wife's half of community property is not a part of the property of the deceased husband."[152] The former opinion was thereby amended, approved by the Treasury Department, and incorporated into official field guidance for revenue agents around the country.[153] For both federal income and estate tax purposes, spouses in all eight community property states were deemed to own one-half community income and property and were thus permitted to file separate returns each reflecting half the community's gross income.

Demonstrably chagrined and desiring a different outcome, the Attorney General withdrew his opinion within two months for further consideration.[154] Several

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does not mention the property; if she can revoke a gift even as to specific property; can it be consistently said that she takes as an heir, as one who can be defeated by the merest whim of the ancestor? . . . An heir has nothing, but a wife has testamentary power."); Esmond Schapiro, *Status of Federal Income and Estate Taxes on Community Property in California*, 12 CALIF. L. REV. 99, 100–01 (1924) (arguing statutory changes left no doubt that the wife's interest in California community property was fully vested during marriage).

147. Cmty. Prop. in Cal.—Fed. Estate Tax, 34 Op. Att'y Gen. 376, 378 (1924).

148. *Id.*; *see also* Wardell v. Blum, 276 F. 226, 227–28 (9th Cir. 1921) (finding "wife of a decedent acquires upon his death one-half of the community property in her own right, and not as heir of her husband").

149. *Wardell*, 276 F. at 228–29 (last quote quoting Arnett v. Reade, 220 U.S. 311, 320 (1911)); *see also* Cmty. Prop. in Cal.—Fed. Estate Tax, 34 Op. Att'y Gen. 376, 377–78 (1924).

150. Blum v. Wardell, 270 F. 309, 314–15 (N.D. Cal. 1920).

151. Cmty. Prop. in Cal.—Fed. Estate Tax, 34 Op. Att'y Gen. 376, 378 (1924).

152. *Id.* at 378, 393 (emphasis omitted in last quote).

153. *See* T.D. 3568, III-1 C.B. 84 (1924).

154. T.D. 3596, III-1 C.B. 101 (1924).

months later he reaffirmed the earlier opinion, but with palpable reluctance. "I am constrained to reestablish and reaffirm that opinion," the Attorney General concluded.[155] After "a full review" and "a study of the situation presented by the California decisions including those handed down by the Supreme Court of California since the decision of *Blum v. Wardell*, and considering those principles which must govern the incidence of a Federal taxing statute upon a subject matter which is the creation of State law," the Attorney General was "unable to find those considerations which would . . . justify the Government in beginning anew in some other case, a juridical controversy which was litigated to a final conclusion . . . and in which the Government's position was fully presented."[156] The opinion was limited to the wife's interest under the federal estate tax, but "express[ed] no opinion with respect to the principles which govern the taxation of income derived from community property."[157]

Down but not out, the Treasury Department accepted the reaffirmed ruling with respect to the nature of a California wife's interest for purposes of the federal estate tax. At the same time, it received permission from the Attorney General to litigate the nature of the wife's interest for purposes of the federal income tax. In a document sent to all revenue agents, the Commissioner of Internal Revenue wrote, "It is the judgment of the Treasury that public interest requires a final determination of the right of the husband and wife each to return separately one-half of the community income."[158] The Commissioner expressed "grave doubt" as to the legality of the earlier Treasury decisions, because

> the husband has complete control of the community income and may dispose of it as he sees fit during his lifetime without the consent of his wife. It is obviously a somewhat strained construction to consider that the husband has received only one-half of his earnings for income tax purposes although he controls for practical purposes the whole.[159]

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155. Cmty. Prop. in Cal.—Estate Tax, 34 Op. Att'y Gen. 395, 405 (1924).

156. Cmty. Prop. in Cal.—Estate Tax, 34 Op. Att'y Gen. 395, 404–05 (1924). At the time of the Attorney General's opinion, and shortly after the *Blum* decision, two additional decisions had been handed down by the California Supreme Court. *See* Roberts v. Wehmeyer, 218 P. 22, 26 (Cal. 1923) (finding no retroactive effect to amended statute); Taylor v. Taylor, 218 P. 756 (Cal. 1923) (holding upon dissolution by divorce and without a property decree the wife becomes owner of one-half the community property as tenant in common with her husband). The Attorney General noted that the two decisions reflected the two disparate lines of cases in California, and that notwithstanding the federal court's final determination in *Blum*, "[i]f confusion existed before so far as the California decisions are concerned, it is now the more confounded." Cmty. Prop. in Cal.—Estate Tax, 34 Op. Att'y Gen. 395, 401 (1924).

157. *Id.* at 405. The qualified holding raised questions about the authority of guidance issued a few months earlier directing revenue agents to treat California spouses the same as other community property spouses for purposes of the federal income tax. *See* T.D. 3568, III-1 C.B. 84 (1924).

158. T.D. 3670, IV-1 C.B. 19, 19 (1925).

159. *Id.* The Commissioner was undeterred by contrary Supreme Court rulings, including *Warburton v. White*, 176 U.S. 484, 497 (1900) (calling it a "misconception . . . to suppose

The Commissioner was particularly concerned about the tax avoidance opportunities created by the "valuable privilege" of separate filing.[160] If California spouses prevailed in the courts and were found to have a right to file separate returns, the government would already owe significant tax refunds for previous years.[161] Such funds, the Commissioner was quick to point out, would come "out of the taxes collected from citizens of other States" who were unable to take advantage of this tax "privilege."[162] "In fairness to the country as a whole," the Treasury Department, in conjunction with the Attorney General, would seek to expedite a case to the Supreme Court for a final resolution.[163]

IV. THE LEGISLATIVE ATTACK AGAINST THE COMMUNITY PROPERTY TAX LOOPHOLE

The Treasury Department also lobbied Congress that community property law created unjustified tax inequities. The civil law system perpetrated geographic tax discrimination, according to the Treasury, by providing tax savings to a minority of husbands and wives in a handful of states. In 1921, the Treasury Department crafted a legislative proposal taxing all marital income to the spouse "having the management and control of the community property."[164] The plan targeted spouses in community property states and effectively prevented them from filing separate income tax returns while leaving married couples in common law states free to file separately or jointly.[165] As in its earlier rulings on the nature of a wife's interest in community property, the Treasury proceeded even though the Supreme Court had already ruled that "might" was not synonymous with "right."[166] The "marked advantage" enjoyed by married residents of community property states, the Senate Finance Committee wrote in its explanation of the Treasury proposal, was inequitable in any event[167] and had been condemned by both the Attorney General and the Treasury Department. "Income which in other States is taxed as a unit to the husband," the Finance Committee said, "is divided between husband and wife in States having community property laws, and the surtaxes are correspondingly

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that because power was vested in the husband to dispose of the community acquired during marriage, as if it were his own, therefore by law the community property belonged solely to the husband") and *Arnett v. Reade*, 220 U.S. 311, 320 (1911) (finding despite husband's management powers over community property during marriage, "it is very plain that the wife has a greater interest than the mere possibility of an expectant heir").

160. T.D. 3670, IV-1 C.B. 19, 20 (1925).

161. *Id.*

162. *Id.*

163. *Id.*

164. H.R. REP. NO. 67-350, at 11 (1921).

165. *See id.* at 13.

166. *See supra* note 159. The Treasury also ignored the recent ruling in *Blum v. Wardell*, 270 F. 309, 314 (D. Cal. 1920), to which both the Attorney General's 1921 opinion and the Treasury's 1921 ruling referred ("[A]gency of the husband as head of the family is much broader, and his control and dominion over personal property much greater, than in the case of real property; but it has never been supposed, that this difference lessens the estate of the wife in community personal property, or calls for a different rule of succession.").

167. *See* S. REP. NO. 67-275, at 14 (1921).

reduced."[168] The proposed change would "restore uniformity of treatment" to married taxpayers nationwide.[169]

Members of Congress required little convincing that such treatment was unjustified. Most of them viewed community property law as a tax loophole that should be closed. "Why should the husband of a woman in Arizona," asked Senator Reed Smoot of Utah, "whose wife has no income whatever from property held by her, have a less rate of taxation imposed upon him than a man in the same position in the State of New York?"[170] Similarly, Senator Boies Penrose of Pennsylvania saw "no reason why the so-called marital community system in Arizona should have a preference in connection with taxation in this relation over Pennsylvania or New York. Certainly all parts of the country ought to be similarly treated."[171]

Like the Treasury Department, supporters of the management-and-control proposal believed that dominion over marital income and property rather than shared legal interests under property law principles should determine taxability. "Suppose, as is the case, husband and wife own the property jointly, but the husband has the sole management of the property and derives the sole income from its use and enjoyment. Having that income, should he not pay the tax on that income?"[172] Watson answered his own question: "[O]wnership has nothing in the world to do with it; it is solely a question of income. The wife does not control the income and the husband has no accounting to make afterwards. He does not account for a dollar . . . ."[173]

The gendered lens of the common law, as much as legislators' lack of familiarity with the civil law, influenced Congress's perspective. The "only way" a wife can access her "half" of the marital income, said Senator Smoot, "is to go into court and break the community bond, and in my State the only way the wife can do it is by doing the same thing, by getting a divorce."[174] In community property states, Smoot opined (albeit inaccurately), the wife had no legal control over marital income. "It is not her income unless she dissolves the community interest. She does not own it; she does not control it; she cannot invest a dollar of it. The husband does that; he receives the income; he has the distribution of it, and he ought to pay the tax."[175]

Even if the husband acted as "trustee" for his wife's share, as some community property representatives analogized,[176] he could still be made to pay the entire tax.

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168. *See id.*

169. *Id.* Congressional supporters of the plan also touted its tax equalization effects. *See* 61 CONG. REC. 5914 (1921) (statement of Sen. Penrose) (arguing that the plan "proposes to place the so-called community property States on an equality with the other States of the Union from the point of view of taxation").

170. 61 CONG. REC. 5916 (1921) (statement of Sen. Smoot).

171. *Id.* at 5914 (statement of Sen. Penrose).

172. *Id.* at 5917 (statement of Sen. Watson).

173. *Id.* at 5920.

174. *Id.* at 5921 (statement of Sen. Smoot).

175. *Id.*

176. *See id.* at 6874 (statement of Charles E. Dunbar, Jr.) ("The husband as a rule is given by law the administration of this property during the marriage which is in the nature of the right of a managing partner at common law or a trustee with very full power of

"I do not think there is any limitation on the right of the Government of the United States," argued Senator Oscar Underwood, "to tax the property in the hands of the trustee who holds it for somebody else rather than in the hands of the actual owner."[177] The trusteeship argument for taxing the husband on only one-half of the community income proved as unpersuasive as the partnership argument.[178] "It is not the same as a partnership at all," said Senator Smoot.[179] He continued:

> If the wife had the right in Louisiana to demand half of all of the gains that are received by the husband and take that money and put it in her own name, and had a right to invest it no matter whether the husband objected or not, then she would control it, and it would be her income . . . .[180]

Senator Smoot concluded, "but it is not her income. It is the husband's income,"[181] and he should remit the tax.

Community property law did not reflect a more socially progressive property law regime, as its supporters suggested.[182] Nor was it better aligned than traditional common law with political egalitarianism and ratification of the Nineteenth Amendment.[183] To its critics, it was a tax avoidance device that, if left unchecked, would grow into a capacious tax loophole. Suppose a state "wanted to extend her community law," Senator Smoot suggested ominously, "[by providing] that it shall

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administration."); *see also id.* at 5918 (statement of Sen. Broussard) (explaining that the "law merely permits" the husband to act as trustee of his wife's share and arguing that "[i]t is not his income, it is not his revenue. He only has one half of that and the other half is permitted to remain in his custody provided his spouse is willing for him to invest it in her interest; but he at no time owns that other half.").

177. *Id.* at 5916 (statement of Sen. Underwood).

178. Community property representatives likened the marital partnership to business partnerships. *See id.* at 6873 (statement of Sen. Ransdell) (reading a letter from a lawyer constituent saying "marital community is a partnership, [in which spouses] have an equal interest in the profits of the partnership, [such that] Congress can no more force the husband to treat the entire community income as his than it could compel an ordinary commercial partner to return the entire income of the partnership as his own").

179. *Id.* at 5920 (statement of Sen. Smoot).

180. *Id.*

181. *Id.*

182. Community property representatives underscored enlightened aspects of the civil law. *See id.* at 5915 (statement of Sen. Ashurst) (quoting legal scholar Richard Ballinger as noting the law's "many commendable features," including "social advancement" and inevitable influence over the traditional common law, which "can [no longer] impede the development of a system of laws which yield to the wife, in matters of property, the equality of interest and right with the husband which Christian justice demands"). Under *reformed* common law, it was less clear whether wives possessed greater or lesser legal interests than wives in community property states. In California during the late nineteenth century, for instance, "women's legal status was . . . worse . . . than in common law states with married woman's property acts," while other community property states worked to "empower women rather than simply to protect them." Schuele, *supra* note 81, at 263, 281.

183. *See* 61 CONG. REC. 5915 (1921) (statement of Sen. Ashurst) (arguing civil law states had long guaranteed legal and economic rights for wives in the same spirit as the suffrage movement).

not only apply to wife and husband but to every child they may have."[184] If Congress had to accept each state's definition of taxable income, "then a State could pass a law claiming not only community privileges for the husband and wife but for every child that was born to the husband and wife."[185] Families with six or seven children would be able to divide family income "in such [a] way that a man could have at least $70,000 or $75,000 [of] income [$865,000 to $925,000 in 2011 dollars] and never pay a cent of income tax."[186] States would seek to benefit their own citizens at the expense of the national government, and tax revenues would shrink dramatically.[187]

Defenders of the community property system freely acknowledged its favorable tax effects. But similar tax saving was also available to common law married couples through unrestricted tax avoidance devices. Husbands and wives in non–community property states could "execute a partnership agreement embodying the identical principles" of community property law, and thereby "enjoy all the benefits of separate returns for taxation purposes."[188] Moreover, to the extent Congress should be concerned about income shifting between spouses, these private law partnerships were considerably more superficial than community partnerships. The partnerships available to common law spouses were voluntary and authorized by a state's contract law, while community partnerships were mandatory for all husbands and wives and carried with them significant legal responsibilities. Community property law "impose[d] serious property limitations on the husband in the nature of a marital partnership."[189] In fact, the "burdens and limitations" on the husband "may well be considered sufficient to counterbalance the taxation benefits that now exist and certainly justify the recognition of the community system by the Federal Government in its scheme of taxation."[190] Common law husbands paid more tax than community property husbands on equal amounts of income, but they also enjoyed unfettered command over marital property.

Common law husbands reaped additional benefits. In the event of divorce, spouses under community property law split marital income and property in half, while common law husbands could take it all. In addition, a community property wife could "will one-half of the property that may be acquired as a result of the

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184. *Id.* at 5918 (statement of Sen. Smoot).

185. *Id.*

186. *Id.*

187. *See* H.R. REP. NO. 67-350, at 6 (1921) (arguing "excessively high [tax] rates" encouraged "various methods of tax evasion," including income shifting under community property law).

188. 61 CONG. REC. 6875 (1921).

189. *Id.* at 6876 (statement of Charles E. Dunbar). Community property representatives attributed support for the Treasury's management and control proposal to confusion over the civil law system. *Id.* at 5915 (statement of Sen. Ashurst) (expressing "no doubt" that common law legislators "able lawyers as they are, who have been trained under the common law found this a perplexing subject and that their intellects could not at once grasp this puzzling question of community property law"); *id.* at 6873–74 (1921) ("[P]rinciples which are peculiar to the laws of the [community property] States . . . are not so well known or understood by others from the common-law States." (quoting Oct. 19, 1921 letter from Jesse Andrews to Hon. William E. Borah)).

190. *Id.* at 6876.

marriage partnership to her twenty-second cousin or to a stranger" without her husband's permission.[191] A common law wife "has no such right, and the husband's property is subject only to his disposition by will or the law of inheritance of the State."[192] A community property husband, moreover, could not give away his wife's interest in the community, but a common law husband "is not subject to any such limitation."[193] And while a community property husband could not defraud his wife of her interest in the community or act as a "reckless and dangerous trustee," a common law husband could dispose of marital property "by gambling or in as reckless and extravagant manner as he chooses."[194]

In the end, the management and control plan did not make it into the Revenue Act of 1921.[195] Whether it was the unified effort among community property representatives to educate their common law colleagues on the practical effects of the civil law; embarrassment that the plan contradicted recent advances in women's legal and political rights; statistics reporting that only a fraction of married taxpayers filed separate income tax returns and that recent tax cuts mitigated the benefits of separate filing;[196] the availability of income-shifting devices for common law spouses;[197] wariness over impinging on states' sovereign power to determine laws of a "domestic and state nature;"[198] or legitimate concern that the plan was unconstitutional under the Due Process Clause of the Fifth Amendment (by taxing one person on the property of another)[199] as well as the Uniformity Clause pertaining to Congress's taxing power (by imposing geographic discrimination in applying direct taxes),[200] the Treasury proposal went down in defeat.

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191. *Id.* at 6875.

192. *Id.*

193. *Id.*

194. *See id.* at 6875–76.

195. *See* H.R. REP. NO. 67-486, pt. 2, at 1, 11 (1921) (Conf. Rep.).

196. *See* Revenue Act of 1921, ch. 136, 42 Stat. 227, at 233, 237 (lowering top marginal rate on individuals from 73% to 58%).

197. *See supra* notes 54–62 and accompanying text; *see also* Stanley S. Surrey, *Assignments of Income and Related Devices: Choice of the Taxable Person*, 33 COLUM. L. REV. 791, 813–14 (1933) [hereinafter Surrey, *Assignments of Income*] ("[I]f it is the declared policy of a state that contractual assignments between spouses are desirable and enforceable, the situation does not differ appreciably from that in community property states."); Note, *Disparity of Federal Tax Incidence Resulting from Division of Income Under Community Property Laws*, 40 YALE L.J. 665, 666 (1931) ("Where income is derived from property, uniformity in federal revenue exaction is presently possible, since in the non-community states an assignment of such property would effect the same result as in the community-property states.").

198. Warburton v. White, 176 U.S. 484, 496 (1900); *see also* De Vaughn v. Hutchinson, 165 U.S. 566, 570 (1897); United States v. Crosby, 11 U.S. 115, 116 (1812).

199. *See, e.g.*, 61 CONG. REC. 5918 (1921) (statement of Sen. Broussard) (arguing "no man may be required to return property which is not vested in him or does not belong to him, and to pay taxes upon it").

200. *See, e.g.*, *id.* at 5919 (statement of Sen. Underwood) (arguing bill makes "a distinction as to communities where the civil law prevails and a division of the property under the law rests between the husband and wife. It seems to me that that is a geographical

Undeterred, Secretary Mellon urged Congress to include an identical version of the plan in the Revenue Act of 1924.[201] The "unfair advantage" enjoyed by residents of community property states "over the citizens of the other States of this country," Mellon told Congress, cost the Treasury dearly in lost revenues.[202] Taxing community income "to the spouse having control of the income" would "restore the equality" of taxation nationwide.[203] Mellon's management and control plan fared even worse than the 1921 proposal, failing to make it out of committee. The plan increased taxes on married taxpayers in community property states, which conflicted with Congress's desire for across-the-board rate reduction.[204] As important, community property representatives mobilized quickly against the plan, marshaling opposition from elected officials, chambers of commerce, taxpayer associations, and citizen committees, while bombarding Congress with letters, testimony, and legal briefs.[205]

Even in defeat, Mellon was steadfast in his desire to end the "unfair advantage" enjoyed by community property taxpayers. He wrote once more to Congress: "There is a serious question in my mind as to whether or not any State, which has by the sixteenth amendment granted to the Federal Government the right to levy income taxes, can make the graduated income tax of the Federal Government ineffective by passing a community property law."[206] For the time being, however, there was no need for legislative action. The question concerning how to tax spouses in community property states was presently before the Supreme Court in a

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division, and if it be a geographical division then the proposal is unconstitutional"). This argument would soon prove unavailing. *See* Florida v. Mellon, 273 U.S. 12, 17 (1927) ("All that the Constitution requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States." (citation omitted)).

201. *See* Revenue Act of 1924, ch. 234, 43 Stat. 253 (1924).

202. DEP'T OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF FINANCES FOR THE FISCAL YEAR ENDED ON JUNE 30, 1923, at 9 (1924).

203. *Id.*

204. The 1924 law followed the Revenue Act of 1921 by further slashing taxes and lowering the top marginal rate from 58% to 46%. Revenue Act of 1924, ch. 234, 43 Stat. 253, 264, 267 (1924).

205. *See, e.g.*, *Revenue Revision, 1924: Hearings Before the H.R. Comm. on Ways and Means*, 68th Cong. 194–97 (1924) (statement of Rep. O'Connor); *id.* at 195 (statement of Walter Parker, New Orleans Association of Commerce); *id.* at 348–61 (statement of R. C. Fulbright, Houston Chamber of Commerce and Texas Taxpayers); *id.* at 362–63 (statement of Rep. Black); *id.* at 363–71 (statement of John J. Underwood, Seattle Chamber of Commerce); *id.* at 371–74 (statement of Walter Mossaman, Counsel for Association of Washington Taxpayers); *id.* at 375–87 (statement of Charles E. Dunbar Jr., Citizens Committee and New Orleans Association of Commerce); *id.* at 478–82 (statement of Rep. Miller): *id.* at 482–85 (statement of Rep. Summers). After passage of the Revenue Act of 1924, the Treasury issued regulations recognizing the right of married couples in community property states (excluding California) to file separate returns reflecting income which "under the laws of the respective States, becomes simultaneously with its receipt community property." T.D. 3640, 26 Treas. Dec. Int. Rev. 745, 755 (1924).

206. *Revenue Revision, 1925: Hearings Before the H.R. Comm. on Ways and Means*, 69th Cong. 9 (1925).

case originating in California. Perhaps the Court could accomplish what Congress had failed to do: "restore the equality" between taxpayers nationwide.[207]

V. THE SUPREME COURT AND FAMILY TAXATION: DEFINING OWNERSHIP

The Ninth Circuit's decision in *Wardell v. Blum*[208] and the Treasury Department's acquiescence to the holding[209] created a split decision. For estate tax purposes, a California wife possessed a one-half vested interest in community income and property, but for income tax purposes she did not. The U.S. Supreme Court weighed in on the issue with respect to the federal income tax and ended up accentuating rather than ameliorating the distinction.

In *United States v. Robbins*,[210] the Court considered for only the fifth time in its history the nature of a wife's interest under community property law.[211] More importantly, for the first time, it considered the nature of a wife's interest for purposes of the federal income tax. Writing for the majority, Justice Holmes said that a California wife possessed a "mere expectancy" in the community under the laws of California prior to 1917.[212] As a result, she could not make a separate income tax return reporting one-half the community income. All income of the community was taxable wholly to the husband. In so holding, the Court reversed the district court's lengthy finding that statutory changes over twenty-five years had so restricted the rights and powers of the California husband with respect to the community that the wife possessed "a real, substantial, vested, and existing interest," and that the husband's dominion over the community was "no broader than it is in some of the other community property states."[213] Unlike the district court, the Supreme Court conducted a cursory examination of California community property statutes, relied on dated case law, and disregarded subsequent

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207. *Id.*

208. *See* Wardell v. Blum, 276 F. 226 (9th Cir. 1921); *supra* notes 148–50 and accompanying text.

209. *See* Cmty. Prop. in Cal.—Estate Tax, 34 Op. Att'y Gen. 395, 404–05 (1924); *supra* notes 147–53 and accompanying text.

210. 269 U.S. 315 (1926).

211. *See* Arnett v. Reade, 220 U.S. 311, 320 (1911) (finding New Mexico wife possessed present vested interest in community property notwithstanding husband's management and control over community); Moffitt v. Kelly, 218 U.S. 400 (1910) (holding even if California wife owned one-half the community property prior to her husband's death, the U.S. Constitution did not prevent the state from imposing a tax on wife's share); Garrozi v. Dastas, 204 U.S. 64 (1907) (holding reasonableness of expenditures made by husband during marriage as manager of the community under Puerto Rico's community property law was not a question to be decided by the courts); Warburton v. White, 176 U.S. 484, 496 (1900) (holding Washington wife possessed a present vested interest in community property).

212. *Robbins*, 269 U.S. at 327.

213. Robbins v. United States, 5 F.2d 690, 697, 702 (N.D. Cal. 1925); *see also id.* at 705 ("It is the marriage which creates the ownership; death or divorce merely give possession. . . . And the truth and substance is that only one-half of the income really belongs to the husband; the other half, in law and right and justice to the wife.").

acts of the state legislature expressing its intent to provide vested rights in the wife.[214]

The holding was a blow to married taxpayers in California. But the dicta was a bombshell for married taxpayers nationwide, particularly those living in community property states. The nature of the wife's interest as determined by state courts, Holmes wrote, was to be followed "so far as material."[215] In addition, "[e]ven if we are wrong as to the law of California and assume that the wife had an interest in the community income that Congress could tax if so minded, it does not follow that Congress could not tax the husband for the whole."[216] If the husband controlled the income, he could be taxed on it regardless of its ownership as determined by state property law. "[H]e alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. . . . That he may be taxed for such a fund," Holmes concluded summarily, "seems to us to need no argument."[217]

Congress,[218] the Attorney General,[219] and previous Courts[220] had felt constrained by state law characterizations of ownership in locating "the most obvious target for the shaft."[221] The Court had liberated them. Community income could "be in two places at once,"[222] both "wholly the income of the husband and half the income of the wife."[223] In deciding whom to tax, courts now had a choice, because both

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214. The Court relied particularly on *Spreckels v. Spreckels*, 48 P. 228 (Cal. 1897) (holding wife's interest a mere expectancy, and finding no distinction between community estates and the separate estate of the husband, even subsequent to statutory amendments).

215. *Robbins*, 269 U.S. at 326.

216. *Id.* at 327.

217. *Id.* (citation omitted).

218. In the same year the Court decided *Robbins*, Congress included a provision in the Revenue Act of 1926 indicating that state law was the final arbiter of ownership with respect to marital property. *See* Revenue Act of 1926, ch. 27, § 1212, 44 Stat. 9, 130 (stating where "the wife has a vested interest as distinguished from an expectancy," income and property should be reported "by the spouse to whom the income belonged under the *State law* applicable to such marital community for such period" (emphasis added)).

219. *See* Cmty. Prop.—Income and Estate Taxes, 32 Op. Att'y Gen. 435, 461 (1921); *supra* notes 125–30 (citing Supreme Court precedent).

220. *See supra* notes 127–29 and 211 and accompanying text. The Supreme Court had been particularly clear on this subject with respect to determining respective interests of spouses in marital property. *See* Moffitt v. Kelly, 218 U.S. 400, 406 (1910) (finding "nature and character of the right of the wife in the community for the purpose of taxation was peculiarly a local question which we have no power to review"). When faced with interpreting a state statute or rule of property, however, the Court recognized that if state decisions were in conflict or failed to establish a definitive rule, it could exercise its own judgment. *See, e.g.*, Burnet v. Harmel, 287 U.S. 103, 110 (1932) (invalidating state definition of a "lease" as a "sale" with respect to sub-soil rights and holding "[an] Act of Congress has its own criteria, irrespective of any particular characterization . . . in the local law"); Burk-Waggoner Oil Ass'n v. Hopkins, 269 U.S. 110 (1925) (disregarding state classification of a business enterprise).

221. United States v. Robbins, 269 U.S. 315, 328 (1926).

222. *Developments in the Law—Taxation 1933*, 47 HARV. L. REV. 1209, 1273 (1934) (referring to *Robbins*) [hereinafter *Developments in the Law*].

223. Douglas B. Maggs, *Community Property and the Federal Income Tax* (pt. 2), 14

husband and wife could be said to own rights in community income and the property from which it flowed. If Congress wanted to tax both members of the community as co-owners, then ownership as determined by state statutes and interpreted by state courts could be considered "material." If, on the other hand, Congress wanted to tax the husband on the entirety of community income and property, then ownership under state law could give way to the husband's "beneficial [interest]" where "the possession of power of disposition [became] in and of itself a proper test of income tax liability."[224] In other words, income could include "not only property the legal ownership of which is acquired by the taxpayer during the tax period, but also property, the beneficial ownership of which is thus acquired."[225] In the end, *Robbins* highlighted that income and property in a marital partnership could "be taxed to the person who controls them, although he does not own them or the property producing them."[226] That possibility meant that husbands in *all* states could be taxed on the whole of marital income, whatever the wife's interest under state law.[227] It also meant that if the husband could be taxed on the whole under the federal income tax, the same was true under the federal estate tax.[228]

The immediate aftermath of *Robbins* provided ominous signs for community property spouses. First, the Attorney General announced that it was considering applying Holmes's dicta to states other than California.[229] To help him better understand the nature of the wife's interest in community income, he invited community property representatives "to state their views on the subject" and to file briefs.[230] In 1927, the Attorney General issued his opinion on the subject,

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CALIF. L. REV. 441, 441–42 (1926). Commentators questioned the result. *See* Douglas B. Maggs, *Community Property and the Federal Income Tax* (pt. 1), 14 CALIF. L. REV. 351, 365–66 (1926) ("Upon what theory may community income, half of the funds comprising which is owned, under the state decisions, by the wife, be said to be wholly the income of the husband?").

224. Maggs (pt. 1), *supra* note 223, at 368. Legal commentators noted the pro-government features of Holmes's opinion. *See id.* at 365 (arguing that the Court's "position is that the doctrine of those state courts which hold that the wife is co-proprietor of community property with her husband is material, and would be followed by the Supreme Court to the extent of permitting Congress to tax the wife for her interest in the community income; but is not material, and will not be followed, to the extent of preventing Congress from taxing the husband for the whole").

225. Maggs (pt. 2), *supra* note 223, at 441.

226. Surrey, *Assignments of Income*, *supra* note 197, at 811.

227. *See* George Donworth, *Federal Taxation of Community Incomes—The Recent History of Pending Questions*, 4 WASH. L. REV. 145, 159 (1923) (querying whether *Robbins* could be applied to other community property states and concluding that Holmes's dictum applied only to California).

228. *See* Maggs (pt. 1), *supra* note 223, at 357 n.18 (arguing even if wife received her half of the community upon husband's death as survivor rather than heir, "it is doubtful whether any *constitutional* objection can be urged against a construction of the federal estate tax law which would subject it to the tax" (emphasis in original)).

229. Donworth, *supra* note 227, at 164. George Donworth was a Washington lawyer, federal district court judge, founding member of Perkins Coie, and counsel for the taxpayer in *Seaborn*.

230. *Id.*

withdrawing earlier opinions from 1920[231] and 1921,[232] and concluding that the "problems presented [could] not be settled by any opinion of the Attorney General . . ." nor by congressional action.[233] Instead, he encouraged the Secretary of the Treasury "to arrange for test cases in the courts or otherwise deal with the matter as you may think proper."[234] In addition, the Ninth Circuit overturned its earlier holding in *Blum*, finding that a wife in California took her one-half interest in the community upon the death of her husband as an heir rather than as a survivor, which properly subjected her interest to federal estate taxes.[235] The Ninth Circuit had already followed *Robbins* in an earlier case finding a California husband taxable on the whole of community income and property, including those portions specifically attributable to his wife's community earnings.[236] Other courts were also influenced by *Robbins* in finding that California community property statutes did not vest sufficient interest in the wife to treat her as co-owner of the community during marriage.[237] Indeed, it appeared as if the federal judiciary was inching inexorably towards removing the tax benefits associated with community property law, in California and elsewhere.

A. Control, Beneficial Interests, Enjoyment, and Other Indicia of Ownership

Beneficial interests as well as legal interests evidenced ownership according to the Court. An expansive, dynamic conception of ownership was particularly appropriate if it curbed tax avoidance, a problem to which the Court became increasingly attentive as reports from Treasury and Congress indicated that noncompliance threatened federal receipts. In an opinion authored by Justice Holmes, the Court held in 1918 that stock dividends did not constitute income

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231. *See* Income Tax—Cmty. Prop., 32 Op. Att'y Gen. 298 (1920).

232. *See* Cmty. Prop.—Income and Estate Taxes, 32 Op. Att'y Gen. 435 (1921).

233. Withdrawal of Opinions Relating to the Wife's Interest in the Community Income, 35 Op. Att'y Gen. 265, 267–68 (1927).

234. *Id.* at 269. Meanwhile, the Treasury Department's Division of Tax Research prepared an administrative ruling prohibiting husbands and wives from dividing community income on separate returns. Members of Congress from community property states intervened, and persuaded the Treasury to withhold its ruling pending test cases. *See* Memorandum from Mr. Tarlean to Mr. Sullivan (June 10, 1941) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Record Group 56, Box 54), *available at* http://taxhistory.tax.org/Civilization/Documents/marriage/hst28693/28693-1.htm.

235. Talcott v. United States, 23 F.2d 897 (9th Cir. 1928).

236. *See* Comm'r v. Roth, 22 F.2d 932 (9th Cir. 1927); *see also* Belcher v. Comm'r, 11 B.T.A. 1294 (1928) (holding in absence of an ante-nuptial agreement, the whole of community earnings taxable solely to the husband). *But see* Harris v. Comm'r, 10 B.T.A. 1374 (1928) (finding valid written agreement stipulating the wife's salary as separate property permitted her to report income separately); Estate of Randall v. Comm'r, 4 B.T.A. 679 (1926) (holding wife domiciled in California entitled to file a separate income tax return reflecting separate earnings).

237. *See, e.g.*, Hirsch v. United States, 62 F.2d 128 (9th Cir. 1932); Preston v. Comm'r, 21 B.T.A. 840, 848 (1930) (following *Robbins* in taxing all community income to husband whose "dominion and control" were not altered by statutory amendments).

within contemplation of the federal income tax.[238] Two years later, the Supreme Court reached the same conclusion, but with Holmes dissenting strongly. The earlier decision interpreted a statute that did not reach the full extent of the Sixteenth Amendment, which should be read, Holmes urged, "in 'a sense most obvious to the common understanding at the time of its adoption.'"[239] "The known purpose of this Amendment," he continued, "was to get rid of nice questions as to what might be direct taxes, and I cannot doubt that most people not lawyers would suppose when they voted for it that they put a question like the present to rest."[240] Justice Brandeis also reversed course like Holmes, and articulated a considerably more expansive view of taxable income. "In terse, comprehensive language befitting the Constitution, [the people] empowered Congress 'to lay and collect taxes on incomes, from whatever source derived.' They intended to include thereby everything which by reasonable understanding can fairly be regarded as income."[241]

The broad taxing powers of Congress that the Court articulated in *Robbins* had roots in this earlier jurisprudence. As the Court considered taxpayers' artful attempts to avoid taxes by shifting legal ownership of income to other individuals and entities, it adopted nontraditional indicia of ownership that went far beyond legal title. Control, power, or dominion over income, beneficial interest, equitable interest, and enjoyment of rights constituent of ownership all justified taxability. In crafting an expansive definition of income and its ownership, the Court operated with the "acknowledged purpose of saving the revenue from defeat and preventing tax avoidance."[242] Its jurisprudence with respect to trusts and assignments is exemplary.

1. Trusts: Relinquishing Control, Part I

As part of the Revenue Act of 1924, Congress had enacted "revolutionary innovations" to the taxation of trusts,[243] effectively taxing the grantor of certain trusts on income the grantor never received. One provision taxed the grantor on income from revocable trusts if the grantor retained "the power to revest in himself title to any part of the corpus of the trust,"[244] while another provision taxed the grantor on trust income which may be distributed to him, accumulated for future distribution to him, or used to pay his life insurance premiums.[245] Commentators at the time observed that the provisions amounted to "a statutory application of the principle of constructive receipt,"[246] and that they appropriately addressed

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238. *See* Towne v. Eisner, 245 U.S. 418 (1918).

239. Eisner v. Macomber, 252 U.S. 189, 219–20 (1920) (citation omitted).

240. *Id.* at 220.

241. *Id.* at 237.

242. Randolph E. Paul & Valentine B. Havens, *Husband and Wife Under the Income Tax*, 5 BROOK. L. REV. 241, 248 (1935).

243. Roswell F. Magill, *Notes on the Revenue Act of 1924: Income Tax Provisions*, 24 COLUM. L. REV. 836, 858 (1924).

244. Revenue Act of 1924, ch. 234, § 219(g), 43 Stat. 253, 277 (1924).

245. *Id.* § 219(h).

246. Roswell F. Magill, *The Taxation of Unrealized Income*, 39 HARV. L. REV. 82, 98

overaggressive tax avoidance.[247] Taxpayers, meanwhile, argued that the law was unconstitutional, amounting to a tax on income that was not legally the grantor's but rather that of the trustee (by virtue of the legal estate) or the beneficiary (by virtue of the equitable interest). The Supreme Court disagreed.

In *Corliss v. Bowers*,[248] the Court considered a revocable trust established by a husband, with income payable to the wife and remainders to the children. The trust instrument reserved for the husband the power to revoke, alter, or modify the trust in whole or in part, and he further retained full control over trust investments. Justice Holmes wrote for a unanimous Court. "[T]axation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid."[249] "[I]ncome that is subject to a man's unfettered command," he concluded, "and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."[250] Legal commentators praised the decision for "preventing tax avoidance,"[251] while others condemned it for violating the taxpayer's due process by taxing him on another's income.[252] But the case was a relatively easy one for the Court in that it involved an unconditional power of revocation in the grantor, evincing "unfettered command" over income. The harder cases involved situations "where the command was fettered."[253] Here, too, the Court acted boldly.

In *Reinecke v. Smith*,[254] a grantor husband created trusts for the benefit of his wife and children. The trustees were the settlor, one of his sons (also the direct beneficiary of one trust and contingent beneficiary of the others), and a bank. Each trust authorized the settlor to revoke it with the consent of one additional trustee. The Court held the settlor taxable on the trust income. "Congress had [this] power," Justice Roberts wrote for another unanimous Court, "in order to make the system of income taxation complete and consistent and to prevent facile evasion of the law."[255] Trustees owed a duty to manage trusts faithfully, but they were under no duty to resist alteration or revocation of the trust. In the case at hand, moreover, the grantor's command was only restricted by receiving consent from one of two

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(1925).

247. *See* Magill, *supra* note 243, at 860–61 (opining Treasury was appropriately "seeking to prevent . . . evasion" in cases where the taxpayer maintains control over income or property "whether he exercises it or not").

248. 281 U.S. 376 (1930).

249. *Id.* at 378.

250. *Id.*

251. Recent Cases, *Taxation—Internal Revenue—Constitutionality of Applying Federal Estate Tax to Tenancy by Entirety*, 15 MINN. L. REV. 130, 131 (1930) [hereinafter Recent Cases, *Taxation*]; *see also* Note, *Tax Dodging by the Assignment of Future Income*, 40 YALE L.J. 663, 665 (1931) (calling decision "indicative of a tendency of the federal courts to nullify devices intended to reduce surtaxes by distributing the income among more than one recipient"); Recent Cases, *Trusts—Constitutionality of Statute Taxing the Settlor for Income from a Revocable Trust*, 78 U. PA. L. REV. 440, 441–42 (1930) [hereinafter Recent Cases, *Trusts*] (finding decision "commendable in that it carries out the purpose of the legislature which was to prevent the evasion of surtaxes by means of estates and trusts").

252. *See* Recent Cases, *Trusts*, *supra* note 251, at 441.

253. Surrey, *Assignments of Income*, *supra* note 197, at 819.

254. 289 U.S. 172 (1933).

255. *Id.* at 178.

people, neither of whom possessed an interest to withhold consent. "A contrary decision would make evasion of the tax a simple matter," the Court said.[256] "[I]t would be easy to select a friend or relative as co-holder of such a power and so place large amounts of principal and income accruing therefrom beyond the reach of taxation upon the grantor while he retained to all intents and purposes control of both."[257] Congress reached a similar conclusion the previous year when it indicated that a grantor with power to revest title to any part of the trust corpus, "either alone or in conjunction with any person not having a *substantial adverse interest*," was required to include all trust income as his own.[258] Congress's power was not unlimited.[259] But where the taxpayer "retains for himself so many of the attributes of ownership," he could not claim to be "the victim of despotic power when for the purpose of taxation he is treated as owner altogether."[260]

But what if the taxpayer retained no attributes of ownership? That is, what if the proceeds of a trust, revocable or irrevocable, went to named beneficiaries, and the taxpayer retained no power to change the designation of the beneficiaries, revoke the trust, or in any way exercise control over the trust? The taxpayer could *still* be subject to taxation if he received beneficial use of the income. In such a situation, the Supreme Court required a grantor to include in his taxable income the portion of trust income applied to the payment of premiums on life insurance policies for his benefit.[261] In *Burnet v. Wells*, the Supreme Court found that "[l]iability does not have to rest upon the enjoyment by the taxpayer of all the privileges and benefits enjoyed by the most favored owner at a given time or place," nor was the government "in casting about for proper subjects of taxation . . . confined by the traditional classification of interests or estates."[262] Indeed, according to the Court, Congress

> may tax not only ownership, but any right or privilege that is a constituent of ownership. Liability may rest upon the enjoyment by the taxpayer of privileges and benefits so substantial and important as to make it reasonable and just to deal with him as if he were the owner, and to tax him on that basis.[263]

If a taxpayer enjoyed significant enough privileges and benefits from the disposition of income, it was "reasonable to treat the taxpayer as if he had ownership of the income or an equivalent of ownership."[264] The value and power associated with disposing of income was tantamount to ownership.

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256. *Id.*

257. *Id.*

258. Revenue Act of 1932, ch. 209, § 166, 47 Stat. 169, 221 (1932) (emphasis added).

259. *See* Reinecke v. N. Trust Co., 278 U.S. 339 (1929) (invalidating an estate tax levy where the grantor's power to revoke was dependent on the acquiescence of a trust beneficiary who possessed an adverse interest).

260. DuPont v. Comm'r, 289 U.S. 685, 689 (1933).

261. Burnet v. Wells, 289 U.S. 670 (1933) (upholding section 219(h) of the Revenue Acts of 1924 and 1926).

262. *Id.* at 678.

263. *Id.* (citation omitted).

264. *Developments in the Law*, *supra* note 222, at 1277. Similarly, if a husband created a

2. Assignments: Relinquishing Control, Part II

The Supreme Court's treatment of assignments of income and property paralleled that of its trust jurisprudence. As with trusts, when future payments were assigned, "the assignor is merely exercising in advance his control over them,"[265] and "the enjoyment and benefit derived by a person from the payments to an intended beneficiary is taxable income" to the assignor.[266] The taxpayer was treated as having constructively received the assigned income and taxed as if he had actually received it. "This *constructive* receipt is just as effective for tax purposes as *actual* receipt of the income by the assignor."[267] Also as with trusts, the Court's approach to the cases involved its "fear of tax avoidance."[268] The Court inquired as to whether "a sufficient *quantum* of rights has flowed from assignor to assignee to bring about a shift in the taxable person."[269]

This inquiry was particularly difficult in the context of the family, where "the intimate relationship of husband and wife sometimes enables the consummation of transactions perfect in form, but wholly lacking in substance."[270] The Court was aware of the heightened opportunity to avoid tax in the family setting.[271] A disproportionate number of assignment cases involved intrafamily transactions, including assignments of partnership interests,[272] trust estates,[273] rents,[274]

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trust for the benefit of his wife pursuant to a separation agreement or to enable the wife to pay household expenses during marriage, the husband was taxable as a beneficiary of the trust in satisfaction of a legal obligation. *See* Turner v. Comm'r, 28 B.T.A. 91 (1933); Welch v. Comm'r, 12 B.T.A. 800 (1928); Van Brunt v. Comm'r, 11 B.T.A. 406 (1928).

265. Surrey, *Assignments of Income*, *supra* note 197, at 828.

266. *Id.*

267. Paul & Havens, *supra* note 242, at 244 (emphasis in original).

268. Surrey, *Assignments of Income*, *supra* note 197, at 793; *see also* Recent Decisions, *Taxation—Income Tax—Partnership of Husband and Wife*, 32 COLUM. L. REV. 1080, 1081 (1932) (observing that assignment cases "have probably been conditioned by their background of bad faith").

269. Surrey, *Assignments of Income*, *supra* note 197, at 796 (emphasis in original).

270. Paul & Havens, *supra* note 242, at 255. "'Bed chamber' arrangements," Paul and Havens observed, "are difficult to prove or disprove, and diligence is necessary where tax avoidance is easy." *Id.* at 264.

271. *See* Burnet v. Wells, 289 U.S. 670, 677 (1933) ("The solidarity of the family is to make it possible for the taxpayer to surrender title to another and to keep dominion for himself, or if not technical dominion, at least the substance of enjoyment."); Kunau v. Comm'r, 27 B.T.A. 509, 512 (1933) (recognizing the "necessity for close scrutiny of transactions between persons related by blood, marriage, or community of interest in order to be sure that their dealings are in fact what they, on face, purport to be as to their validity, effect and finality").

272. *See, e.g.*, Balkwill v. Comm'r, 77 F.2d 569 (6th Cir. 1935) (holding the assignor partner-sibling taxable rather than the assignee brothers and sisters); Rosevear v. Comm'r, 31 B.T.A. 146 (1934) (holding the assignor husband-partner taxable on distributed earnings rather than the assignee wife).

273. *See, e.g.*, McDonald v. Helvering, 74 F.2d 1005 (D.C. Cir. 1934) (same, assignor husband/assignee wife); Brewster v. United States, 9 F. Supp. 686 (Ct. Cl. 1935) (holding the assignor sibling taxable rather than the assignee sibling).

274. *See, e.g.*, Bing v. Bowers, 22 F.2d 450 (S.D.N.Y. 1927) (holding the assignor son taxable rather than the assignee mother), *aff'd*, 26 F.2d 1017 (2d Cir. 1928); Woods v.

securities,[275] and commissions on insurance premiums.[276] And while ownership of income continued to determine taxability, the rule did not necessarily mean that "rights will not be contrasted and balanced, and income allocated on vague principles of equity and fairness."[277] State law continued to define property as well as who owned it, but federal law determined its taxability. As the Supreme Court phrased it in *Burnet v. Harmel*, "The state law creates legal interests, but the federal statute determines when and how they shall be taxed."[278] In rendering decisions in the assignment cases, the Supreme Court continued to embrace incidents of ownership broader than those recognized by the states. In the process, it also continued to protect Congress's broad taxing powers.

In *Burnet v. Leininger*, the Court held that an assignment of partnership interests from a husband to wife without a change in partnership documents or ownership interests did not defeat taxation of the husband on distributed partnership earnings.[279] In language reminiscent of *Robbins* that Congress could levy tax on the basis of control, a unanimous Court said, "If it be assumed that Mrs. Leininger became the beneficial owner of one-half of the income which her husband received from the firm enterprise, it is still true that he, and not she, was the member of the firm and that she had only a derivative interest."[280] Assigning his partnership interest was not the same as transferring "the corpus of the partnership property to a new firm with a consequent readjustment of rights in that property and management."[281] As legal commentators noted at the time, "a partner must transfer a 'share' in the partnership as well as profits earned upon such share" to avoid tax.[282] Assignment of "profits" alone did not relieve the assignor of the tax,[283] nor did merely assigning "interest" in the firm.[284] Similarly, assignment of unearned future income, by itself, did not free the assignor from tax on that income,[285] nor did an

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Comm'r, 5 B.T.A. 413, 415–16 (1926) (holding the assignor father-husband taxable rather than the assignees wife and daughter).

275. *See, e.g.*, Van Brunt v. Comm'r, 11 B.T.A. 406 (1928) (holding the assignor husband taxable, not the assignee wife); Le Blanc v. Comm'r, 7 B.T.A. 256, 259 (1927) (holding the assignor father-employer taxable not the assignee son-employee).

276. *See, e.g.*, Parker v. Routzahn, 56 F.2d 730 (6th Cir. 1932) (holding the assignor husband taxable on future commissions rather than the assignee wife); Bishop v. Comm'r, 54 F.2d 298 (7th Cir. 1931) (same).

277. Surrey, *Assignments of Income*, *supra* note 197, at 796.

278. 287 U.S. 103, 110 (1932).

279. 285 U.S. 136 (1932). *But see* Rose v. Comm'r, 65 F.2d 616, 617 (6th Cir. 1933) (holding the declaration of a trust of partnership interests and properties sufficient to relieve the partner husband-father from tax on grounds that the trustee family members received "rights of partners").

280. *Leininger*, 285 U.S. at 141.

281. *Id.*

282. Current Decisions, *Income Taxation—Assignment of Partnership Profits*, 41 YALE L.J. 925, 926 (1932).

283. *See, e.g.*, Harris v. Comm'r, 39 F.2d 546 (2d Cir. 1930); Rossmore v. Anderson, 1 F. Supp. 35 (S.D.N.Y. 1932).

284. *See, e.g.*, Battleson v. Comm'r, 62 F.2d 125 (9th Cir. 1932); Balkwill v. Comm'r, 25 B.T.A. 1147 (1932) (holding the distributive share of the partnership income taxable to the partner, despite the declaration of trust with respect to the beneficiaries).

285. *See, e.g.*, Lucas v. Earl, 281 U.S. 111 (1930) (holding the assignor husband taxable on the assignment of future earnings); Bing v. Bowers, 22 F.2d 450 (S.D.N.Y. 1927)

assignment of income already earned.[286] Control of income and its taxability involved both "the right to demand or obtain the income and the right to control it after it has been received."[287] If the assignor retained both these rights, he was taxable on the income when it accrued.[288] Conversely, if the assignor relinquished both rights in an irrevocable assignment, he was no longer taxable on the income.[289]

More than anything, an effective assignment required the assignor to relinquish control, not only over the income stream, but over the source of the income and any beneficial enjoyment over the income.[290] Thus, taxpayers could not assign income from a spendthrift trust because, by law, they controlled neither the income nor the trust corpus.[291] An effective assignment of profits from the sale of property required relinquishing control over the entire property prior to the sale.[292] An assignor had to assign the contract and not just income from the contract.[293] He had to transfer the corpus (i.e. tangible property),[294] a property right (i.e. covering contract rights broader than property transfers),[295] more than a mere promise,[296] and

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(holding the assignor son taxable on the mere promise to pay future income to his mother), *aff'd*, 26 F.2d 1017 (2d Cir. 1928).

286. *See, e.g.*, Daugherty v. Comm'r, 63 F.2d 77 (9th Cir. 1933) (holding the husband taxable on an assignment to his wife of undivided one-half interest in contingent fee for which he had fully performed).

287. Recent Cases, *Taxation*, *supra* note 251, at 129.

288. *See, e.g.*, Mitchell v. Bowers, 9 F.2d 414 (S.D.N.Y. 1925) (holding the husband partner taxable on partnership profits assigned to his wife who had no present interest in the partnership assets), *aff'd*, 15 F.2d 287 (2d Cir. 1926).

289. *See, e.g.*, Rosenwald v. Comm'r, 33 F.2d 423 (7th Cir. 1929) (holding the husband not taxable on the assignment of negotiable bond coupons on grounds he divested himself of all control, while holding him taxable on assigned stock dividends, interest on a note, and rents from real property that he still controlled).

290. *See, e.g.*, Comm'r v. Field, 42 F.2d 820 (2d Cir. 1930) (holding the assignor husband not taxable on the assignment of trust income to his beneficiary wife on grounds that he effectively transferred his equitable estate); Clark v. Comm'r, 16 B.T.A. 453 (1929) (holding the assignment alienating equitable life interest as a valid transfer of present property right to assignees sufficient to make them taxable on future income).

291. *See, e.g.*, Comm'r v. Blair, 60 F.2d 340 (7th Cir. 1932) (holding the beneficiary of spendthrift trust taxable on assignments of trust income). Such trusts are for the benefit of persons unable to control their own spending.

292. *See, e.g.*, Wright v. Comm'r, 26 B.T.A. 21 (1932) (holding the assignee taxable on a pre-sale transfer of an undivided one-half interest in property); Rogers v. Comm'r, 15 B.T.A. 638 (1929) (holding the assignor taxable on profits from a sale of property assigned after the sale transaction); Walker v. Comm'r, 6 B.T.A. 1142 (1927) (holding the assignment of an oil and gas lease from a husband to his wife an effective transfer of the husband's interest).

293. *See* Nelson v. Ferguson, 56 F.2d 121 (3d Cir. 1932); Hall v. Burnet, 54 F.2d 443 (D.C. Cir. 1931).

294. *See, e.g.*, Van Brunt v. Comm'r, 11 B.T.A. 406 (1928) (assigning rental and dividend income from property not corpus); Parshall v. Comm'r, 7 B.T.A. 318 (1927) (holding the husband's transfer of partnership interest to his wife sufficient to make a subsequent partnership distribution taxable to her).

295. *See, e.g.*, Leydig v. Comm'r, 15 B.T.A. 124, 132 (1929) (finding "where the thing assigned was a property right, real or personal, productive of income, income thereafter arising from such property is income to the assignee by virtue of his ownership").

296. *See, e.g.*, Bing v. Bowers, 22 F.2d 450 (S.D.N.Y. 1927) (emphasizing the difference

a right to collect income as well as to exercise interest in the property generating the income.[297] If the assignor failed to divest himself of all legal, equitable, and beneficial interests in income and its sources, he still enjoyed sufficient control to justify taxing him on the subject of the assignment.

3. Income as Consumption and Control as Ownership

By viewing control as tantamount to ownership, the Court defined the reach of the income tax in a way that was more appropriate for defining income under a consumption tax. Cases like *Burnet v. Wells*,[298] *Reinecke v. Smith*,[299] *DuPont v. Commissioner*,[300] and *Burnet v. Leininger*[301] all moved the income tax "close to a 'services' or 'flow of satisfactions' concept of income—the enjoyment and benefit derived by a person from the payments to an intended beneficiary is taxable income to the former."[302] Taxable income under this theory tracked not only increases and decreases in wealth but also increases and decreases in the value of personal satisfaction.[303] In many ways, the Court's expanding conception of income resembled what modern-day theorists would recognize as the Haig-Simons definition. Named for its two most influential proponents, economists Robert Haig and Henry Simons, the definition considered income as the algebraic sum of "the market value of rights exercised in consumption and the change in the value of the store of property rights."[304] "Personal income," Simons wrote more pointedly, "connotes, broadly, the exercise of control over the use of society's scarce resources."[305]

Some commentators at the time expressed concern that this "broad and convenient formula" for income could "dangerously stimulate the appetite and imagination of hungry income tax collectors."[306] Several members of the Supreme Court were similarly worried that a definition of taxable income untethered to

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between a mere promise to pay and an effective transfer of a property right); Colbert v. Comm'r, 12 B.T.A. 565 (1928) (same).

297. *See, e.g.*, Rose v. Comm'r, 65 F.2d 616, 617 (6th Cir. 1933) (finding that an assignment from husband-partner to assignee family members transferred a right to partnership income as well as "rights of partners"); *Parshall*, 7 B.T.A. at 318 (finding the assignee wife received a right to partnership income as well as partnership interests).

298. 289 U.S. 670 (1933).

299. 289 U.S. 172 (1933).

300. 289 U.S. 685, 689 (1933).

301. 285 U.S. 136 (1932).

302. Surrey, *Assignments of Income*, *supra* note 197, at 828 (citation omitted).

303. *See* Paul & Havens, *supra* note 242, at 253 ("[N]ew development of constructive or equivalent-of-cash income is but a short step to the 'flow-of-satisfaction' concept of income, to the doctrine that personal satisfaction is alone sufficient to constitute the equivalent of cash.").

304. HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 50 (1938) (numbering omitted); *see also* Robert Murray Haig, *The Concept of Income—Economic and Legal Aspects*, *in* READINGS IN THE ECONOMICS OF TAXATION 54 (Richard A. Musgrave & Carl S. Shoup eds., 1959).

305. SIMONS, *supra* note 304, at 49.

306. Paul & Havens, *supra* note 242, at 253.

ownership as defined by legal title inappropriately broadened the powers of taxation. Justice Sutherland, for one, opined that taxing a grantor

> requires something more tangible than a purpose to perform a social duty, or the recognition of a moral claim as distinguished from a legal obligation, which, we think, is not supplied by an assumption of his desire thereby to secure his own peace of mind and happiness or relieve himself from further concern in the matter.[307]

While Congress enjoyed broad taxing powers, "the distinction between taxation and confiscation must still be observed."[308] In its zeal to protect the revenue, the Court may have blurred the line.

A definition of income that equated control with ownership raised a constitutional concern involving due process under the Fifth Amendment. In the words of Justice Sutherland, "So long as the Fifth Amendment remains unrepealed and is permitted to control, Congress may not tax the property of A as the property of B, or the income of A as the income of B" on grounds that B controls A's property or income.[309] The Supreme Court first considered this issue under the Fourteenth Amendment rather than the Fifth Amendment. In *Hoeper v. Tax Commission*,[310] a married taxpayer protested taxes paid under the Wisconsin state income tax, which computed tax liability by aggregating spouses' incomes on a single return. A divided Court struck down the Wisconsin statute on grounds that the husband had no legal interest in his wife's income nor did he control it under the state's reformed common law. The Court held:

> We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income.[311]

The Court applied the same reasoning to a case arising under the Fifth Amendment, finding that both "in law and in fact the wife's income was her separate property," a separation of interests which prevented the government from taxing her income as her husband's.[312] Without legal title or control over the wife's income, it could not be said that the husband owned in any sense—legal, equitable, beneficial—a taxable property right.

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307. Burnet v. Wells, 289 U.S. 670, 683 (1933) (Sutherland, J., dissenting).
308. *Id.*
309. *Id.*
310. 284 U.S. 206 (1931).
311. *Id.* at 215.
312. Heiner v. Donnan, 285 U.S. 312, 326 (1932) (involving the federal gift tax and finding the "situation presented in the *Hoeper* case . . . the same as that presented here").

Three dissenting justices in *Hoeper* saw control where state law did not. "Taxation may consider not only command over, but actual enjoyment of, the property taxed," Justice Holmes wrote for himself, Brandeis, and Stone.[313]

> In some States, if not in all, the husband became the owner of the wife's chattels, on marriage, without any trouble from the Constitution; and it would require ingenious argument to show that there might not be a return to the law as it was in 1800. It is all a matter of statute. But for statute, the income taxed would belong to the husband, and there would be no question about it.[314]

The majority's emphasis on "separation of interests" as between the spouses "cannot make us deaf to the assumption . . . of community when two spouses live together and when usually each would get the benefit of the income of each without inquiry into the source."[315] Regardless of the spouses' statutory interests under Wisconsin's or any other state's property law, husbands and wives operated as a family unit and benefitted from each other's income. The reality of that shared enjoyment and use justified taxing combined family income to either spouse.[316] Under the prevailing gendered view of the family and its common law roots, the husband should bear the burden. Taxing combined family income was also justified "by its tendency to prevent tax evasion."[317] Although "the law and the evil" had to share a just and reasonable relation to pass constitutional muster, the Court had regularly held "that administrative necessity may justify the inclusion of innocent objects or transactions within a prohibited class."[318] Preventing tax avoidance and accounting for the realities of family economics justified aggregating family income and taxing it as a unit.

VI. *POE V. SEABORN*: OWNERSHIP UNDER STATE PROPERTY LAW GOVERNS TAXABILITY

Holmes's expansive definition of income went on trial in 1930. Three years earlier, the Attorney General encouraged the Treasury Department "to arrange for test cases" to determine the nature of the wife's interest under community property

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313. *Hoeper*, 284 U.S. at 220 (Holmes, J., dissenting).

314. *Id.*

315. *Id.* at 219–20.

316. *See* Recent Decisions, *Taxation—Power to Determine Income Tax Rate of Husband on Basis of Combined Income of Husband and Wife*, 30 MICH. L. REV. 810, 811 (1932) (observing in context of *Hoeper*, "family continues to operate as a unit and the property and income of all its members are still pooled for the benefit of all, regardless of where the legal title stands"). Other commentators argued that taxing someone on the income of another was justified under a control theory or constructive receipt. *See* Magill, *supra* note 243, at 860–61. Still others noted "[t]here would seem to be no constitutional objections to taxing the use of income rather than the income itself." Notes, *Federal Taxation of Income as Affected by Community Ownership*, 39 HARV. L. REV. 762, 765 (1926).

317. *Hoeper*, 284 U.S. at 220.

318. *Id.* at 220–21.

law and to further determine the proper tax treatment of that interest.[319] By 1930, test cases had percolated up to the highest court.

In the lead case, *Poe v. Seaborn*,[320] the Supreme Court interpreted the Revenue Act of 1926 as applied to the interests of husband and wife in community property under the law of Washington. The opinion, authored by Justice Roberts, challenged definitions of taxable income that deviated from strict legal title. The relevant federal income tax provisions "lay a tax upon the net income of every individual," and "use of the word 'of' denotes ownership. It would be a strained construction, which, in the absence of further definition by Congress, should impute a broader significance to the phrase."[321] The wife's ownership interest in community property, in turn, "must be found in the provisions of the law of the State."[322] According to the government, the husband under Washington law enjoyed "such broad powers of control and alienation, that while the community lasts, he is essentially the owner of the whole community property, and ought so to be considered" for tax purposes.[323] The Court disagreed, finding that while the husband was relegated to powers of management and control over community personal property, his power was "subject to restrictions which are inconsistent with denial of the wife's interest as co-owner."[324] The "community must act through an agent," not just to discourage litigation between spouses which might "subvert the marital relation," but also to protect the reliance and expectancy interests of third parties dealing with one or the other spouse.[325] Most importantly, a careful review of Washington's community property statutes and state decisions interpreting them indicated that the wife possessed a "clear" and "vested property right in the community property, equal with that of her husband."[326]

The Court's decision was a definitive blow to the position that control determined ownership. "Power is not synonymous with right," the Court asserted.[327] Control could be indicative of ownership but not determinative. In fact, under Washington law, the husband's control as managing agent of the community "was but a recognition of the ownership of another."[328] "The law's investiture of the husband with broad powers, by no means negatives the wife's present interest as co-owner."[329] Under the law of Washington, "the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife."[330] Thus, married couples in Washington could file

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319. *See supra* note 234 and accompanying text.
320. 282 U.S. 101 (1930).
321. *Id.* at 109.
322. *Id.* at 110.
323. *Id.* at 111–12.
324. *Id.* at 110–12.
325. *Id.* at 112.
326. *Id.* at 111.
327. *Id.* at 113.
328. Surrey, *Assignments of Income*, *supra* note 197, at 828 n.147.
329. *Seaborn*, 282 U.S. at 113.
330. *Id.*

separate returns, "each treating one-half of the community income as his or her respective income."[331]

The Court held similarly in the companion cases accompanying *Seaborn*. It found that the community property laws of Arizona,[332] Louisiana,[333] and Texas[334] granted wives in those states present vested interests equal to their husbands in one-half the community income and property. The equal ownership interests between spouses in those states permitted them to file separate federal income tax returns each with one-half the community income.

In addition, by way of certificate from the Ninth Circuit, the Court revisited the nature of the wife's interest under California community property law. In *United States v. Malcolm*,[335] the Court considered two questions: (i) under the federal income tax, "must the entire community income of a husband and wife domiciled in California be returned and the income tax thereon be paid by the husband?";[336] and (ii) did a wife in California possess "such an interest in the community income that she should separately report and pay tax on one-half of such income?"[337] California law had changed since the Court last considered these questions. Prompted by the adverse decisions in *Robbins*[338] and *Stewart v. Stewart*,[339] the California legislature had enacted a statute identifying the "respective interests of husband and wife in community property" during marriage as "present, existing, and equal."[340] The Supreme Court considered the above questions in light of the legislative declaration.[341] Citing *Seaborn* and its companion cases, the *Malcolm* Court found, first, that a California husband did not have to report the entire community income on his own return, and second, that a California wife possessed sufficient interest in the community to report one-half the community income on a return separate from her husband's.[342] Shortly thereafter, the Treasury Department issued a ruling that applied the holdings in *Seaborn*, *Malcolm*, and the companion cases to the remaining three community property states of Idaho, Nevada, and New Mexico.[343] By the close of 1931, married couples residing in all eight community

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331. *Id.* at 118.

332. *See* Goodell v. Koch, 282 U.S. 118, 121 (1930).

333. *See* Bender v. Pfaff, 282 U.S. 127, 131 (1930).

334. *See* Hopkins v. Bacon, 282 U.S. 122, 126–27 (1930).

335. 282 U.S. 792 (1931).

336. *Id.* at 793.

337. *Id.* at 794.

338. United States v. Robbins, 269 U.S. 315 (1926).

339. 249 P. 197, 206 (1926) (concluding that the legislature "did not state . . .'in plain language,' . . . 'that the purpose of these amendments was to *vest* in the wife during the marriage a present interest or estate in the community property'" (emphasis added in second quote)).

340. Act of April 28, 1927, ch. 265, § 1, 1927 Cal. Stat. 484; *see also* William M. Simmons, *The Interest of a Wife in California Community Property*, 22 CALIF. L. REV. 404, 417 (1934).

341. Some commentators argued that the 1927 amendments simply clarified longstanding policy and law. *See, e.g.*, Recent Legislation, *Community Property*, 16 CALIF. L. REV. 68, 68 (1927).

342. *Malcolm*, 282 U.S. at 793–94.

343. I.R.S., I.R.B., MIMEOGRAPH 3853 139–40 C.B. X, pt. 1.

property states reported income for federal income tax purposes as co-owners of marital income and property.

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In the same year that the Supreme Court decided *Seaborn*, it heard another seminal tax case, *Lucas v. Earl*.[344] Both cases involved the taxation of married couples living in community property states. But while the Washington spouses in *Seaborn* were found to share equal ownership interests in the community and therefore allowed to file separate federal income tax returns, the Earls, residents of California, were not. In 1901, Mr. and Mrs. Earl contracted to divide equally all present and future income and property.[345] Thirty years later, the Court considered the tax implications of Mr. Earl's contractual assignment of personal service income to his wife. Justice Holmes wrote for a unanimous Court, holding that the assignment did not relieve Mr. Earl of his responsibility to pay tax on the whole of his income.[346] In language reminiscent of *Corliss*'s "refinements of title,"[347] Holmes said that the case was "not to be decided by attenuated subtleties."[348] Rather, it turned on

> the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it.[349]

Holmes concluded famously: "[N]o distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."[350] Artifice did not relieve the owner of income from his tax obligations.

Legal commentators at the time debated whether the Court's subsequent decision in *Seaborn* overruled *Earl*.[351] But the Court itself distinguished the cases.

> The very assignment in [*Earl*] was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different question from this, because here, by law, the earnings are never the property of the husband, but that of the community.[352]

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344. 281 U.S. 111 (1930).
345. *Id.* at 113–14.
346. *Id.* at 113–15.
347. *See supra* note 249 and accompanying text.
348. *Earl*, 281 U.S. at 114.
349. *Id.* at 114–15.
350. *Id.* at 115.
351. *See, e.g.*, Surrey, *Assignments of Income*, *supra* note 197, at 813 ("As far as community property is concerned, *Lucas v. Earl* has been overruled by *Poe v. Seaborn*.").
352. Poe v. Seaborn, 282 U.S. 101, 117 (1930).

In other words, *Earl* was not a community property case, but rather a contract case. In the context of contract law, the tree that bore the fruit was Mr. Earl, while in the context of community property law, the tree was the community, comprised equally of husband and wife. *Earl* stands for the proposition that one cannot avoid tax by assigning income to a third party who does not already own the income. *Seaborn*, on the other hand, says that husbands in community property states own just one-half the community income in the first place, and thus owe tax only on their respective halves. I tell my students to think of it like this: in *Earl*, 100% of family income flowed from Mr. Earl's employer to Mr. Earl and then, a nanosecond later by virtue of state contract law, 50% of the income passed to Mrs. Earl; comparatively, in *Seaborn*, and by virtue of general property law rather than private contract law, 100% of the income flowed to the community in which both Mr. and Mrs. Seaborn enjoyed equal, 50% ownership interests. Ownership in *Seaborn* "spr[u]ng by operation of law," while that in *Earl* was created "by agreement of the parties."[353]

One could argue this view amounts to a distinction without a difference.[354] That is, whether by operation of law or by private agreement, *both* shift ownership of income and property, *both* are initiated voluntarily by the parties, and *both*, if validated, result in lower tax liability. The Supreme Court, however, viewed the distinction between income shifting by general law versus private law as real and meaningful. Moreover, the difference had nothing to do with whether a marriage contract was more or less sacred than contracts governing market-based transactions. It involved ownership, and it applied as equally to community income as to separate income, to community property spouses as to common law spouses. Husbands and wives in community property states were co-owners of the community, but they enjoyed distinct ownership interests, as distinct and separate as the ownership interests of husbands and wives in common law states.

As Randolph Paul, the "architect of the modern federal tax system,"[355] wrote in the aftermath of *Seaborn*, "For income tax purposes a husband and wife are, generally speaking, separate persons. This is true in community property states, and is equally true in non-community property states."[356] Thus, income shifting by private contract, in both community property and common law states, reshuffled ownership interests and qualified as a taxable event. Income shifting by community property law, from husband to wife or from wife to husband, did not reshuffle ownership interests nor constitute a taxable event, because neither husband nor wife had more than one-half of the whole to shift. In *Seaborn*, the Court acknowledged this fundamental characteristic of community property law and of family taxation. In no uncertain terms, it held that ownership was the lodestar of family taxability.

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353. *See* Recent Decisions, *supra* note 268, at 1081.

354. *See, e.g.*, Surrey, *Assignments of Income, supra* note 197, at 813 (noting *Seaborn* "interposes the community ownership between the salary and the earner, so that the salary is diverted to the community. It may be urged that an assignment creating enforceable rights in the assignee to the assignor's salary should similarly be interposed between the earner and his salary").

355. Joseph J. Thorndike, *Profiles in History: Randolph E. Paul*, 105 TAX NOTES 529, 529 (2004).

356. Paul & Havens, *supra* note 242, at 243.

VII. FROM LODESTAR TO LEGAL FICTION

In the aftermath of *Seaborn*, family tax issues did not disappear from the Court's docket. Nor did taxpayers slacken their solicitude for tax saving devices. In fact, the stakes for achieving tax avoidance went up nearly every year in the period between *Seaborn* and the end of World War II. The Revenue Act of 1932 raised the top marginal income tax rate from 25 to 63% and the top estate tax rate from 20 to 45%.[357] The new law had the effect of doubling the effective tax rate on the richest 1% of households, from 3.4% to 6.8%.[358] It also raised tax avoidance stakes for middle-income and upper-middle-income taxpayers, transforming what had been a class-based income tax into a mass-based regime.[359] In particular, it lowered personal exemptions for single as well as married taxpayers,[360] and raised tax rates throughout the middle-income range.[361] But that was just the beginning. Congress upped taxes again in 1934 and 1935, and almost every year between 1940 and 1944. By war's end, the top marginal rate reached a staggering 94% while personal exemptions plummeted to $500 for singles and $1000 for married couples.[362]

As the value of tax avoidance went up, so did tax litigation. By 1940, federal tax matters constituted "the largest group of cases by subject matter on the [Supreme] Court's docket."[363] In the 1940 term, the Court decided an astonishing thirty-four tax cases[364] and an equally high number (twenty-four) by historical standards one

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357. Revenue Act of 1932, 47 Stat. 169, 174–77, 243–44 (1932).

358. Brownlee, *supra* note 32, at 51.

359. *See generally* Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 BUFF. L. REV. 685 (1988).

360. *See* Revenue Act of 1932, at 184.

361. *See id.* at 174.

362. TAX FOUND., FACTS AND FIGURES ON GOVERNMENT FINANCE 103, 116 (Sumeet Sagoo ed., 38th ed. 2005). Lower exemptions pulled millions of Americans into the federal income tax system. Indeed, between 1939 and 1943, the number of income tax filers jumped from 4 million to 43 million. Christopher J. Tassava, *The American Economy During World War II*, EH.NET (Feb. 5, 2010, 11:19), *available at* http://eh.net/encyclopedia/article/tassava.WWII. By war's end, the broad-based progressive federal income tax accounted for a near majority of all federal receipts. *See* TAX FOUND., *supra*, at 85 (showing that in 1945 the personal income tax accounted for 41% of federal receipts while the personal and corporate income taxes combined for 76% of all federal receipts).

363. Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of the Recent Decisions*, 35 ILL. L. REV. 779, 779 (1941) [hereinafter Surrey, *The Supreme Court*].

364. *Id.* at 780. The Court sided with the government in twenty-seven of the thirty-four cases. *Id.*

year earlier.[365] Taxation, law professor Roswell Magill observed, was "by all odds the chief matter of concern of the Court."[366]

To counteract the avoidance efforts that produced litigation, the Supreme Court articulated an expansive definition of income and of ownership under the federal taxing power. Observers were keenly aware of the trend. "The present Court," Stanley Surrey wrote in 1941, "has already indicated that the steady broadening of the concept of income which characterized the past decade will continue, but at a pace so accelerated that it almost dwarfs the progress of that decade."[367] Others noted the Court's increased willingness to explore the outer reaches of Congress's taxing power rather than the four corners of statutes as written. In more and more cases, the "broad sweep" of what constituted gross income "was construed to indicate Congressional purpose to use the full measure of the taxing power."[368] Quite consciously, the Court "resorted to sweeping theoretical observations to prevent the obvious escape from the surtax."[369] "While it is true that economic gain is not always taxable as income," the Court wrote in *Helvering v. Bruun*, "it is settled that the realization of gain need not be in cash derived from the sale of an asset."[370] "Economic gain" occurred whenever an asset appreciated in value, and the Constitution provided few restrictions on when the government could tax that appreciation. Determining when it was appropriate to levy a tax had to be framed "in practical terms and must be shaped by considerations of administrative convenience and taxpayer convenience. A constitutional strait-jacket imposed by the Court would not be conducive to such an answer."[371] In the face of aggressive tax avoidance behavior, "[l]egislative ingenuity need not be the sole response to taxpayer ingenuity."[372]

Judicial resourcefulness was also necessary to protect the revenue, particularly with respect to family taxation. When analyzing the Court's family tax

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365. Roswell Magill, *The Supreme Court on Federal Taxation, 1939–40*, 8 U. CHI. L. REV. 1, 1–2 (1940). To put the number of cases in historical perspective, consider that the Court decided only twenty-four federal tax cases between 2000 and 2010. *See United States Law Week's Supreme Court Today: Topical List of Cases Decided*, BNA, http://pubs.bna.com/ip/bna/lwt.nsf/TopicalCasesDecided?OpenView&Start=1&Count=100&Expand=63#63.

366. Magill, *supra* note 365, at 1.

367. Surrey, *The Supreme Court*, *supra* note 363, at 781.

368. Edmund W. Pavenstedt, *The Broadened Scope of Section 22(a): The Evolution of the* Clifford *Doctrine*, 51 YALE L.J. 213, 213–14 (1941). Legal scholars noted the Court's constitutional rather than statutory approach. *See* Magill, *supra* note 365, at 2 (asking whether "the Court [should] attempt to do in some cases what Congress failed to do—seek to obviate avoidance by holding the income taxable to the settlor by a judicially enacted exception to the general rule"); George E. Ray, *The Income Tax on Short Term and Revocable Trusts*, 53 HARV. L. REV. 1322, 1341 (1940) (noting "while there has been no real slackening in the pace of the taxpayer [to avoid taxes], Congress has been inactive," and "the courts have taken over more and more the burden of protecting the revenue").

369. Surrey, *The Supreme Court*, *supra* note 363, at 791.

370. 309 U.S. 461, 469 (1940) (holding lessor taxable on the value of a building erected by lessee in the year of lessee's default rather than upon lessor's disposition of the property).

371. Surrey, *The Supreme Court*, *supra* note 363, at 792.

372. *Id.* at 810.

jurisprudence, one had to "sharply differentiate the statutory and constitutional aspects. What the statute provides is one thing; what the statute may or can provide, under the Constitution, is another thing."[373] Ownership remained the guidepost for analysis, and the Court continued to rely on incidents of ownership beyond strict legal title to frame a broad definition of taxability. "Technical considerations," the Court warned in its most famous trust case, *Helvering v. Clifford*, "niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue," which in the case at hand involved "the normal consequences of family solidarity."[374] In *Clifford* and other family tax cases, observers noted that the Court was "firmly insisting that the realities of the situation must not be forgotten in the confusion of technical arguments. In each case the reality" of the taxpayer's position reflected an attempt to avoid tax "by a transaction having no substance in itself and deriving its meaning only from the effort at tax reduction."[375]

Adhering to the letter of the law did not guarantee validation by the Court.[376] The family unit provided far too many avenues of escape for the Court to accept a taxpayer's transaction at face value. In *Clifford*, the applicable statute said that income from a trust was taxable to beneficiaries if distributable, taxable to the trust if not distributable, but never taxable to the grantor.[377] The Court largely ignored this directive, and examined the transaction under Congress's taxing power. The question was not whether the taxpayer fit into the form of the trust statutes, but "whether the grantor after the trust has been established may still be treated, under this statutory scheme, as the owner of the corpus."[378] The answer to the question required "special scrutiny of the arrangement," particularly "where the grantor is the trustee and the beneficiaries are members of his family group . . . lest what is in reality but one economic unit be multiplied into two or more."[379] Under its sweeping analysis, the Court found "at best a temporary reallocation of income within an intimate family group. Since the income remains in the family and since the husband retains control over the investment, he has rather complete assurance

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373. Paul & Havens, *supra* note 242, at 241. Defining taxable income, the Court acknowledged, involved "the boundaries of legislative power. It must be dealt with in a large way, as questions of due process always are, not narrowly or pedantically, in slavery to forms or phrases." Burnet v. Wells, 289 U.S. 670, 677–78 (1933).

374. 309 U.S. 331, 334, 337 (1940). One year later, the Court noted that it had long prevented "form to obscure the reality" of transactions. Harrison v. Schaffner, 312 U.S. 579, 583 (1941).

375. Surrey, *Assignments of Income*, *supra* note 197, at 803; *see also* Magill, *supra* note 365, at 19 ("The taxpayer cannot count on a close technical interpretation; if his case is within the general spirit of the taxing sections, as the Court views it, he will be held liable . . . .").

376. This was also true in areas extending beyond family taxation. *See, e.g.*, Higgins v. Smith, 308 U.S. 473 (1940) (disallowing losses from sales of securities to taxpayer's wholly-owned corporation); Gregory v. Helvering, 293 U.S. 465 (1935) (requiring reorganization to have a business purpose to qualify for tax-free treatment).

377. *See* 309 U.S. 331 (holding grantor husband, rather than beneficiary wife, taxable on income from short-term trust).

378. *Id.* at 334.

379. *Id.* at 335.

that the trust will not effect any substantial change in his economic position."[380] In similar fashion, the Court looked beyond the statute and probed the outer reaches of the Sixteenth Amendment in holding the grantor taxable in cases involving trusts established for the payment of alimony,[381] the support of minor children,[382] and the satisfaction of debts.[383] Control over income, enjoyment in the power of its disposition, and satisfaction in delivering it to intended recipients also guided the Court in taxing donors on gifts of interest-bearing coupons[384] and assignor-beneficiaries on assignments of trust income.[385]

Under its expansive definition of ownership, the Court could choose whomever to give the "shaft."[386] The assignee of future salary payments was taxable due to an increase in wealth as the new owner, while the assignor was taxable as the old owner enjoying the power of disposition. Similarly, in the context of divided property interests, the grantor/assignor/donor could be taxed if he actually received the income as well as if he enjoyed disposing of it in satisfaction of some other obligation, while the beneficiary/assignee/donee could be taxed as the new owner of income-bearing property. Faced with taxpayers' insatiable appetite for tax avoidance, the Court relied on a mix of statutory, constitutional, and philosophical arguments to protect the revenue.

A. Politics of Tax Avoidance and Taxing the Family

Meanwhile, the Treasury Department was busy prosecuting its own anti-avoidance war. It received inspiration from President Franklin Roosevelt, who railed against tax "loopholes" that provided an "unfair advantage [to] the few."[387]

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380. *Id.* at 335–36. Commentators noted the importance of "control" in determining ownership of income and, in turn, of taxability. *See, e.g.*, Pavenstedt, *supra* note 368, at 230 (noting "quantum of control" as "the all-important—and perhaps, it may be ventured, the solely decisive—factor when considering" taxability).

381. *See, e.g.*, Douglas v. Willcuts, 296 U.S. 1, 10 (1935) (finding "no warrant for a construction [of the statutes] which would preclude the laying of the tax against the one who through the discharge of his obligation enjoys the benefit of the income as though he had personally received it"). *But see* Helvering v. Fuller, 310 U.S. 69 (1940) (holding the grantor husband not taxable on income from an alimony trust where the trust discharged his duty of support). *Cf.* Helvering v. Leonard, 310 U.S. 80 (1940) (holding the grantor husband taxable on the income from an alimony trust where the state granting the divorce retained the power to modify the divorce decree).

382. *See, e.g.*, Helvering v. Schweitzer, 296 U.S. 551 (1935) (mem.) (per curiam); Helvering v. Stokes, 296 U.S. 551 (1935) (mem.) (per curiam).

383. *See, e.g.*, Helvering v. Blumenthal, 296 U.S. 552 (1935).

384. *See* Helvering v. Horst, 311 U.S. 112, 117–18 (1940) ("[The] power to dispose of income is the equivalent of ownership of it."); *see also* Helvering v. Eubank, 311 U.S. 122, 124 (1940) (holding the assignor husband taxable on an assignment to his wife of renewal insurance commissions payable in the future).

385. *See* Harrison v. Schaffner, 312 U.S. 579, 581–82 (1941) (holding the assignor mother taxable on income assigned to her children from a trust of which she was the beneficiary).

386. *See* United States v. Robbins, 269 U.S. 315, 328 (1925).

387. Franklin D. Roosevelt, A Message to the Congress on Tax Revision, *in* 4 PUBLIC

Tax avoidance was as bad as tax evasion. "'Tax avoidance' means you hire a $250,000-fee lawyer," Roosevelt said, "and he changes the word 'evasion' into the word 'avoidance.'"[388] Both were "inequitable and undemocratic," and both had been getting worse.[389] In 1937, after persuading the tax-writing committees in Congress to create a Joint Committee on Tax Evasion and Avoidance, Roosevelt argued that avoidance and evasion had become "so widespread and so amazing both in their boldness and their ingenuity, that further action without delay seems imperative."[390] Invoking the words of recently deceased Justice Holmes, Roosevelt wrote to Congress: "'Taxes are what we pay for civilized society.' Too many individuals, however, want the civilization at a discount."[391]

Roosevelt's Treasury Department identified eleven "principal devices" used by taxpayers "with large incomes for the purpose of defeating the income taxes."[392] Chief among them were three techniques to shift income within the family: trusts, partnerships, and community property law, the last of which Treasury Secretary Henry Morgenthau called "unjustifiable."[393] All told, $193 million ($2.97 billion in 2011 dollars) in tax revenue was lost annually to separate returns: $159 million ($2.44 billion) from income shifting among common law spouses and another $34 million ($522 million) from community property couples.[394] As a solution to the revenue loss, the Treasury recommended that Congress enact compulsory joint returns, requiring spouses wherever resident to aggregate family income on a single return with tax liability apportioned according to spouses' respective earned income shares.[395] Congress took no action on the recommendation,[396] but Treasury pushed ahead in crafting solutions to family tax avoidance.

Beginning in the mid-1930s, the Treasury Department devoted considerable time to studying family taxation. In the process, it adopted a holistic approach, seeking a solution involving all separate returns and not just those filed by

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PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 270, 271 (Samuel I. Rosenman ed., 1938).

388. Franklin D. Roosevelt, The Two Hundred and Twenty-Fifth Press Conference, *in* 4 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 312, 313 (Samuel I. Rosenman ed., 1938).

389. *Id.*

390. Franklin D. Roosevelt, The President Urges Legislation to Prevent Tax Evasion, *in* 1937 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 238 (Samuel I. Rosenman ed., 1941).

391. *Id.*

392. *Id.* at 239–45 (statement of Henry Morgenthau, Jr.).

393. *Id.* at 244; *see also* Randolph E. Paul, *The Background of the Revenue Act of 1937*, 5 U. CHI. L. REV. 41, 71–77, 84–85 (1937) (discussing family tax avoidance techniques in the context of the 1937 bill).

394. *Tax Evasion and Avoidance: Hearings Before the Joint Committee on Tax Evasion and Avoidance*, 75th Cong. 310 (1937) (statement of Roswell Magill, Undersecretary of the Treasury).

395. *Id.*; *see also id.* at 17–21, 33–34. The plan was similar to the one that Treasury had recommended in 1933 and 1934. *See* H.R. REP. NO. 73-704, pt. 1, at 3, 43–44, 113 (1934). The pro-rata allocation between husband and wife was designed to overcome due process concerns raised in *Hoeper* pertaining to taxing one spouse on the income of another.

396. *See* H.R. REP. NO. 75-1546 (1937).

community property spouses.[397] It quantified the number of separate returns,[398] the lost revenue associated with separate filing,[399] and which families it benefited.[400] Treasury also evaluated "the complexity of the marital relationship"[401] and fundamental questions such as "how marital status should affect tax liability,"[402] how to treat economies of scale in households of varying size,[403] and how to account for imputed income of stay-at-home spouses[404] as well as additional

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397. *See, e.g.*, Carl Shoup, *Suggestions for Study of Taxation of Community Property*, 1–2 (Sept. 19, 1939) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/39.5) (urging a coherent approach that viewed the "community property problem" alongside "the general treatment of married versus single taxpayers").

398. *See, e.g.*, Miss Coyle, *supra* note 35, at Table 1 (finding that the number of separate returns jumped nearly 60% between 1935 and 1939); Martin Atlas, *Separate and Joint Returns of Husbands and Wives: Comparison of Tax Under Present Law and Treasury Proposal* (Apr. 16, 1941) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/41.3); Miss Coyle and Staff, *Present Distribution of Separate Returns of Husbands and Wives Classified by Size of Their Combined Net Incomes, 1936* (June 7, 1941) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/41.12).

399. *See, e.g.*, *Revenue Act of 1942: Hearing on H.R. 7378 Before the S. Comm. on Fin.*, 77th Cong. 8–9 (1942) (statement of Henry Morgenthau) (separate returns costing $400 million annually); Mr. Haas to Mr. Blough (Nov. 13, 1941), cited in Miss Coyle, *supra* note 35 (citing another source) (reporting separate returns costing $353 million annually).

400. *See, e.g.*, TREASURY DEP'T, THE TAX TREATMENT OF FAMILY INCOME (1947), in *Revenue Revisions, 1947–48: Hearings Before the H. Comm. Ways and Means*, 80th Cong. 859 (1947); Mr. Fefferman, *Comments on Mr. Turner's Memorandum Regarding a Plan to Allow Husbands and Wives in All States the Option of Equal Division of Income for Tax Purposes*, 5 (Dec. 6, 1946) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/46.7); Mr. Turner to Dr. Atkeson, *Analysis of Effects on Tax Revenue and Individual Burdens on Equalizing Tax Treatment of Community and Noncommunity Income*, 2–6 (July 13, 1946) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/46.7); Anita Wells, *Difference in Federal Income Tax on Incomes of Specified Size in Community Property and Non-Community Property States, 1935–1944* (Aug. 14, 1943) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/43.4).

401. Roy Blough to Mr. Hanes, *Comment on Mr. Wood's "Alternative Plan for Eliminating Inequalities in Income Tax on Married Couples,"* 5 (Sept. 27, 1938) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/37.3).

402. Roy Blakey, "Federal Income Tax, Section VII: Joint Versus Separate Returns," in *The Federal Revenue System: Forward and Summary of Recommendations* (Sept. 20, 1934) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 62), *available at* http://taxhistory.tax.org/Civilization/Documents/Surveys/hst23735/23735-1.htm.

403. *See, e.g.*, Roy Blough & Carl Shoup, "Chapter 3: Income Taxation, 3. Joint vs. Separate Returns," in Roy Blough & Carl Shoup, *A Report on the Federal Revenue System Submitted to Undersecretary of the Treasury Roswell Magill* (Sept. 20, 1937) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 63), *available at* http://products.tax.org/civsite/Documents/Surveys/b&s_1937/CH1.HTM.

404. *See, e.g.*, *id.*; Roy Blough to Mr. Sullivan, *Compulsory Joint Returns*, 1 (June 10, 1941) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/41.9).

expenses of two-earner families.[405] Further, it attempted to measure income sharing and power relationships within families,[406] and it monitored changes in community property laws across the country,[407] particularly once common law states began converting to community property for the tax savings.[408] Treasury's comprehensive approach accounted for economic, legal, and philosophical considerations. As important, it was aided by a stable of talent that included Roy Blough,[409] Milton Friedman,[410] Roswell Magill,[411] Herman Oliphant,[412] Randolph Paul,[413] Carl Shoup,[414] Stanley Surrey,[415] William Vickrey,[416] and Jacob Viner.[417]

By the mid-1940s, opinion among Treasury's experts was unanimous: use of the individual as the tax unit produced multiple inequities when applied to the family.[418] Taxing the family as an entity could equalize taxes among similarly

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405. *See, e.g.*, *Revenue Act of 1942*, *supra* note 399, at 31–32 (statement of Randolph Paul) (proposing working wife tax credit); Richard Slitor, *Special Income Tax Allowance for Earnings of Wife or Head of Family* (Nov. 10, 1943) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/43.10) (same).

406. *See* TREASURY DEP'T, *supra* note 400, at 859 (noting data indicated spouses consumed family income "for the joint benefit of both spouses"); Mr. Fefferman, *Issues Involved in the Income-Splitting Plan*, 1 (Feb. 18, 1947) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/46.7) (examining sharing and consumption patterns within families); Roy Blough to Mr. Hanes, *supra* note 401 (concluding it was impossible to learn the "actual truth" of these relationships).

407. *See, e.g.*, Anita Wells, *Community Property*, 12 (July 24, 1941) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/41.23); Ellis W. Manning, *Oklahoma Community Property Law of 1939*, 4 (1940) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/41.23); Anita Wells to Roy Blough (Nov. 6, 1939) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/39.6) (discussing Oklahoma optional community property law).

408. *See* McMahon, *supra* note 24 (discussing states' efforts to reduce federal taxes on their residents); *infra* notes 447–50 and accompanying text.

409. Economist, University of Chicago, Columbia University; Member, Council of Economic Advisors; Assistant Secretary and Director, Division of Tax Research, Treasury.

410. Economist, University of Chicago; Nobel Laureate.

411. Law professor, Columbia University; Chief Attorney, Assistant Secretary, and Undersecretary, Treasury.

412. Law professor, University of Chicago, Columbia University; General Counsel, Treasury.

413. General Counsel, Treasury; Director, New York Federal Reserve Bank; Founder, Paul Weiss LLP.

414. Economist and lawyer, University of Chicago; Led multiple tax missions on behalf of U.S. government after World War II; Credited with inventing concept of value-added taxation.

415. Law professor, Harvard University; Assistant Secretary and Tax Legislative Counsel, Treasury; Pioneered concept of tax expenditure budget.

416. Economist, Columbia University; Nobel Laureate.

417. Economist, University of Chicago; Special Advisor, Treasury; Early proponent of monetarism.

418. *See, e.g.*, TREASURY DEP'T, *supra* note 400, at 849, 851–52 (stating individual tax unit produced "substantial tax differences between families with equal incomes").

situated families, prevent income shifting among family members, and raise federal revenues. It also enjoyed "the basic merit of recognizing the family as a single unit in its financial affairs, consistently with its unity in other respects and with governmental policy in other fields,"[419] including "relief, subsidized housing and minimum wage determination."[420] For "the bulk" of Americans, "the family is a communal organization which serves as the unit for income receipt, for spending, [] for measuring sacrifice," and for determining ability to pay taxes.[421]

Treasury's thinking coincided with a growing consensus among experts, courts, and Congress. Current law allowed families to create "an unreal number of economic units"[422] that achieved "multiplication of the taxpayer's personality."[423] Families acted in "every other vital economic and social respect . . . on a consolidated basis," but not under the tax law.[424] Income shifting devices and community property, Randolph Paul said, obscured the unity of the family to make it appear "as if there were no such economic unit."[425] Family tax avoidance not only reduced revenues, but backlogged courts. "Our tax machinery is too heavily strained to stand this increasing load of litigation," Stanley Surrey warned.[426] "The law should be changed to require husbands and wives and minor children living together to file a composite return."[427] Treating families as a unit could "eliminate the greater part of questionable current avoidance, and would remove the unjustified tax differential between citizens of community property states and those of other states."[428]

The Supreme Court had already begun recognizing the family as a taxable unit. In *Wells*, the Court emphasized the "solidarity of the family,"[429] while in *Clifford* it found a "temporary reallocation of income within an intimate family group."[430] In *Hormel v. Helvering*,[431] the Court handed down a "startling broadening of the family solidarity concept" by effectively finding that trustee-wives could never act independently of co-trustee-husbands.[432] The Court also validated the unity of the family with respect to loss deductions from sales of property between family members,[433] aggregated charitable deductions,[434] and different exemption levels for

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419. Miss Coyle, *supra* note 35; *see also* WILLIAM VICKREY, AGENDA FOR PROGRESSIVE TAXATION 74–75 (1947) (arguing families made consumption expenditures "for the joint benefit of all members of the family").

420. Roy Blough to Mr. Sullivan, *supra* note 404, at 1.

421. *Id.*

422. Pavenstedt, *supra* note 368, at 216.

423. Paul, *supra* note 393, at 48.

424. Paul & Havens, *supra* note 242, at 264.

425. Paul, *supra* note 393, at 48–49.

426. Stanley S. Surrey, *Family Income and Federal Taxation*, 24 TAXES 980, 982 (1946).

427. Harry J. Rudick, *The Problem of Personal Income Tax Avoidance*, 7 LAW & CONTEMP. PROBS. 243, 264 (1940).

428. *Id.*

429. Burnet v. Wells, 289 U.S. 670, 677 (1933).

430. Helvering v. Clifford, 309 U.S. 331, 335 (1940).

431. 312 U.S. 552 (1941).

432. Pavenstedt, *supra* note 368, at 220 (writing that the Court considered "one spouse the *alter ego* of the other" (emphasis in original)).

433. *See* Helvering v. Janney, 311 U.S. 189 (1940) (prohibiting such sales).

434. *See* Taft v. Helvering, 311 U.S. 195 (1940) (permitting such deductions).

single and married taxpayers.[435] These and other decisions prompted observers to predict that the Court would uphold a tax statute treating the family as a unit.[436]

Congress appeared willing to consider such a statute. It noted the Court's receptivity to taxing the family as a unit,[437] and it debated alternatives to taxing families on total rather than individual income.[438] A number of tax statutes already treated the family as an economic unit, including the option to file joint returns, personal exemptions for married taxpayers, the disallowance of loss deductions from sales of property between family members, and the treatment of family members as one person for purposes of personal holding companies. But what would a generalized statute look like that treated all families as single economic units? Management and control plans discriminated against community property spouses by failing to address income-shifting arrangements among common law spouses, and Congress had already rejected the plan three times. Mandatory joint returns had fared as poorly. And although concerns over the plan's constitutionality had ebbed, the prevailing wisdom was that "you can not [sic] get the votes to make a law out of it."[439]

Enter the split-income plan. As early as 1937, the Treasury Department considered remedying longstanding family tax problems by moving "in the direction of the community property states, not away from them."[440] The idea of universalizing community property for tax purposes floated around Congress in the early 1940s,[441] and tax experts analyzed the concept.[442] Extending community

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435. *See* Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916).

436. *See, e.g.*, Roswell Magill, *The Federal Income Tax on the Family*, 20 TEX. L. REV. 150, 164 (1941) (calling constitutionality of taxing the family as a unit "reasonably clear"); George E. Ray, *Proposed Changes in Federal Taxation of Community Property: Income Tax*, 30 CALIF. L. REV. 397, 432 (1942) (expressing "little doubt as to the constitutionality of a statutory provision taxing the income of a family as a unit"); Surrey, *The Supreme Court*, *supra* note 363, at 814 (concluding that the "Court will not place a constitutional barrier" to taxing the family as a unit).

437. *See* H.R. REP. NO. 77-1040, at 10, 17–22 (1941) (noting Court decisions "conclusively demonstrate that the convenient phrase, 'A may not be taxed on B's' income, is by no means an all-pervasive formula which will assist in the solution of tax problems").

438. *See Revenue Act of 1942*, *supra* note 399 (mandatory joint return with pro-rata liability); *Revenue Revision of 1942: Hearing Before H. Comm. on Ways & Means*, 77th Cong. (1942) (same); H.R. Rep. No. 77-1040, *supra* note 437 (same); *see also* S. Rep. No. 77-673 (1941) (hybrid joint return plan with earned income taxable to the earner and unearned income taxable to the spouse with management and control).

439. *Reduction of Individual Income Taxes: Hearing on H.R. 4790 Before S. Comm. on Fin.*, 80th Cong. 272 (1948) (statement of Sen. Eugene Millikin).

440. Blough & Shoup, *supra* note 403.

441. *See Revenue Act of 1942*, *supra* note 399, at 32–33 (statement of Sen. Robert Taft) ("It seems to me, if you want to eliminate [tax disparities between families] the thing to do is to go back to the individual basis and let the families divide their income between husband and wife equally, as they do in community-property States.").

442. *See* ERWIN N. GRISWOLD, CASES AND MATERIALS ON FEDERAL TAXATION 427 (1940) (querying whether it was "feasible to extend to all of the country the tax benefits of the community system"); George T. Altman, *Community Property: Avoiding Avoidance by Adoption in the Revenue Act*, 16 TAXES 138, 141 (1938) (arguing for taxing similarly

property nationwide even made its way into the public discourse.[443] Common law states sought tax savings for their married residents without adopting community property laws. In 1947, ten states[444] petitioned Congress for a law universalizing community property for purposes of filing federal income taxes, and individual legislators introduced twenty bills providing income-splitting privileges to spouses nationwide.[445] Public opinion polls reflected the widespread support, with 74% of respondents answering "yes" to the Gallup poll question: "For the purpose of income taxes in nine States a man and wife can divide their income equally between themselves to reduce their income tax. Should married couples in the other 39 States be allowed to do the same thing?"[446]

By 1948, five states and one territory decided they could wait no longer for Congress to intervene.[447] They took the drastic step of converting from longstanding common law regimes to community property law, while twelve more states considered similar measures.[448] The Treasury urged Congress to enact a national plan before additional states made the awkward conversion to community property, a process that created "considerable confusion and dislocation of property interests in the various States."[449] With "so many States shifting" and with others prepared to do the same, Treasury official Stanley Surrey argued that it was "proper for the Federal Government to act" with a split income plan.[450]

Other historical factors converged to move the idea of income splitting to the top of the policy agenda. In the immediate postwar period Congress sought tax cuts, both as a peace dividend and as a way to stimulate the economy. Experts, too, believed that tax cuts could ease the economy's transition from wartime to peacetime, and provide the necessary stimulus to private investment.[451] Income

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situated families equally by "extending to all the benefits now limited to the few").

443. *See* Jones, *supra* note 359, at 266–74; McMahon, *supra* note 24.

444. Colorado, Illinois, Iowa, Kansas, Missouri, Nebraska, North Dakota, Oregon, South Dakota, and Wisconsin.

445. *See* Anita Wells, *Community Property States* (Sept. 1, 1947) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/47.15).

446. *Individual Income Tax Reduction: Hearing on H.R. 1 Before S. Comm. on Fin.*, 80th Cong. 551 (1947) (statement of Sen. William Fulbright).

447. Hawaii (1945), Michigan (1947), Nebraska (1947), Oklahoma (1939), Oregon (1943), and Pennsylvania (1947). *See* McMahon, *supra* note 24 (discussing states' efforts to reduce federal taxes on their residents).

448. Alabama, Colorado, Connecticut, Illinois, Indiana, Massachusetts, New Hampshire, New Jersey, New York, North Dakota, Wisconsin, and Wyoming. Some common law residents sought tax savings by migrating to neighboring community property states. For the tax-induced exodus from common law to community property states, see 93 CONG. REC. 5837–40 (statements of Sen. John McClellan, Sen. William Knowland, Sen. Kenneth Wherry, Sen. William Fulbright).

449. *Individual Income Tax Reduction: Hearing on H.R. 1*, *supra* note 446, at 488 (statement of Stanley Surrey, Tax Legislative Council, Treasury Department).

450. *Id.* at 489; *see also* Erwin N. Griswold, *Defense Emphasizes Our Need for Sound Tax System*, N.Y. TIMES, Jan. 12, 1941, at E8 (arguing forcing common law states to adopt community property was "highly undesirable in view of complexity of that regime").

451. *See, e.g.*, HAROLD M. GROVES, POSTWAR TAXATION AND ECONOMIC PROGRESS (1946); RANDOLPH E. PAUL, TAXATION FOR PROSPERITY (1947); Carl Shoup, *Three Plans for Post-War Taxation*, 34 AM. ECON. REV. 757 (1944); Clark Warburton, *A Suggestion for*

splitting accomplished the desired tax reduction without protracted and acrimonious debate over adjustments to tax rates and brackets.

After sweeping to victory in the 1946 mid-term elections, Republicans wasted little time in passing two tax reduction bills. President Truman vetoed them both on the grounds that they offered "the wrong kind of tax reduction, at the wrong time."[452] The Republican leadership repackaged tax cuts a third time in a "veto-proof" bill that provided something for everyone.[453] It increased personal and dependent exemptions,[454] a move that appealed to Democrats, and it lowered tax rates across the board,[455] a move supported by Republicans. The bill also permitted spouses nationwide to split marital income and property for purposes of filing federal income taxes,[456] a provision that amounted to an additional tax cut for married, common law taxpayers. It even included something for community property residents: repeal of the 1942 amendments to the federal estate and gift taxes that had raised transfer taxes on community property spouses.[457]

Truman opposed the bill, but there was little he could do to prevent its enactment. The split-income plan accomplished "simplicity of taxpayer compliance, ease of administration, and minimum of disruptive change in the local laws of States."[458] It prescribed the soothing pill of "tax-reduction and tax-equalization."[459] It did not "do violence to [the] fundamental property laws" of states, nor raise constitutional concerns.[460] It produced tax uniformity among married couples, discouraged income-shifting schemes, and minimized litigation over tax-saving devices. It stanched the "impetuous enactment" of community property law, moreover.[461] And it promised tax saving for all married couples,[462] a

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Post-War Taxes, 36 AM. ECON. REV. 882 (1946).

452. H.R. DOC. NO. 80-322, at 1 (1947).

453. RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 482 (1954).

454. H.R. 4970, 80th Cong. § 201 (1948).

455. *Id.* §§ 101, 401.

456. *Id.* § 301.

457. *Id.* § 351; *see also* S. REP. NO. 80-1013 (Supplementary Report) (1948). The 1942 amendments ignored shared individual ownership interests of spouses under community property law, and taxed the predeceasing spouse as full owner of the marital property in addition to the surviving spouse on her share at death. With respect to the gift tax, the law treated community property spouses as a single entity such that they received one gift tax exemption while common law spouses received two.

458. Division of Tax Research Staff, *Major Issues in Drafting the 50-50 Family Income Splitting Proposal*, 2 (Oct. 2, 1947) (on file in Office of Tax Analysis/Div. of Tax Research (OTA/DTR) Files, Box 54, Folder GA-5/47.10).

459. H.R. REP. NO. 80-1274, at 3 (1948).

460. *Reduction of Individual Income Taxes: Hearing on H.R. 4790*, *supra* note 439, at 305 (statement of Allan H. W. Higgins, Section of Taxation, American Bar Association).

461. S. REP. NO. 80-1013, at 25 (1948).

462. In 1948, the tax benefits associated with income splitting accrued disproportionately to a small cohort of wealthy taxpayers. *See Reduction of Individual Income Taxes: Hearing on H.R. 4790*, *supra* note 439, at 24 (statement of John Snyder, Secretary of the Treasury) (reporting 97.5% of income-splitting benefits went to less than 4% of taxpayers). Rising incomes and the declining value of tax-free thresholds in the postwar period meant that an increasing number of spouses would realize income-splitting benefits over the next several decades.

group that comprised 80% of all households.[463] Common law spouses benefited from dividing marital income equally, while community property spouses benefited from dividing income from separate property, a source of income which was not co-owned under community property law.

In the end, the income-splitting plan, along with the rest of the Revenue Act of 1948,[464] sailed through Congress, easily overcoming Truman's third veto of tax legislation in less than a year.[465] Tax reformers heralded income splitting as a victory. Basking in its enactment, Harvard law professor and former Treasury official Stanley Surrey observed with satisfaction that the provision "adds a chapter" to "the long history of the treatment of family income" that was "likely to be the last for many years."[466] Moreover, it reflected the principle "that achievement of tax equity among married couples requires an income tax based upon a nationwide uniform plan that disregards, as between husband and wife, the legal allocation of their income or the legal ownership of the property producing the income."[467]

With the enactment of income splitting, ownership as the lodestar of family taxation had been supplanted by a legal fiction. Or had it?

CONCLUSION: *SEABORN*, INCOME SPLITTING, AND TAXING MODERN FAMILIES

In 1935, tax lawyers Randolph Paul and Valentine Havens argued that treating husbands and wives as single tax units could solve the problems associated with ascertaining family tax liability under an ownership rule. "There would be no need to resort to ownership as a test of tax incidence if the husband and wife were a tax unit, or 'unified welded entity.'"[468] Paul and Havens were right that treating spouses under the federal income tax as a single unit rather than two distinct units with "legal separateness"[469] would shift the focus from the individual to the family. But it would not eliminate ownership "as a test of tax incidence." At best, it replaced an ownership rule concerned with individual interests with another ownership rule concerned with combined interests. Aggregating a family's income and property to determine its tax liability still required examining ownership interests of individual family members under state property law. Specifically, it still required determining what income and property individual members owed such that it could be aggregated, split in two, and taxed as two equal halves.

The income-splitting provision enacted in 1948 was even less of a threat to the ownership principle than the concept of treating families as single economic units. It was "simply a method of calculating the Federal income tax on a husband and

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463. KAREN ANDERSON, WARTIME WOMEN: SEX ROLES, FAMILY RELATIONS, AND THE STATUS OF WOMEN DURING WORLD WAR II 5 (1981).

464. Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 110.

465. H.R. DOC. NO. 80-589, at 2 (1948).

466. Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1104 (1948).

467. *Id.* at 1114.

468. Paul & Havens, *supra* note 242, at 245 (quoting Brownsville Coal & Coke Co. v. Heiner, 38 F.2d 248, 251 (W.D. Pa. 1930)).

469. *Id.*

wife who file a joint return," Stanley Surrey told Congress in 1947.[470] It was an administrative convenience, a device to extend postwar tax cuts and to discourage families from undertaking costly income-shifting behavior. As the Senate explained in its own description of the provision, it merely allowed husbands and wives the "opportunity" to "file joint returns, divide their net income and exemptions by two, compute their tax on this basis, and multiply the result by two."[471]

Income splitting did not challenge *Seaborn*'s holding that the federal income tax was a levy "upon the net income of every individual" and that "the word 'of' denotes ownership."[472] Nor did it alter prevailing internal revenue laws requiring that the federal income tax be "levied, collected, and paid for each taxable year upon the net income of every individual."[473] And it certainly did not stop federal and state courts from invoking *Seaborn* nearly 100 times for the "ownership equals taxability" principle.[474] Owners of income and property within families were still subject to federal income taxation, and ownership was still determined by the interests of individual family members under applicable state law.[475]

Eighty years after *Seaborn* and sixty years after introduction of the income-splitting provision, the "ownership equals taxability" principle still resonates. Not only is *Seaborn* good law,[476] it remains the lodestar of family taxation. It tells us that family tax liability under both the federal income tax and federal estate tax follows ownership, not marriage. In 2011 as in 1930, *Seaborn* requires ascertaining property interests as determined by state law rather than locating the presence or absence of a marriage license. Members of state-recognized familial relationships in 2011 may look different or more heterogeneous than members of state-recognized familial relationships in 1930, but ownership of income and property under state property law rather than the existence of a marital contract dictates family tax liability.

In 2010, the IRS acknowledged this reality by applying the "ownership equals taxability" principle to registered domestic partners in California, both same-sex and opposite-sex RDPs.[477] "Applying the principle that federal law respects state law property characterizations," the IRS Chief Counsel opined, "the federal tax treatment of community property should apply to California registered domestic partners."[478] Subsequently, the government extended its holding to domestic

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470. *Individual Income Tax Reduction: Hearing on H.R. 1*, *supra* note 446, at 490 (statement of Stanley Surrey, Tax Legislative Council, Treasury Department).

471. S. REP. NO. 80-1013, at 4 (1948).

472. Poe v. Seaborn, 282 U.S. 101, 109 (1930).

473. 26 U.S.C. § 11 (1946). Current law reflects the same focus on individual ownership, even for married taxpayers. *See* 26 U.S.C. § 1(a)–(d) (2006) (the federal income tax reaches the "taxable income" of "every married individual . . . who makes a single return jointly with his spouse"; of "every head of a household"; of "every individual . . . who is not a married individual"; and of "every married individual" who does not file jointly).

474. Cases on file with author.

475. *See also* McMahon, *supra* note 24.

476. *See supra* note 3 (recent cases citing *Seaborn* favorably).

477. California permits opposite-sex couples to register as domestic partners so long as one or both persons are over the age of 62. CAL. FAM. CODE § 297(b)(5)(B) (2010).

478. I.R.S. Chief Couns. Mem. 201021050, *supra* note 11, at 2.

partners in Nevada and Washington, both of which grant full community property rights to RDPs.[479] Thus, even though the federal Defense of Marriage Act (DOMA) prohibits these couples from filing federal income taxes as spouses[480] (the filing status with the most favorable rates), they can now take advantage of tax savings associated with income splitting. For example, as a result of the 2010 ruling, a domestic partnership in California with one partner earning $100,000 and the other earning $30,000 would now report two incomes of $65,000 when filing federal income taxes, resulting in tax savings of $942.[481]

There is much to praise in the 2010 guidance, not least of which is the explicit application of the "ownership equals taxability" principle to nontraditional families. But the ruling leaves much to be desired.

First, it has no precedential value. Neither the Chief Counsel Advisory[482] nor the private letter ruling[483] on which it was based may be used or cited as precedent.[484] The letter ruling applies exclusively to the specific taxpayer who requested the ruling and solely to the questions posed in the original request. Similarly, the CCA only analyzes the unique facts and circumstances posed in the ruling request without covering relevant questions pertaining to the application of federal taxation to state law.

In its 2010 Annual Report to Congress, the IRS National Taxpayer Advocate highlighted some of these unresolved issues, identifying them among the "Most Serious Problems" facing taxpayers.[485] Federal tax law contains provisions

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479. *See supra* note 15 and accompanying text.

480. *See supra* note 25.

481. Calculated from tables for 2010 tax year. *See* Rev. Proc. 2011-12, 2011-2 I.R.B. 1. Without income splitting, the couple would pay $25,692 in federal income tax compared to $24,750. Tax savings for domestic partners in the three affected states will vary based on the income ratio between partners. Generally, greater savings will accrue to partners with more unequal ratios, because shifting higher percentages of total income moves the family further down the rate scale (in other words, the tax on one $100,000 income will be lower than the tax on two $50,000 incomes).

482. I.R.S. Chief Couns. Mem. 201021050, *supra* note 11.

483. *See* I.R.S. Priv. Ltr. Rul. 201021048 (May 5, 2010).

484. 26 U.S.C. § 6110(k)(3) (2006).

485. 1 NATIONAL TAXPAYER ADVOCATE, INTERNAL REVENUE SERV., 2010 ANNUAL REPORT TO CONGRESS 211–20 (2010). For news coverage of these issues and the confusion they create for same-sex couples, including the approximately 60,000 legally partnered same-sex couples in California (comprising approximately 18,000 same-sex marriages and 58,000 RDPs, two overlapping categories), *see* Scott James, *For Same-Sex Couples, a Tax Victory That Doesn't Feel Like One*, N.Y. TIMES, Jan. 14, 2011, at A21; *see also* Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (preserving the 18,000 same-sex marriages performed in California between June and November 2008); Laura Meckler, *Gay Couples Get Equal Tax Treatment*, WALL ST. J. ONLINE (June 5, 2010), http://online.wsj.com/article/SB10001424052748704080104575286931017169308.html (58,000 California RDPs). A significant percentage of these couples are legally recognized as both RDPs and spouses under state law; that is, they are registered as domestic partners with the California Secretary of State, and they also obtained valid marriages between June 16, 2008 and November 5, 2008 before Proposition 8 denied that right under the state constitution. *See* CAL. CONST. art. 1, § 7.5, *invalidated by* Perry v. Schwarzenegger, 704 F.Supp. 2d 921 (N.D. Cal. 2010), *stay*

pertaining to childcare, health care, education, and welfare that require taxpayers to meet certain qualifying definitions. Defining "child" under the federal income tax, for instance, determines eligibility for head of household filing status[486] and the dependency deduction,[487] in addition to the child-care credit,[488] child tax credit,[489] and earned income tax credit.[490] But it is unclear which partner in a domestic partnership or civil union or same-sex marriage may be entitled to claim these tax benefits on her tax return, particularly if the qualifying child was the stepchild of one partner by virtue of the domestic partnership or civil union or marriage. Federal tax law does not define "child" in relation to marriage, and DOMA provides no definition. But if DOMA disregards the legal existence of these families, it is unclear which of the two partners—both of whom are considered the child's parent under state law—can qualify the child for federal tax purposes.[491] Such characterization is significant for allocating these child-related subsidies in the most tax advantageous way, all of which require positive taxable income as a condition of receipt and some of which phase out at higher income levels.

A similar problem occurs when trying to qualify eligible "dependents" under the tax law's education provisions. These include tax dispensations for a dependent's college tuition and student loan interest as well as the Lifetime Learning Credit, Hope Scholarship Credit, American Opportunity Tax Credit, and other deductions and exclusions related to education.[492] As the National Taxpayer Advocate asked in its 2010 annual report, "Is a domestic partner or same gender spouse in a community property state deemed to provide, for dependency purposes, the support that he or she earns?"[493] More specifically, "will dependency status be determined on the basis of individual earnings or only after allocating all community income equally between the partners?"[494] The same questions arise for tax provisions related to medical care expenses of dependents.[495]

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granted, No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

486. 26 U.S.C. § 2(b) (2006).

487. *See id.* §§ 151–52 (2006 & Supp. II 2009).

488. *See id.* § 21.

489. *See id.* § 24.

490. *See id.* § 32.

491. For discussion of DOMA's impact on the federal tax treatment of same-sex couples, see Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481 (2009); Anthony C. Infanti, *Taxing Civil Rights Gains*, 16 MICH. J. GENDER & L. 319 (2010); William P. Kratzke, *The Defense of Marriage Act (DOMA) Is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399 (2005).

492. *See* 26 U.S.C. § 222 (Qualified tuition and related expenses); *id.* § 135 (Income from U.S. savings bonds used to pay higher education tuition and fees); *id.* § 221 (Interest on education loans); *id.* § 25A (Hope and Lifetime Learning credits).

493. 1 NATIONAL TAXPAYER ADVOCATE, *supra* note 485, at 215.

494. Patricia Cain, *National Taxpayer Advocate Reports That Tax Law Creates Serious Problem for Same-Sex Couples*, SAME SEX TAX LAW BLOG (Jan. 15, 2011, 4:03 PM), http://law.scu.edu/blog/samesextax/national-taxpayer-advocate-reports-that-tax-law-creates-serious-problem-for-same-sex-couples.cfm.

495. These provisions include, among others, the exclusion for certain employer reimbursements, 26 U.S.C. § 105, the deduction for extraordinary medical and dental expenses, *id.* § 213, Flexible Spending Accounts, *id.* § 125, Archer Medical Savings Accounts, *id.* § 220, and Health Savings Accounts, *id.* § 223. Additional issues discussed in

Congress enacted all of these provisions—whether related to childcare, health care, education, or general welfare—to help families with children. Yet it is unclear, particularly in light of DOMA, whether members of same-sex marriages, domestic partners, civil unions and all related children enjoy access to the same economic and educational support enjoyed by all other taxpayers. In the meantime, hundreds of thousands of same-sex couples take positions on their tax returns every year in an environment of significant legal uncertainty.[496]

Besides lacking precedential value and failing to answer myriad questions, the 2010 ruling applies exclusively to domestic partners in three community property states. It mandates that RDPs in California, Nevada, and Washington "must report one-half of the community income . . . on his or her federal income tax return."[497] But what about the hundreds of thousands of other same-sex couples in legally recognized relationships throughout the country, particularly those living in states that extend property rights to these nontraditional families?

This Article lays the foundation for a broader application of the "ownership equals taxability" principle. Its contents demonstrate that same-sex couples in legal relationships recognized under the law of *any* community property state are entitled to the same federal income tax treatment as afforded RDPs in California, Nevada, and Washington. This includes Wisconsin, which already has a relatively robust domestic partnership law (though it currently does not extend application of marital property law to domestic partners),[498] New Mexico, which appears to be on the brink of enacting domestic partnership legislation,[499] and any of the remaining four community property states (Arizona, Idaho, Louisiana, Texas) that in the future may recognize same-sex couples and subject them to the state's community property regime. It would also include same-sex spouses in California, whether married before or after Proposition 8 and whether their marriage licenses were

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the National Taxpayer Advocate's report include the treatment of alimony and property settlements upon divorce, whether the creation of community property should be treated as a taxable transfer for same-sex couples, and whether same-sex tenants by the entirety have a qualified joint interest for estate tax purposes. *See* 1 NATIONAL TAXPAYER ADVOCATE, *supra* note 485, at 215–17.

496. Given this legal uncertainty, which was heightened by the government's 2010 ruling pertaining to RDPs in California, the American Bar Association Section of Taxation authorized its Teaching Tax Committee to examine community property issues related to RDPs. Upon completion of its study, the ABA Community Property Comment Project will submit comments to the IRS. *See* Nicole Duarte, *ABA Forms Group to Examine Domestic Partner Community Property Questions*, 127 TAX NOTES 1435 (2010). In the interest of full disclosure, I serve as a member of this task force.

497. I.R.S. Chief Couns. Mem. 201021050, *supra* note 11, at 2.

498. *See* WIS. STAT. §§ 770.001–.018 (West 2010) (providing various legal protections in areas including insurance, decisions about medical treatment and health care, retirement, death benefits and probate, but not encompassing some aspects of marriage, including, among other things, marital property law).

499. Although domestic partnership legislation failed to pass the New Mexico legislature in both 2010 and 2009, it enjoys the strong support of Gov. Bill Richardson. Its key sponsor, Sen. Peter Wirth (D-Santa Fe), has predicted, "It's gonna happen, it's just a matter of when." Larry Behrens, *Domestic Partnerships Done for 2010, But Will Be Back, Supporters Say*, N.M INDEP. (Feb. 15, 2010, 7:52 P.M.), http://newmexicoindependent.com/47693/domestic-partnerships-done-for-2010-but-will-be-back-supporters-say.

issued by California or other jurisdictions. Same-sex couples with California marriage licenses (only issued between June 16, 2008 and November 5, 2008) remain subject to the state's community property regime, because the California Supreme Court held that all same-sex couples married in California before the effective date of Proposition 8 are still legally married.[500] Moreover, by virtue of SB 54, signed into law by Governor Arnold Schwarzenegger in late 2009, same-sex couples with marriage licenses issued outside California either before or after Proposition 8 are entitled to full recognition as married couples and fully subject to the state's community property statute.[501]

In addition to providing the basis for extending "ownership equals taxability" to same-sex couples in all community property states (not just California, Nevada, and Washington), this Article foreshadows an even more expansive application of the principle to common law states. Currently, a number of common law states recognize familial relationships other than traditional spouses, including same-sex marriages,[502] civil unions,[503] domestic partnerships,[504] and reciprocal beneficiary relationships.[505] In addition to the six jurisdictions that authorize same-sex marriage, New Jersey (civil union), Oregon (domestic partnership), and the District of Columbia (domestic partnership) confer comprehensive legal status on same-sex couples substantially similar to marriage. The other jurisdictions recognizing same-sex relationships transfer less comprehensive legal status with more limited rights. Regardless of specific allocation of rights, to the extent these common law jurisdictions determine ownership of income and property for same-sex couples by virtue of general property law, *Seaborn*'s "ownership equals taxability" principle

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500. Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (preserving the 18,000 same-sex marriages performed in California).

501. *See* Nat'l Ctr. for Lesbian Rights & Equal. Cal., SB 54 and Same-Sex Couples Who Marry Outside California (Oct. 20, 2009), *available at* www.nclrights.org/site/DocServer/SB_54_FAQ.pdf?docID=6641. In the United States, jurisdictions granting marriage licenses to same-sex couples include Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and the District of Columbia. International jurisdictions include Argentina, Belgium, Canada, Iceland, Norway, Portugal, South Africa, Spain, Sweden, and The Netherlands. *See* Dan Fastenberg, *International Gay Marriage*, TIME (July 22, 2010), http://www.time.com/time/printout/0,8816,2005678,00.html.

502. Common law states recognizing same-sex marriages include Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and the District of Columbia. Three additional states (Maryland, New York, Rhode Island) recognize same-sex marriages from these six jurisdictions.

503. New Jersey is the only state that currently recognizes civil unions, while Illinois will begin authorizing civil unions in June 2011. *See* Ray Long & Monique Garcia, *Illinois Senate OKs Civil Unions, Historic Legislation Goes to Quinn, Who Supports It*, CHI. TRIB. (Dec. 1, 2010), http://articles.chicagotribune.com/2010-12-01/news/ct-met-civil-unions-senate-20101201_1_civil-unions-gay-child-vote. In Connecticut, New Hampshire, and Vermont, civil unions were replaced by same-sex marriage.

504. Common law jurisdictions recognizing domestic partnerships include Colorado, Maine, Maryland, Oregon, and the District of Columbia.

505. Hawaii is the only state that recognizes reciprocal beneficiary relationships, which under current law extends limited rights to beneficiaries.

should apply.[506] It is true that most common law jurisdictions currently follow a strict title theory of ownership during the lifetime of the marriage (emphasizing separate rather than shared interests), such that *Seaborn* cannot accomplish income splitting as readily as it does in community property states. But for those common law states that apply less rigid title theories of ownership under their marital property law, or whose property law reflects some aspects of community property principles, *Seaborn*'s "ownership equals taxability" rule could accomplish at least some degree of income splitting for same-sex couples.[507]

While *Seaborn* may have only partial application in common law jurisdictions, it can achieve uniform and comprehensive reform in all nine community property states, not just in California, Nevada, and Washington. To the extent the remaining six community property states desire extending comprehensive legal status to same-sex couples at some point in the future (while also securing valuable income-splitting privileges on par with same-sex residents in California, Nevada, and Washington), I offer three suggestions, two based on this Article's findings and a third based on current political and economic realities.

First, the chosen policy (whether marriage, civil union, or domestic partnership) should automatically rather than voluntarily subject same-sex couples to a state's community property regime. In *Commissioner v. Harmon*,[508] the U.S. Supreme Court invalidated Oklahoma's elective community property law, which, "even though authorized by state law and irrevocable in character," did not transfer necessary ownership interests for purposes of allowing couples to split their income under the federal income tax.[509] The optional Oklahoma statute looked and

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506. As this Article has demonstrated, federal courts view domestic relations law as the province of the states. As recently as 2004, the Supreme Court reaffirmed its deference, stating,

> One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that '[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (quoting *In re* Burrus, 136 U.S. 586, 593–94 (1890)); *see also* Mansell v. Mansell, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law."); Moore v. Sims, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."). Also as this Article has shown, federal courts respect income splitting between members of state-recognized families by operation of general property law, but not by private contract. And, as *Seaborn* itself held, ownership of income and property determines tax liability, and state property law determines ownership of family income and property.

507. Examining this claim in a comprehensive and meaningful way requires an entirely separate article.

508. 323 U.S. 44, 46 (1944) (invalidating Oklahoma's optional community property law as creating a "consensual" rather than a "legal" community).

509. *Id.* According to the leading scholar on the subject, "the allure of the community property regime [in Oklahoma] had been intimately linked to its tax savings," a fact not overlooked by the Court as it sought to determine whether the Oklahoma statute sufficiently altered incidents of ownership or inappropriately authorized tax savings for state residents. McMahon, *supra* note 24, at 622. For a wonderful discussion of Oklahoma's optional community property law and the *Harmon* decision, see *id.* at 592–611.

operated more like a private law contract than a general law property statute, the latter of which vested by operation of law rather than by discretion of the parties. By comparison, RDPs in California (and Nevada and Washington) "are mandatorily subject to the community property regime. For them, community property is part of a single system and not an option they can elect or reject while retaining the rest of the rights and obligations of the system."[510] Consequently, the community property regime in these states can be said to transfer sufficient ownership interests, allowing domestic partners to split their combined income.

Second, the chosen policy should provide immediate, vested, and equal rights in all income and property to same-sex couples in the same way it does to opposite-sex spouses. For the "ownership equals taxability" rule to attach, state law must require that income is shared the moment it arises (and not shared, for instance, by virtue of an assignment or gift or contract), at which point *Seaborn* authorizes income splitting for federal income tax purposes.

Finally, while "state domestic relations law has outpaced federal tax law,"[511] there remains solid opposition to extending equal rights to same-sex couples, even in states that currently recognize same-sex relationships.[512] Advocates for state-recognized, same-sex relationships must seize every political and economic advantage, including exploiting the findings of studies that indicate extending legal rights to same-sex couples can generate significant revenue for states. According to researchers, allowing same-sex marriage in New Jersey, for instance, could boost the economy by $200 million per year, create 1,400 jobs, and net $15.1 million in tax revenues for the state and for local governments.[513] Another study found that since 2005, the economic benefit to Massachusetts from allowing same-sex marriage topped $100 million.[514] Indeed, the positive economic impact of

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510. Cain, *Taxing Families Fairly*, *supra* note 21, at 846.

511. 1 NATIONAL TAXPAYER ADVOCATE, *supra* note 485, at 211.

512. For the successful efforts to repeal same-sex marriage in California and Maine, both of which have domestic partnership laws, see CAL. CONST. art. 1, § 7.5; *November 3, 2009 General Election Tabluations: People's Veto and Referendum Questions, County and Statewide Totals*, ME. BUREAU OF CORPS., ELECTIONS & COMM'NS, http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html.

513. *See* BRAD SEARS, CHRISTOPHER RAMOS & M.V. LEE BADGETT, WILLIAMS INST., THE IMPACT OF EXTENDING MARRIAGE TO SAME-SEX COUPLES ON THE NEW JERSEY BUDGET (2009) .

514. *See* NAOMI G. GOLDBERG, MICHAEL D. STEINBERGER & M.V. LEE BADGETT, WILLIAMS INST., THE BUSINESS BOOST FROM MARRIAGE EQUALITY: EVIDENCE FROM THE HEALTH AND MARRIAGE EQUALITY IN MASSACHUSETTS SURVEY (2009). For additional studies pertaining to the economic impact of extending legal status to same-sex couples in other states, see NAOMI G. GOLDBERG, R. BRADLEY SEARS & M.V. LEE BADGETT, WILLIAMS INST., POTENTIAL IMPACT OF HB444 ON STATE OF HAWAII (2009) (citing as much as $9.5 million over four years from civil union celebrations, $40.3 million in out-of-state guest travel to civil union celebrations, $1.6 million in higher excise tax revenues $77,000 in filing fees, $400,000 savings in public benefits programs, and 333 new jobs); CHRISTOPHER RAMOS, M.V. LEE BADGETT & BRAD SEARS, WILLIAMS INST., THE ECONOMIC IMPACT OF EXTENDING MARRIAGE TO SAME-SEX COUPLES IN THE DISTRICT OF COLUMBIA (2009) (citing $52.2 million in revenue over three years, $5.4 million in taxes and fees, and 700 new jobs); CHRISTOPHER RAMOS, M.V. LEE BADGETT, MICHAEL D. STEINBERGER & BRAD SEARS,

extending legal rights to same-sex couples could ease the severe fiscal crisis facing every state.[515] Researchers have also shown that recognizing same-sex relationships nationwide as part of federal policy could have similarly positive economic effects on the national budget, netting as much as $1 billion a year.[516]

If policy makers and reformers followed these three rules, particularly the first two, they would help millions of non-traditional families, same-sex as well as opposite-sex. Extending equal "rights, protections, and benefits" to non-traditional families under state property law, and subjecting them to the same "responsibilities, obligations, and duties . . . as are granted to and imposed upon spouses" would put these families squarely within the four corners of *Seaborn*, authorizing them to split combined income in half when filing federal income taxes.[517] In so doing, *Seaborn* offers these legally recognized couples an opportunity to circumvent the tax filing restrictions and disadvantages created by DOMA. Indeed, *Seaborn*'s "ownership equals taxability" rule remains the guidepost of family taxation, which for more than eighty years has followed ownership not marriage.

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WILLIAMS INST., THE IMPACT ON MAINE'S BUDGET OF ALLOWING SAME-SEX COUPLES TO MARRY (2009) (noting a net annual budgetary gain of $7.9 million); CHRISTOPHER RAMOS, M. V. LEE BADGETT & BRAD SEARS, WILLIAMS INST., THE ECONOMIC IMPACT OF EXTENDING MARRIAGE TO SAME-SEX COUPLES IN VERMONT (2009) (citing $31 million in new spending over three years, $3.3 million in tax revenues, and 700 new jobs); BRAD SEARS & M.V. LEE BADGETT, WILLIAMS INST., THE IMPACT OF EXTENDING MARRIAGE TO SAME-SEX COUPLES ON THE CALIFORNIA BUDGET (2008) (citing $63.8 million in revenue over three years from same-sex weddings and tourism); M.V. LEE BADGETT, AMANDA K. BAUMLE, ADAM P. ROMERO & R. BRADLEY SEARS, WILLIAMS INST., THE IMPACT ON IOWA'S BUDGET OF ALLOWING SAME-SEX COUPLES TO MARRY (2008) (noting a net annual budgetary gain of $5.3 million); M.V. LEE BADGETT, R. BRADLEY SEARS, ELIZABETH KUKURA & HOLNING LAU, WILLIAMS INST., THE IMPACT ON OREGON'S BUDGET OF INTRODUCING SAME-SEX DOMESTIC PARTNERSHIPS (2008) (noting a net annual budgetary gain between $1.5 million to $3.7 million); M.V. LEE BADGETT, WILLIAMS INST., IMPLICATIONS OF HB 9 FOR BUSINESSES IN NEW MEXICO (2008) (boosting economy by $16 million); M.V. LEE BADGETT, AMANDA BAUMLE, SHAWN KRAVICH, ADAM P. ROMERO & R. BRADLEY SEARS, WILLIAMS INST., THE IMPACT ON MARYLAND'S BUDGET OF ALLOWING SAME-SEX COUPLES TO MARRY (2007) (citing a net annual budgetary gain of $3.2 million).

515. *See* ELIZABETH MCNICHOL, PHIL OLIFF & NICOLAS JOHNSONS, CENTER ON BUDGET AND POL'Y PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT (2010) (calling current recession the worst since the 1930s with "the steepest decline in state tax receipts on record").

516. *See* CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (2004).

517. CAL. FAM. CODE § 297.5(a) (West 2007).