

SAVING SEABORN: OWNERSHIP AS THE BASIS OF FAMILY TAXATION

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This Article examines the historical and jurisprudential development of the principle that ownership determines federal taxation of families. 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 decisions in Poe v. Seaborn and Lucas v. Earl. It is a story of the early federal income tax and its administration; 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 sought to protect Congress’ taxing power by articulating an expansive definition of ownership for purposes of determining taxability that relied on indicia of ownership such as control, management, dominion, beneficial interests, equitable interests, enjoyment, and even a “flow of satisfactions” concept that tracked consumption tax principles more closely than income tax principles.

In the end, the Article lays the groundwork for removing the modern-day false barometer of marriage between a man and a woman as the basis of family taxation. In place of marriage, it reestablishes ownership principles grounded in longstanding Supreme Court jurisprudence as the historically and legally accurate gauge for family taxation. In so doing, the Article presages an argument that will be articulated in a subsequent Article for taxing members of all state-recognized civil partnerships—marriage, domestic partnerships, civil unions, reciprocal beneficiary relationships—according to ownership interests as determined by state law.

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* Acting Professor of Law, UC Davis School of Law. I thank Steve Bank, Karen Burke, Pat Cain, Paul Horton, Bert Lazerow, Grayson McCouch, Susan Westerberg Prager, Joe Thorndike, David Walker...In addition, I benefited from comments received at the American Association of Law Schools 2009 Annual Meeting, USD School of Law Tax Law Speaker Series, the Jr. Tax Scholars Workshop...

INTRODUCTION

In 2007, the Ninth Circuit considered the federal tax implications of pension benefits accumulated during marriage to a divorced California couple.¹ Under California law, the distributions were considered community property, taxable to the spouses in proportion to their equal ownership interests in the former community. The federal income tax was imposed on the net income “of” individuals, the Ninth Circuit explained, and the Supreme Court’s 1930 decision in *Poe v. Seaborn* held that “‘of’ denotes ownership.”² Furthermore, ownership was governed by state law. When a state’s property law created a “vested property right” in all marital income for each member of the community, both members had taxable income equal to one-half the community’s total income.³ In further support of this “ownership equals taxability” principle, the Ninth Circuit cited to additional cases, which, in turn, also cited to *Seaborn*.⁴

The Ninth Circuit’s recent invocation of *Seaborn* is not unique. In fact, federal and state courts routinely cite to the case for the proposition that ownership of family income as defined by state law determines federal income tax liability.⁵ Moreover, every major law school casebook on federal income taxation includes a thorough discussion of *Seaborn* and identifies it

¹ See *Comm’r v. Dunkin*, 500 F.3d 1065 (9th Cir. 2007).

² 282 U.S. 101, 109 (1930).

³ *Dunkin*, 500 F.3d at 1069, quoting *Seaborn*, 282 U.S. at 111.

⁴ See *id.*, citing to *United States v. Mitchell*, 403 U.S. 190, 197 (finding under *Seaborn* that “with respect to community income...federal income tax liability follows ownership. In the determination of ownership, state law controls.”); *Leonard v. Comm’r*, T.C. Memo 1998-290 at *6 (1998).

⁵ See *e.g.*, *Mitchell v. Comm’r*, 2008 U.S. Tax Ct. LEXIS 33 *8 (2008) (citing *Seaborn* for the proposition that “tax liability for income from property attaches to the owner of the property”); *Raymond v. United States*, 355 F.3d 107, 112 n. 8 (2d Cir. 2004) (finding that *Seaborn* held “a married couple could ‘split’ income derived from property co-owned by operation of law”); *Dotson v. Comm’r*, T.C. Summary Opinion 2004-164 at *4 (2004) (noting “the well-established principle that income from property is taxed to the owner of the property,” citing *Seaborn*); *Witcher v. Comm’r*, T.C. Memo 2002-292 at *7 (2002) (finding that “income from property is taxed to the owner of the property,” citing *Seaborn*); *Swoboda v. Swoboda*, 17 S.W.3d 276, 280 (Ct. App. Tex. 2000) (stating that state law determines ownership of property, particularly in the context of federal family taxation, citing *Seaborn*).

as the source of the “ownership equals taxability” principle.⁶ In addition, the Internal Revenue Service has long recognized *Seaborn* for the proposition that ownership of income determines taxability,⁷ a principle that legal scholars also universally endorse.⁸

Despite its high profile, we know next to nothing of the historical and jurisprudential developments that culminated in the Supreme Court’s most famous family tax decision. This Article remedies that deficiency. Ultimately, it demonstrates that ownership of income and property within the family, as based on state law, determines a family’s federal income tax liability, and that marriage, per se, has nothing to do with it.

Part I of the Article examines the modern federal income tax in its early years. As tax officials, policymakers, and courts waded through uncharted fiscal territory, they faced acute administrative and enforcement difficulties associated with family tax issues. The family provided unique opportunities for tax avoidance, which became considerably more lucrative during World War I as the Wilson administration made the federal income tax the engine of its war finance machine. Within a span of three years, Congress increased the top marginal rate

⁶ See e.g., MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION 466-67, 490 (6th ed. 2009); SANFORD M. GUERIN ET AL., PROBLEMS AND MATERIALS IN FEDERAL INCOME TAXATION 435-38, 472-74 (7th ed. 2008); RICHARD SCHMALBECK & LAWRENCE ZELENAK, FEDERAL INCOME TAXATION 737-41 (2d ed. 2007); WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 604-08 (14th ed. 2006); JAMES J. FREELAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION 913-14 (14th ed. 2006); PAUL R. MCDANIEL ET AL., FEDERAL INCOME TAXATION 930-31, 968-70 (5th ed. 2004).

⁷ See e.g., Rev. Rul. 2002-22, 2002-1 C.B. 849; 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.

⁸ See e.g., Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2008); Keeva Terry, *Separate and Still Unequal?: Taxing California Registered Domestic Partners*, 39 U. TOL. L. REV. 633 (2008); Shari Motro, *A New “I Do”: Towards a Marriage Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006); Dennis J. Ventry, Jr., *No Income Splitting for Domestic Partners: How the IRS Erred*, 110 TAX NOTES 1221 (2006); Patricia A. Cain, *Relitigating Seaborn: Taxing the Community Income of California Registered Domestic Partners*, 111 TAX NOTES 561 (2006); Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757 (2004); Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S. CAL. L. REV. 145 (1998); Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J. L. & POLITICS 241 (1997); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994); Marjorie J. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L. J. 63 (1993); Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1988).

from 7 to 77 percent, slashed personal exemptions, enacted a federal estate tax, raised corporate tax rates, and passed an excess profits tax. The significantly steeper levies spawned tax avoidance devices that reduced federal receipts, and threatened the nascent income tax.

The Treasury Department identified income shifting within families as one of the primary sources of avoidance. In addition to using gifts, trusts, assignments of income and property, and family partnerships to reduce tax liability, some married couples accomplished income shifting simply by virtue of where they lived. Spouses in the eight community property states acquired income and property during marriage as equal co-owners under the precepts of the civil law system. Regardless of which spouse “earned” the income in the traditional market sense, both husband and wife under community property law owned one-half of the total community, and were taxed accordingly. Under the progressive rate scale, the aggregate tax on two halves was often considerably lower than one tax on the combined whole.

Part II examines the nature of spouses’ interests in community income and property. It discusses in detail California community property law compared to the other seven community property states. As in 2009, California was at the center of a national discussion over evolving family forms and the respective legal interests of family members. The case of California was especially interesting to contemporaries because even its highest court could not agree on the extent of a wife’s interest in community property. In fact, over an eighty-year period, from 1850-1930, the California Supreme Court issued two disparate lines of decisions, one holding that the wife enjoyed a “vested” interest in the community while the other held she possessed a “mere expectancy.” If the wife’s interest vested only upon dissolution of the marriage by divorce or death, she could not be said to own any of the community during marriage, and thus she could not report one-half the community income on a separate tax return.

Given the lack of consensus on the nature of a wife's interest in community property, the national government challenged the purported equal ownership interests enjoyed by community property spouses. Parts III and IV reveal that while the Treasury Department and Congress acknowledged that state law determined ownership of income and property and that ownership determined taxability, they questioned the validity of a wife's one-half ownership interest in marital income when the husband was the sole market participant. Some of the resistance involved the inability of officials, policymakers, and judges reared in the common law to fully comprehend the civil law. Even if the wife received marital income as co-owner, they argued, community property statutes still granted the husband absolute powers of management over the community. How could the wife own income that she did not control? And, if the government were to recognize the wife as co-owner of income controlled by the husband, what was to stop states from extending co-ownership treatment to other family members such that families could divide total income not just in half but in thirds or fifths or tenths, thereby further reducing their federal income tax liability? After repeated failed attempts to close what critics considered a capacious tax loophole, Treasury and Congress turned to the Supreme Court for help in dealing with the community property problem.

Parts V and VI examine the Court's tax jurisprudence over the first twenty years of the federal income tax, culminating in the *Seaborn* decision. Like the executive and legislative branches, the judiciary was sensitive to tax avoidance. With vigor it protected the revenue and Congress's taxing power, particularly when it sensed that form was defeating substance. While the Court continued to hold that states had an absolute right to determine property ownership of their residents, it also found that Congress had nearly as absolute a right to tax that property under the federal income tax. In defining an expansive definition of ownership, the Court

articulated incidents of ownership within families that included control, management, dominion, beneficial interests, equitable interests, enjoyment, and even a “flow of satisfactions” concept of income that tracked consumption tax principles more closely than income tax principles. In the process, the Court crafted a definition of income that was not dependent on “refinements of title”⁹ or “attenuated subtleties,”¹⁰ but rather on “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.”¹¹

In other words, the Court could consider “might” synonymous with “right” to give effect to the internal revenue laws. But “might” was simply one incident of ownership which the Court could use to ascertain true ownership. When ownership was clear, legal title was the Court’s guide. In *Seaborn*, the Court encountered such a case, and held that “[p]ower is not synonymous with right.”¹² Under community property law, the Court found that spouses enjoyed present and equal ownership interests in the community. The husband’s control over the community as its managing agent did not “negative[] the wife’s present interest as co-owner,” but rather explicitly recognized the wife’s ownership which the law required the husband to protect. As co-owners, the Court concluded that husbands and wives in community property states could file separate returns, each reflecting one-half the whole of community income and property.

By making ownership the lodestar of family taxation, the Supreme Court sanctioned tax saving for families with divided ownership interests in income and property. Spouses in community property states achieved divided ownership by virtue of state property law, while spouses in common law states accomplished it through income-shifting devices. Part VII

⁹ *Corliss v. Bowers*, 281 U.S. 376, 377 (1930).

¹⁰ *Lucas v. Earl*, 281 U.S. 111, 114 (1930).

¹¹ *Burnet v. Wells*, 289 U.S. 670, 678-79 (1933).

¹² *Seaborn*, 282 U.S. 101, 113 (1930).

describes efforts at the Treasury Department and in Congress, first, to take away these tax benefits in the period leading up to and during World War II, and then to extend these benefits in the immediate postwar period by permitting married couples wherever resident to split income and property in half for federal tax purposes. This legal fiction of nationwide income splitting, the Article concludes, neither overturned nor challenged the “ownership equals taxability” principle articulated in *Seaborn*.

Finally, the Article also lays the groundwork for applying the “ownership equals taxability” principle to present-day family tax policies. A forthcoming Article affirms the vitality of the principle from 1930 to the present by examining every federal and state court decision citing to *Seaborn* (i.e., more than 450 cases). After establishing the ownership rule as good law, it makes an argument for taxing members of all state-recognized civil partnerships—marriage, domestic partnerships, civil unions, reciprocal beneficiary relationships—according to ownership interests as determined by state law. If federal courts defer to the states to ascertain ownership of income and property—which they do—and if ownership determines taxability under the federal income tax—which it does—then a state’s definition of family and the relative property rights of individual members within state-recognized families should determine tax liability.

Today, the “ownership equals taxability” principle is not being applied uniformly to families with equal ownership interests. The Internal Revenue Service has ruled that both *Seaborn* and its principle of ownership apply only to married, opposite-sex families.¹³ Under this view, the presence or absence of a marriage license, rather than ownership of income and property, determines taxability. This Article removes the false barometer of marriage between a man and a woman as the basis of family taxation. At the same time, it reestablishes ownership

¹³ See Memorandum from the Office of Chief Counsel (CCA), 200608038 (2006).

principles grounded in longstanding Supreme Court jurisprudence as the historically and legally accurate gauge for family taxation.

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.¹⁴ Within months of ratification, Congress enacted an income tax law that was modest by any standard. The new levy assessed a “normal” tax of one percent on incomes above \$3,000 for single individuals and \$4,000 for married couples as well as a progressive “surtax” ranging from one to six percent on incomes above \$20,000.¹⁵ All taxpayers—single, married, with or without dependents—were subject to the same rate schedule.¹⁶ As its Progressive Era advocates had envisioned,¹⁷ the tax fell disproportionately on

¹⁴ For the ratification movement generally, see W. ELLIOT BROWNLEE, *FEDERAL TAXATION IN AMERICA: A SHORT HISTORY* 36-46 (1996); JOHN D. BUENKER, *THE INCOME TAX AND THE PROGRESSIVE ERA* (1985); SIDNEY RATNER, *AMERICAN TAXATION: ITS HISTORY AS A SOCIAL FORCE IN DEMOCRACY* 250-340 (1942); for the integral role played by the 1909 corporate income tax in the creation of the modern personal income tax, see Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 *IND. L.J.* 53 (1990).

¹⁵ Revenue Act of 1913, 38 Stat. 114, 166 (1913). “Normal” income tax rates were assessed on taxable income above the exemption levels and below an income ceiling of \$20,000, while graduated “surtax” rates were assessed on all taxable income falling above the ceiling. The distinction between “normal” and “surtax” rates borrowed from the British usage of “normal” and “super” rate schedules. It is worth noting that neither of the two previous experiments in U.S. federal income taxation accounted for differences in marital status. Both the Civil War income tax and the short-lived 1894 income tax law (declared unconstitutional on grounds it violated the direct-tax clause, see *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 618 (1895)) included one exemption for all taxpayers. In 1916, the Supreme Court upheld the new income tax statute and its varying exemption levels. See *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1916). For the earlier federal income tax experiments, see BROWNLEE, *supra* note ???, at 23-39; JOHN WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 67-75 (1985).

¹⁶ By comparison, since 1969, the federal income tax has contained four different rate schedules: Married individuals filing joint returns and surviving spouses; Heads of households; Unmarried individuals filing (other than surviving spouses and heads of households); and Married individuals filing separate returns. 26 U.S.C. § 1.

¹⁷ For discussions of progressive income taxation as an instrument of economic and social justice, see 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 (2009) (examining the role of “ethical political economists” in the religious and social justice foundations of the federal income tax); Ajay K. Mehrotra, *Envisioning the Modern American Fiscal State: Progressive Era Political 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); RICHARD J. JOSEPH, *THE ORIGINS OF THE AMERICAN INCOME TAX: THE REVENUE ACT OF 1894 AND ITS AFTERMATH* 47 (2004); Ajay K. Mehrotra, *More Mighty Than the Waves of the Sea: Toilers, Tariffs, and the Income Tax Movement, 1880-1913*, 45 *LABOR HISTORY* 165 (2004) (examining the role of organized labor in the adoption of the modern federal income tax); ROBERT STANLEY, *DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861-1913* (1993) (arguing that wealthy Americans and business groups supported the progressive income tax to stave off more radical calls for industrial democracy); RICHARD J. TRILLING, *REALIGNMENT IN AMERICAN POLITICS: TOWARD A THEORY* (1980)

the rich. Adjusted for inflation, the exemption levels created a tax-free threshold for singles and married couples, respectively, of \$65,000 and \$85,000 in 2009 dollars. Meanwhile, only taxpayers with incomes exceeding \$430,000 (adjusted) were subject to the surtax rates, with the top marginal rate only hitting incomes above \$10,700,000 (adjusted).¹⁸ The class-based federal income tax with its generous zero-bracket levels exempted 98 percent of all households.¹⁹

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 joint returns, while families with two earners filed either jointly or separately. Separate filing produced tax benefits, because the statute allocated a higher zero bracket to spouses remitting taxes on separate returns versus joint returns. If filing separately, each spouse was allowed one personal exemption of \$3,000, while one of the spouses could use the additional \$1,000 exemption reserved for married taxpayers, shielding a total of \$7,000 from tax.²⁰ If the spouses aggregated family income on a single return, the statute only exempted \$4,000 from income.²¹ Thus if a couple's income exceeded \$4,000, it could pay higher taxes on identical levels of income based simply on whether they filed separately or as a unit.

The potential tax saving associated with filing separately remained small in the early years of the federal income tax due to reasonably low tax rates. The additional \$3,000 exemption

(showing how agrarian reformers in the nineteenth century supported steeply progressive taxation as a way to redistribute wealth and realign political parties); CORDELL HULL, 1 THE MEMOIRS OF CORDELL HULL 71 (1948) (primary author of the 1913 Revenue Act calling the income tax “the one great equalizer of the tax burden and therefore a tremendous agency for the improvement of social conditions”); RATNER, *supra* note ???; Roy G. Blakey, *The New Income Tax*, 4 AM. ECON. REV. 25, 33 (1914) (emphasizing that progressive taxation was a symbol of economic and social justice); Edwin R. A. Seligman, *The Income Tax*, 9 POL. SCI. Q. 610, 648 (1894) (calling for a federal income tax to “round out the existing tax system in the direction of greater justice”).

¹⁸ The top marginal rate of seven percent began at \$500,000 unadjusted.

¹⁹ 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).

²⁰ The 1913 provided that “in no event shall this additional exemption of \$1,000 be deducted by both a husband and a wife,” language that authorized husbands and wives to file separately with each exempting \$3,000 of income from tax and with one of them exempting another \$1,000. Revenue Act of 1913, *supra* note ???, at 168.

²¹ *See id.* (“Provided, That only one deduction of \$4,000 shall be made from the aggregate income of both husband and wife when living together”).

for couples filing separately, for example, saved taxpayers with \$7,000 in taxable income just \$30, because the additional tax-free threshold would otherwise be subject to the normal tax rate of one percent. Even taxpayers at the highest income levels, subject to the top marginal rate of seven percent, paid just \$210 more in tax if they filed jointly rather than separately. And since these taxpayers would have to report incomes exceeding \$500,000 (unadjusted) to be subject to the full \$210 “penalty,” it was unlikely that filing jointly would motivate them to seek tax avoidance devices.

Perhaps due to the nominal differences between filing separately and jointly, the number of separate returns comprised only a fraction of all returns among married taxpayers. In 1919, only 58,534 husbands and wives out of 2,917,130 married taxpayers (i.e., two percent) filed separate returns.²² This figure was significantly lower than the number of married couples statistically eligible to file separately. In 1920, nine percent of wives participated in the paid labor force,²³ a participation rate that economic historians recognize as significantly under-representing the number of working women.²⁴ Even white married women, the female cohort

²² Ms. Coyle, *Joint Returns of Income of Husbands and Wives* (Apr. 15, 1941), in the Office of Tax Analysis / Division of Tax Research Files, General Records of the Department of the Treasury, Subject Files, Record Group 56, Box 54, National Archives II, College Park, MD, hereafter, “OTA/DTR Files.” This document is reproduced and available at <http://taxhistory.tax.org/Civilization/Documents/marriage/hst28695/28695-7.htm>.

²³ Claudia Goldin, *The Gender Gap in Historical Perspective in QUANTITY & QUIDDITY: ESSAYS IN U.S. ECONOMIC HISTORY* 135, 142 (Peter Kilby ed., 1987).

²⁴ Researchers have identified three sources of bias in census procedures between 1890-1940 that create dampened female labor participation rates: (i) an underinclusive definition of market work; (ii) simple undercounting of workers; and (iii) the movement of production in the economy from the household to the marketplace. One correction to the census data estimates that adjusting the second factor—i.e., undercounting of workers, primarily boardinghouse keepers, unpaid family farm workers, and manufacturing workers in homes and factories—raises the participation rate of married women by as much as 10 percentage points in the early years of the data bias and, under certain assumptions, by a similar amount throughout the entire fifty-year period. CLAUDIA GOLDIN, *UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN* 43-46 (1990). See also Claudia Goldin, *Labor Markets in the Twentieth Century in 2 THE CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES* 549, 576-79 (Stanley L. Engerman & Robert E. Gallman eds., 2000); Claudia Goldin, *The U-Shaped Female Labor force Function in Economic Development and Economic History in INVESTMENT IN WOMEN’S HUMAN CAPITAL* 61 (T. Paul Schultz ed., 1995).

with the highest levels of family income and thus the most to gain from separate filing, achieved a participation rate of 6.5 percent.²⁵

It is possible that the low number of married separate filers relative to the percentage of families with two incomes simply reflected the fact that Americans were still trying to make sense of their new revenue instrument. We know that the government had yet to work out the kinks. In a retrospective 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 incomes regardless of whether they chose to make joint or separate returns.”²⁶ 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.²⁷ 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. This policy “did not seem to derive from any clear conception” of how to tax married versus single taxpayers or from a desire to generate additional revenue.²⁸ Rather, “it seemed merely to be more convenient in some instances” to assess tax liability on husbands and wives jointly rather than separately.²⁹ Perhaps married taxpayers also

²⁵ Goldin, *The Gender Gap*, *supra* note ???, at 142. The flawed census procedures discussed in *supra* note ??? produce the most significant biases on “white, married, and adult women working within their homes and on family farms.” GOLDIN, UNDERSTANDING THE GENDER GAP, *supra* note ???, at 44.

²⁶ Louis Shere, *Tax Revision 1937—Project No. 3, Miscellaneous and Administrative Tax Changes* (Nov/ 19, 1937), at 4-5, OTA/DTR Files, Box 54, Folder GA-5/36.1.

²⁷ *But see infra* note ??? [+3]

²⁸ *Id.*

²⁹ *Id.* The policy also seemed to contradict official Treasury guidance. *See* T.D. 2090 (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 (1915) (same).

filed jointly rather than separately for the convenience.³⁰ 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 help prosecute the war.³¹ In the process, it made paying income 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 percent,³² while holding steady on the personal exemption levels of \$3,000 and \$4,000, respectively, for individuals and married couples.³³ Furthermore, the statute provided a graduated tax on estates exceeding \$50,000 (\$970,000 adjusted) with a top rate of 10 percent on estates above \$5,000,000³⁴ (\$97,000,000 adjusted); it increased the corporate income tax rate from one to two percent³⁵; and it subjected munitions manufacturers to a 12.5 percent excess profits tax.³⁶

³⁰ For this reason, the BIR attempted to glean married taxpayers' intent when examining joint returns. "Where husband and wife clearly indicate on a single return form the net income of each," the Treasury wrote to its revenue agents, "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, § 223, Article 401, No. 4 C.B. 255 (1921). Tax administrators faced similar issues of first impression with respect to other subjects under the new law. *See e.g.*, O.D. 881, § 223, Article 401, No. 4 C.B. 254 (1921) (determining allocation of the wartime excess profits tax exemption between spouses for 1917 returns); O.D. 909, § 223, Article 401, No. 4 C.B. 254 (1921) (determining allocation of deductions between spouses in community property states versus common law states); T.D. 3110, No. 4 C.B. 255 (1921) (determining how taxpayer-parents should return the income of minor children).

³¹ For the federal income tax during World War I, see W. Elliot Brownlee, *Wilson and Financing the Modern States: The Revenue Act of 1916*, in PROCEEDINGS OF THE AMERICAN PHILOSOPHICAL SOCIETY 129, 173-210 (1985); 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 E. Supple eds., 1990); STEVEN BANK ET AL., WAR AND TAXES (chap. 3) (2008).

³² Revenue Act of 1916, 39 Stat. 756, 756-57 (1916).

³³ *Id.*, at 761.

³⁴ *Id.*, at 777-80.

³⁵ *Id.*, at 765-73.

³⁶ *Id.*, at 780-82.

High-income taxpayers charged the Wilson administration with pursuing a “soak the rich” program through the combination of higher taxes on personal and corporate income.³⁷ They were right. In 1917, Congress enacted the administration’s tax program wholesale, raising rates across the board, more than quadrupling the top marginal rate from 15 to 67 percent, and exposing lower levels of income to significantly higher taxes.³⁸ In addition, it reduced personal exemption levels to \$1,000 for individuals and \$2,000 for married taxpayers, pulling tens of thousands of citizens into the federal income tax system for the first time.³⁹ Despite the lower exemptions, the levy remained a class-based tax, affecting only 15 percent of all households.⁴⁰ The richest one percent of Americans, moreover, accounted for 80 percent of federal income tax receipts in 1918, and were subject to effective tax rates (that is, after accounting for exemptions and deductions) exceeding 15 percent, up from 3 percent in 1916.⁴¹ The Revenue Act of 1918 raised rates yet again such that by war’s end personal income tax rates ranged between 12 and 77 percent,⁴² estate tax rates reached 25 percent,⁴³ the basic corporate income tax rate equaled 12 percent,⁴⁴ and the excess profits tax, which took between 30 and 65 percent of a company’s profits above a “normal” rate of return,⁴⁵ grew so large that it accounted for nearly two-thirds of aggregate federal tax revenues collected during the war.⁴⁶

³⁷ The term “soak the rich” taxation was used widely in both the United States and England to describe progressive taxation. See BROWNLEE, *supra* note ???, at 66 n. 27.

³⁸ Revenue Act of 1917, 40 Stat. 300 (1917).

³⁹ *Id.* at 301.

⁴⁰ BROWNLEE, *supra* note ???, at 44.

⁴¹ *Id.* These figures do not account for the incidence of the corporate income tax, which would raise effective rates for high-income taxpayers in 1918.

⁴² Revenue Act of 1918, 40 Stat. 1057, 1062 (1918).

⁴³ *Id.*

⁴⁴ *Id.* at 1075-82.

⁴⁵ *Id.* at 1088.

⁴⁶ BROWNLEE, *supra* note ???, at 45.

In five short years, the income tax went from generating a fraction of all federal tax receipts to generating a near-majority of national revenues.⁴⁷ In just three years, moreover, it went from imposing a modest one-percent tax of \$200 on taxable income of \$20,000 to subjecting that income to ten different tax rates, ranging from 12 to 21 percent, for a total tax of \$3,270, an increase of more than 1,600 percent.⁴⁸ At \$100,000 of taxable income, a taxpayer paid \$2,550 in 1915 and \$36,530 in 1918.⁴⁹ At \$500,000, he paid \$25,050 versus \$324,530. And at \$1,000,000, he paid \$60,050 versus \$704,530.⁵⁰

Very quickly, taxpayers faced significant economic incentives to seek tax avoidance. Some of the early techniques included gifts of income and property both during life and at death, a multiplying array of trusts, joint ownership of property, assignments of income and property, and family partnerships. 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, if a husband and wife with \$100,000 of taxable income filed separate returns each reflecting one-half the total, the tax on each \$50,000 half would amount to \$11,970 for an aggregate tax bill of \$23,940. If the same couple filed jointly, it would owe \$36,530 with the last \$50,000 of income subject to marginal rates ranging from 36 to 64 percent, resulting in a tax penalty of \$12,590 and a tax bill more than 50 percent higher than if they filed separately. The discrepancy was even greater if the couple could split its income not just twice by filing separately, but into three, four, six parts by also shifting income to other family members.

⁴⁷ See BROWNLEE, *FEDERAL TAXATION IN AMERICA*, *supra* note ???, at 47-62; BUENKER, *supra* note ???, at ???-???; WITTE, *supra* note ???, at 67-88. The federal income tax quickly eclipsed the partisan tariff and regressive excise taxes on alcohol and tobacco as the primary source of federal revenue.

⁴⁸ Between 1913 and 1915, the first \$20,000 of taxable income was subject to a single rate of one percent. For prevailing rates in 1915, see Revenue Act of 1913, *supra* note ???, at 166, and for 1918 rates, Revenue Act of 1918, *supra* note ???, at 1062.

⁴⁹ Calculated from *id.*

⁵⁰ *Id.*

Tax authorities and policymakers 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.⁵¹ Wartime surtaxes had “greatly stimulated avoidance, not to say, evasion of the tax,” argued economist Thomas Adams, chair of Treasury’s Tax Advisory Board.⁵² “Revenues have been falling off, particularly the collections from richer taxpayers.”⁵³ For tax year 1917, Adams found that taxpayers with incomes over \$100,000 reported net income of \$1.6 billion, but only \$600 million in 1920. Part of the falloff was due to modest reductions in rates and increases in the personal and dependency exemptions, both of which passed Congress in 1921 at the cessation of the war.⁵⁴ But the reduction was also attributable to high-income taxpayers incorporating personal property, disposing of huge sums 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.”⁵⁵

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 argued, “is reached in a number of southern and western states by the community property laws which bring a division of the ordinary family income.”⁵⁶ Both practices were “major evils” that the government could remedy “rather easily.” Gifts could

⁵¹ CONG. REC. (May 8, 1924), at 8095 (statement of Sen. Walsh, quoting Mellon).

⁵² Thomas S. Adams, *Fundamental Problems of Federal Income Taxation*, 35 Q. J. ECON. 527, 535-36 (1921).

⁵³ *Id.*

⁵⁴ Revenue Act of 1921, 42 Stat. 227, 233 and 243 (1921).

⁵⁵ Adams, *supra* note ???, at 536.

⁵⁶ *Id.*

be made subject to the income or estate tax.⁵⁷ Alternatively, Congress could tax the donor at the time of transfer on any appreciation to the property's value or require the donee to assume the donor's basis.⁵⁸ With respect to the "community property problem," Congress should prohibit separate filing, and require all married couples to combine family income for tax purposes.⁵⁹ Adams commented favorably on the Wisconsin state income tax statute, which required husbands and wives to aggregate taxable income and property on a joint return.⁶⁰ He urged the national Congress to take "action along these lines,"⁶¹ a position also advocated by Secretary Mellon. Permitting spouses in community property states to file separate returns with each reporting half the family income "gives an unfair advantage to the citizens of those states over the citizens of the other states," said Mellon.⁶² Both Adams and Mellon were in further agreement that the federal income tax had proved "elastic and marvelously productive" during and after World War I.⁶³ These "deeper defects" to the tax, however, threatened its capacity to generate sufficient revenue and to survive in the long-term.⁶⁴

The Treasury cracked down on family tax avoidance. It convinced 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

⁵⁷ In 1924, Congress responded to the avoidance through gifting by enacting a gift tax as "a corollary to the estate tax." CONG. REC. (June 4, 1924), at 10565 (statement of Rep. Green). *See* Revenue Act of 1924, *supra* note ???. Its proponents argued that the gift tax would "go a long way toward preventing evasion...by the transfer of possession to the relatives or friends for the purpose of reducing incomes or estates so as to bring them within a tax bracket where they would be subject to lower tax rates." CONG. REC. (May 8, 1924), at 8095 (statement of Sen. Walsh).

⁵⁸ Adams was either unaware or unconcerned by the Supreme Court's decision in *Taft v. Bowers*, 278 U.S. 470 (1929) (holding that donee takes donor's basis in appreciated property and pays tax on any appreciation in the event of a later disposition, while donor goes untaxed on qualifying gifts).

⁵⁹ Adams, *supra* note ???, at 536.

⁶⁰ *See* Wis. Rev. Stat. §§ 71.05(2)(d) and 71.09(4)(c). *See also supra* notes ??? and accompanying text, discussing the statute in the context of *Hoeper v. Tax Commission of Wisconsin*, 284 U.S. 206 (1931) (invalidating Wisconsin income tax statute on grounds that it violated the Fourteenth Amendment).

⁶¹ Adams, *supra* note ???, at 536.

⁶² 67 CONG. REC. 175-76 (Nov. 10 1923) (statement of Mellon).

⁶³ Adams, *supra* note ???, at 536.

⁶⁴ *Id.*

couples, while husbands and wives filing separately were allowed one exemption for married couples and another for single individuals. Beginning in 1918, with personal exemptions having been reduced in 1917 to \$1,000 for single persons and \$2,000 for married couples, spouses were allowed a total exemption of \$2,000 no matter how they filed.⁶⁵ In the event they filed separately, they could allocate the full exemption to one or the other spouse or, alternatively, they could split it between themselves.⁶⁶

The most lucrative tax avoidance opportunities remained available to married couples despite Treasury's best efforts. In particular, husbands and wives could still avoid the sting of steeply progressive rates by dividing family income on separate returns. As discussed above,⁶⁷ they could accomplish 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.⁶⁸ Thus, under general property law precepts, the income and property was already split in half, and for purposes of reporting federal income 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 mandatory joint filing. In so doing, it would have to challenge determinations of property ownership and the

⁶⁵ Revenue Act of 1917, *supra* note ???, at 301.

⁶⁶ See Revenue Act of 1918, *supra* note ???, at 1069.

⁶⁷ See *supra* notes ??? and accompanying text.

⁶⁸ 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.

nature of spouses' interests in martial partnerships, a determination that had traditionally been the exclusive province of state governments.

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

Under traditional common law, marriage resulted in a unified rather than a shared property interest with nearly all the 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.⁶⁹ Upon marriage, a wife's personalty merged with that of her husband such that all her personal property—including clothes, jewelry, furniture—were owned by her husband, 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; she was prohibited from executing wills, holding property in her own name, controlling her earnings (either in market or home production), or enjoying any rights in income, crops, or manufactured goods flowing from her realty. And even though some early colonial statutes extended rights to married women, none of them seriously challenged traditional marital status under coverture.⁷⁰

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 traditional common law marital status by providing wives legal rights

⁶⁹ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (1765) ("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.").

⁷⁰ See e.g., JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 80-124 (1991); ELIZABETH WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN, 1800-1861 1-136 (1987); Richard Chused, *Married Women's Property Law, 1800-1850*, 71 GEO. L. J. 1359, 1384-97 (1983); NORMA BASCH, IN THE EYES OF THE LAW: MARRIED WOMEN'S PROPERTY RIGHTS IN NINETEENTH-CENTURY NEW YORK 15-112 (1982).

independent of husbands.⁷¹ The first wave of statutes protected certain kinds of property that married women brought into marriage from their husbands and their husband's creditors.⁷² Later statutes granted married women additional 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, as well as the authority to control their own wages; to establish separate estates; and to have access to their deceased husband's personal property.⁷³ Researchers have shown that the statutory changes neither "fully emancipate[d] wives from the common law of marital status,"⁷⁴ nor simply reified legal patriarchy.⁷⁵ The truth lies somewhere in between.

⁷¹ Most scholars identify Mississippi as the first state to enact a married woman's property act. The statute provided married women limited property rights, largely in connection with protecting a wife's slaves that she brought into marriage from her husband's creditors. See WARBASSE, *supra* note ???, at 138-60; 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, however, the territorial legislature in Arkansas adopted a law protecting a wife's property from her husband's debts. See WARBASSE, *supra* note ???, at 159; Chused, *supra* note ???, at 1399.

⁷² See e.g., WARBASSE, *supra* note ???, at 159-60 (concluding that in early southern married women's property acts "legislators appear to have been primarily concerned with keeping the wife's property from being taken for the husband's debts," and that they "were really seeking to protect planters from financial disaster as much as to defend married women's rights."); Chused, *supra* note ???, at 1361, 1400-04 (arguing that the economic panic of the 1830s prompted "legislatures to codify a portion of the equitable separate estate tradition [a codification movement that began in the early nineteenth century] by insulating wives' property from their spouses' creditors"); 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."); PEGGY A. RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION* (1980) (finding that statutory changes in women's legal status was motivated by fathers' desire to protect their daughters' inheritance from husbands and husbands' 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"). Compare Rick Geddes & Dean Lueck, *The Gains from Self-Ownership and the Expansion of Women's Rights*, 92 AM. ECON. REV. 1079, 1079-80 (2002) (explaining legal gains for women by "economic growth with attendant increases in wealth and specialized markets [which led] to greater gains from human-capital investment, thus making coverture a relatively costly institution").

⁷³ See e.g., 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); HOFF, *supra* note ???, at 117-35, 128 (identifying six stages of property law reforms).

⁷⁴ 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 Sara L. Zeigler, *Uniformity and Conformity: Regionalism and the Adjudication of the Married Women's Property Acts*, 28 POLITY 467, 469-70 (1996) (finding that "judicial intransigence" and "adher[ence] to long-standing common law principles and institutional norms of statutory

Given prevailing gender norms, moreover, statutory reforms to traditional common law never embraced equality between the sexes or shared ownership principles.⁷⁶ Instead, they granted married women limited legal rights to separate property and earnings that may have actually hardened rather than softened traditional gender roles, with the wife responsible for home production and the husband responsible for market production.⁷⁷

While reformed common law emphasized the spouses' separate interests, community property law presumed shared interests in common property.⁷⁸ Community property law in the

construction...guaranteed the ancient protections and disabilities of wives and limited the legislatures' ability to remove those disabilities and protections'); 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 their own wages); NANCY COTT, *THE GROUNDING OF FEMINISM 186-87* (1987) (same); 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); Richard 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) (finding that judicial interpretation of married women's property statutes in Oregon resulted in "a loss of special status for property owned by married women," emphasis in original); Chused, *supra* note ???, at 1361-62 (concluding that the married women's acts "did not legitimate any radical shifts in the economic status of women," and "confirmed rather than confronted prevailing domestic roles for married women"); BASCH, *supra* note ???, at 4 and 9 (concluding that "full legal equality for married women loomed as a threat to the entire economic structure," and as a result, "[l]arge remnants of the wife's former inferior status survived the legislative assaults of the nineteenth century."); Suzanne D. Lebsack, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J. SO. HIST. 195, 197 (1977) (calling "ill-founded" early feminists' "optimism" that changes in state property law would lead to more radical reforms).

⁷⁵ See e.g., Kahn, *supra* note ???, (finding positive effects of the statutes on wives' entrepreneurialism as measured by the filing of federal patents by women); Shammass, *supra* note ???, 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 later generations of women to be "in a position to make some decisions about their and their family's own consumption, investments, and wealth transmission."); HOFF, *supra* note ???, at 87 (concluding that for women in the early republic "the historical and legal record remains a bleak one until the 1830s," or until enactment of married women's property laws); Linda K. Kerber, *The Paradox of Women's Citizenship in the Early Republic: The Case of Martin v. Massachusetts, 1805*, 97 AM. HIST. REV. 349 (1992) (same).

⁷⁶ See Donna C. Schuele, *Community Property Law and the Politics of Married Women's Rights in Nineteenth-Century California*, 7 WEST. L. HIST. 244, 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, 1112-35 (1994) (describing failed efforts to "empower[] economically productive women to participate equally with men in managing assets both had helped to accumulate"); Siegel, *supra* note ???, at 2128 (situating the statutes in "the gender mores of the industrial era" to accurately evaluate their contribution to the advancement of married women).

⁷⁷ See e.g., Siegel, *supra* note ???, at 2210 (describing how "the movement for egalitarian reform...work[ed] to modernize and so naturalize an antiquated body of status law").

⁷⁸ See e.g., WILLIAM A. REPPY, JR. & WILLIAM Q. DEFUNIAK, *COMMUNITY PROPERTY IN THE UNITED STATES* ???-??? (1975); WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* ???-??? (2d ed. 1971). Traditional common law, as compared to reformed 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 in community property law was shared under the marital partnership in which each spouse possessed equal

United States was patterned primarily off the Spanish system of marital property,⁷⁹ and recognized both common and separate property.⁸⁰ All property acquired during marriage (unless acquired by gift, bequest, devise, or descent) was presumptively common property, and shared equally by husband and wife regardless of which spouse “earned” the property in the traditional market sense of the word. 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.”⁸¹ All “proprietary interests of the spouses are not merely united but unified; not mixed or blent, but identical.”⁸² Under community property law, “dependence of the wife” gave way to “conjugal interdependence.”⁸³

During marriage, the husband acted as manager of the common property for the benefit of the community.⁸⁴ His management powers did not entitle him to a larger share of the marital partnership, however, and the non-managing partner had the right to disturb the husband’s management in the event he shirked his obligations to the community.⁸⁵ Spouses managed their own separate property during marriage, not because of any influence of common law separate

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).

⁷⁹ The only potential outlier is Louisiana. Scholars debate the true 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 it appears that Louisiana property law contains elements of both systems, its most salient provisions derive from Spanish law, which prevailed in the territory prior to adoption of the French civil code. *See e.g.*, HARRIET SPILLER DAGGETT, 4 THE COMMUNITY PROPERTY SYSTEM OF LOUISIANA 6 (1945).

⁸⁰ For Spanish civil law, see DE FUNIAK & VAUGHN, *supra* note ???, at ???; RICHARD A. BALLINGER, A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE UNDER THE COMMUNITY OR GANANCIAL SYSTEM § 5 (1895).

⁸¹ Marion Rice Kirkwood, *The Ownership of Community Property in California*, 7 S. CAL. L. REV. 1, 16 (1933-34).

⁸² Alvin E. Evans, *The Ownership of Community Property*, 35 HARV. L. REV. 47, 65 (1921-22).

⁸³ *Id.* at 67.

⁸⁴ *See infra* notes ??? and accompanying text.

⁸⁵ *See infra* notes ??? and accompanying text. *See also* Evans, *supra* note ???, at 65 (“Management and disposition may be vested in one or both, but that does not affect the proprietary interests.”); Kirkwood, *supra* note ???, at 16 (stating that the “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”).

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.⁸⁶

Though co-ownership undergirded community property law in the United States, there were variations of shared ownership among the eight civil law regimes. In particular, the community property states 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.⁸⁷ The husband and wife formed an entity under Washington law.⁸⁸ And the entity (rather than one⁸⁹ or both spouses⁹⁰) owned all community property in which husband and wife enjoyed equal rights and interests.⁹¹ 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.⁹²

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,

⁸⁶ See DE FUNIAK & VAUGHN, *supra* note ???, at 126-29; REPPY & DEFUNIAK, *supra* note ???, at 129.

⁸⁷ See e.g., *Holyoke v. Jackson*, 3 Wash. Terr. 235, 238-39 (Sup. Ct. 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”).

⁸⁸ See e.g., *Ostheller v. Spokane & I. E. R. Co.*, 107 Wash. 678 (Sup. Ct. 1919); *Harry L. Olive Co. v. Meek*, 103 Wash. 467 (Sup. Ct. 1918); *Wasmund v. Wasmund*, 90 Wash. 274 (Sup. Ct. 1916); *Miller v. Maddocks*, 58 Wash. 695 (Sup. Ct. 1910); *Shoret v. Signor*, 58 Wash. 89 (Sup. Ct. 1910); *Stockand v. Bartlett*, 4 Wash. 730 (Sup. Ct. 1892).

⁸⁹ See *infra* note ??? and accompanying text [CA].

⁹⁰ See *infra* note ??? and accompanying text [AZ, ID, NV, NM].

⁹¹ See e.g., *Ostheller*, 107 Wash. Terr. at 685; *Marston v. Rue*, 92 Wash. 129 (Sup. Ct. 1916); *Mabie v. Whittaker*, 10 Wash. 656 (Sup. Ct. 1895); *Holyoke*, 3 Wash. Terr. 235.

⁹² See e.g., *Holyoke*, 3 Wash. Terr. at 239 (stating that “[m]anagement 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.”).

vested one-half of the community as individuals. It did not matter which spouse held record title in the property.⁹³ 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 paid state inheritance tax or federal estate tax, if any, on the portion that passed under the deceased spouse's will or by intestacy.⁹⁴

Texas and Louisiana practiced yet another brand of community property.⁹⁵ 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 equitable rather than legal.⁹⁶ Moreover, if record title to community property was in the wife's name, the law considered her the legal owner rather than the husband.⁹⁷ In either case, whomever enjoyed legal title held the property, as well as the other spouse's interest in the property, as trustee.⁹⁸ 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.⁹⁹

Not all community property laws were created equal. And 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

⁹³ See e.g., *Beals v. Ares*, 25 N.M. 459 (Sup. Ct. 1919); *Ewald v. Hufton*, 31 Idaho 373 (Sup. Ct. 1918); *In re Williams Estate*, 40 Nev. 241 (Sup. Ct. 1916); *LaTourette v. La Tourette*, 15 Ariz. 200 (Sup. Ct. 1914); *Molina v. Ramirez*, 15 Ariz. 249 (Sup. Ct. 1914).

⁹⁴ See e.g., *Kohny v. Dunbar*, 21 Idaho 258 (Sup. Ct. 1912). By statute, the surviving spouse was the heir of 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.

⁹⁵ 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 ???, at 63.

⁹⁶ *Burnham v. Hardy Oil Co.*, 108 Tex. 555 (Sup. Ct. 1917).

⁹⁷ See *Mitchell v. Schofield*, 106 Tex. 512 (Sup. Ct. 1915); *Houston Oil Co. v. Choate*, 232 S.W. 285 (Tex. Civ. App. 1921).

⁹⁸ Compare this to the treatment under California law, where the husband was still 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*, 16 Cal. App. 594 (1911).

⁹⁹ See e.g., *Burnham*, *supra* note ???; *Edwards v. Brown*, 68 Tex. 329 (Sup. Ct. 1887); *Zimpelman v. Robb*, 53 Tex. 274 (Sup. Ct. 1880); *Johnson v. Masterson Irr. Co.*, 217 S.W. 407 (Tex. Civ. App. 1919); *Kirby Lumber Co. v. Smith*, 185 S.W. 1068 (Tex. Civ. App. 1916).

law principles of shared interests.¹⁰⁰ It protected the wife by giving her rights to manage her own separate property and to prevent her husband from mismanaging her contingent interests in the community rather than making her an immediate co-owner. Moreover, because her interests in the community 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” over all community income and property¹⁰¹ that he was free to manage and control “with the like absolute power of disposition as of his own separate estate.”¹⁰² Yet his “absolute ownership” did not allow him to defraud his wife of her interest in the community, which, again, only ripened by divorce or death of the husband.¹⁰³ If she were merely an expectant heir, with no interest in the community,¹⁰⁴ how could she also be said to have control over the husband’s management of the property that by statute he owned absolutely? How, for example, could she prevent him from assigning her contributions to community income?¹⁰⁵ Or stop him from conveying, selling, or encumbering the community’s real property or leasing it for more than one year?¹⁰⁶ Or from

¹⁰⁰ Susan Prager has documented the “constant tension” in the development of California’s community property law beginning in 1849 “between reformed common law and community property philosophies.” Prager, *supra* note ???, at 1. During its formative years, particularly between 1850 and 1891, Prager states 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.

¹⁰¹ § 172 Cal. Civ. Code, enacted Stats. 1872.

¹⁰² Act of April 17, 1850, § 9, [1849-50] Cal. Stat. 254.

¹⁰³ *See e.g.*, Beard v. Knox, 5 Cal. 252, 256 (Sup. Ct. 1855) (“Our statute has done away with the common law right of dower, and substituted in its place a half interest in the common property. This liberal provision was intended for the benefit of the wife, and the intention of so humane and beneficent a law should not be defeated, by adopting a rule of construction which would leave the future maintenance of herself and family entirely at the caprice of the husband.”); Smith v. Smith, 12 Cal. 216, 225 (Sup. Ct. 1859); Scott v. Ward, 13 Cal. 458, 469 (Sup. Ct. 1859); Payne v. Payne, 18 Cal. 291, 301 (Sup. Ct. 1860); Packard v. Arellanes, 17 Cal. 525, 538 (Sup. Ct. 1861); Fuller v. Ferguson, 26 Cal. 546, 565 (Sup. Ct. 1864); Lord v. Hough, 43 Cal. 581, 585 (Sup. Ct. 1872).

¹⁰⁴ *See* Cal. Civ. Code § 700, enacted Stats. 1872 (“A mere possibility such as the expectancy of an heir apparent is not to be deemed an interest of any kind”).

¹⁰⁵ Cal. Stat. 1913, at 537 (invalidating assignments of wages or salary of either spouse absent written consent).

¹⁰⁶ Act of May 23, 1917, 583 [1917] Cal. Stat. 829-30 (adopting § 172a).

conveying or encumbering any household items such as furnishings and clothing without her written consent?¹⁰⁷ Or from making a gift of community property without valuable consideration or her written consent?¹⁰⁸ The same statutory framework that bestowed upon the husband absolute ownership of community property and that removed from the wife all existing interest in the community provided the wife present interests and negative rights that encumbered the husband's dominion.¹⁰⁹

Not surprisingly, California courts issued decisions reflecting the statutory schizophrenia. 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 in community income and property,¹¹⁰ while another held that she possessed an "existing, vested" interest.¹¹¹ The statutes were not solely to blame for the disparate though parallel holdings. Judges reared in the common law tradition awkwardly attempted to overlay foreign property law concepts on California's civil law system, resulting in inappropriate and imperfect analogies as well as inconsistent and conflicting rulings.¹¹² These jurists were slow to confer equal authority

¹⁰⁷ Act of March 23, 1901, 190 [1901] Cal. Stat. 258, p. 598.

¹⁰⁸ Act of March 31, 1891, 220 [1891] Cal. Stat. 245 (restricting husband's previously absolute management and control of community property by amending § 172).

¹⁰⁹ One might even say that the statute provided the wife present and equal ownership interests in community property. *See*, in particular, Cal. Civ. Code § 682, enacted Stats. 1872 ("The ownership of property by several persons together 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, and even then to deny the wife a present interest in the community. *See e.g.*, *Moore v. Neighbours*, 95 Cal. App. 628, 631 (1928) (finding that although § 682 defined "community interest of husband and wife" as implying co-ownership, married women enjoyed co-ownership of community income and property only upon dissolution of the marriage by death or divorce).

¹¹⁰ *See infra* notes ??? and accompanying text.

¹¹¹ *See infra* notes ??? and accompanying text.

¹¹² *See* 34 Op. Att'y Gen. 395, 402 (1924) (attributing the "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 CAL. L. REV. 302 (1926-27) (attributing the "confusion" over the rights and obligations of husband and wife in community property to "minds trained to the common law"). *See also* Schuele, *supra* note ???, at 251 (describing non-native Californios coming to the state with "a strong

on law developed by legislative grace rather than by judicial deliberation and precedent.¹¹³ They were slower, still, to embrace a property law system that conferred equal rights on married women, and that replaced legal patriarchy with marital co-ownership.

As it would nearly one hundred years later, California found itself in the early decades of the twentieth century at the center of a national discussion over differing family law regimes. The debate involved not just the implications of family dynamics under different state property laws, but also the implications of a state's property law on different families' rights and obligations under federal law, particularly federal tax law. Understanding the earlier episode over California's evolving community property law and novel conception of "family" can help us understand the current debate over the legal recognition of different family forms.

A. *The California Statutory Framework: Towards Common Ownership*

The California constitution reflected common ownership principles for married residents. Adopted in 1849, it recognized a fundamental equality of ownership. It spoke specifically of a wife's property "held in common with her husband," which courts interpreted to mean property held jointly as "community property."¹¹⁴ The first statutes were enacted the following year and embodied common ownership principles. Upon the death of either husband or wife, for example,

allegiance to Anglo-American common law culture that was quite at odds with the prevailing legal culture"); *infra* notes ??? and accompanying text.

¹¹³ 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, 494, 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." In *Arnett v. Reade*, 220 U.S. 311, 320 (1911), applying New Mexico law, Justice Holmes explained why courts 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 practical effect of the husband's power and its legal ground, if not by mistranslation of ambiguous words like *domino*."

¹¹⁴ CAL. CONST. art. 11, § 14 (1849). For courts' interpretation of the provision, see e.g., *Estate of Moffitt*, 154 Cal. 359, 362 (Sup. Ct. 1908) (finding that the provision covered "property of the character now universally designated 'community property'").

both spouses were treated equally, with at least one half of the common property passing “to the survivor” with the other half passing to the descendants; in the absence of descendants, the survivor received the entire community.¹¹⁵ Upon dissolution of the marriage by divorce, the common property was “equally divided between the parties.”¹¹⁶

From the very beginning, these shared ownership principles coexisted with the husband’s exclusive powers of management and control over the community. In theory, these powers did not conflict with the Spanish law of community, which emphasized equal ownership during marriage and from which the California regime sprung.¹¹⁷ Under Spanish law, the husband’s control of community property reflected “nothing but the administration of property owned by halves by both spouses, and which the husband [could] administer only for the benefit of both.”¹¹⁸ Under the early California statutes the husband enjoyed much more than administrative powers, effectively empowered to treat the community property as his own. “The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate,” the statute read.¹¹⁹ California courts held that the husband could not exercise his powers to alienate community property merely to divest the wife of her inchoate claims,¹²⁰ but he otherwise enjoyed unlimited freedom of management and control under the statute.¹²¹

¹¹⁵ Act of April 17, 1850, § 11, [1849-50] Cal. Stat. 255.

¹¹⁶ *Id.*, at § 12.

¹¹⁷ Nor did the husband’s exclusive powers of management and control conflict with the prevailing practice in other community property states. *See e.g.*, Civ. Code Ariz. § 3850; Comp. Stat. Idaho § 4666 (1919); Rev. Civ. Code La. § 2404; Rev. Laws Nev. § 2160; Code N.M. § 2766 (1915); Rev. St. Texas § 4622; Rem. Comp. Stat. Wash. § 6893 (1922). For the relationship between Spanish law and California civil law, see WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 234-56 (2d ed. 1971).

¹¹⁸ DE FUNIAK & VAUGHN, *supra* note ???, at 266.

¹¹⁹ Stats. 1850, § 9, *supra* note ???

¹²⁰ *See e.g.*, Beard v. Knox, 5 Cal. 252, 256 (Sup. Ct. 1855); Scott v. Ward, 13 Cal. 458, 469 (Sup. Ct. 1859); Payne v. Payne, 18 Cal. 291, 301 (Sup. Ct. 1860); Packard v. Arellanes, 17 Cal. 525, 538 (Sup. Ct. 1861); Fuller v. Ferguson, 26 Cal. 546, 565 (Sup. Ct. 1864); Lord v. Hough, 43 Cal. 581, 585 (Sup. Ct. 1872).

¹²¹ The husband also enjoyed near-absolute managerial powers over his wife’s *separate* property. *See* Act of April 17, 1850, § 6, [1849-50] Cal. Stat. 254. Not until 1872 did the legislature grant married women full managerial

During the latter half of the nineteenth century, the California legislature consolidated the husband's stranglehold over the community. Each gain for the husband further disabled the wife. In 1857, the legislature retreated from automatic equal division of community property on divorce, and provided that common property could be divided unequally in the event of adultery or extreme cruelty.¹²² In 1861, the legislature removed from the wife any testamentary power over community property. Upon the death of a married woman, all of the community property passed to the surviving husband; the wife could dispose of none of it. If the husband predeceased the wife, moreover, only one-half of the community passed to the wife, with the husband maintaining alienation over the other half.¹²³ In other words, a husband was the wife's only potential heir with respect to community property. In addition, the husband never lost any of the community upon the wife's death, but the wife lost half of the community upon the husband's death unless the husband had no surviving descendants, *and* he explicitly transferred the other half to his wife in a valid will (because his half did not automatically pass to her intestate). In 1864, the legislature further protected the husband's interest in community property while undermining the wife's. "Upon the dissolution of the community by the death of the wife, the entire common property shall, without administration, go to the surviving husband."¹²⁴ In the

power of their separate property. Citation??? In addition, the wife needed her husband's consent to execute a valid will, even of her separate property (Act of April 10, 1850, § 2, [1849-50] Cal. Stat. 177), a disability that was not lifted until 1866 (Act of March 20, 1866, § 1 [1865-66] Cal. Stat. 316). The statute provided only two minor checks prior to 1891 on the husband's management of the wife's separate property. First, he needed the wife's consent before he could transfer or encumber her separate property (Stats. 1850, § 6, *supra*), but this was a purely negative power. And second, the wife could request that a trustee take charge of her separate property if she had "just cause to apprehend that her husband has mismanaged or wasted, or will mismanage or waste, her separate property." Act of April 17, 1850, § 8, [1849-50] Cal. Stat. 254. There was no such restriction with respect to community property.

¹²² Act of April 14, 1857, [1857] Cal. Stat. 199; codified in 1872 as § 146).

¹²³ Act of May 8, 1861, § 1 [1861] Cal. Stat. 310-11.

¹²⁴ Act of April 4, 1864, § 1 [1863-64] Cal. Stat. 363.

eyes of the legislature, a deceased wife did not have any ownership interests to administer; she could not will any of the community property, because she did not have any interest to will.¹²⁵

The California Supreme Court put a finer point on the wife's fragile legal identity. Her "estate in expectancy" of community property, the court wrote in 1888, "is dependent upon her survivorship; and in the event of her death before her husband, it is deemed never to have existed. If we are correct in this," the court continued, "the husband does not, upon the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed."¹²⁶

To the extent that the California wife gained any rights during this period, either during life or at death, it was with respect to her separate property.¹²⁷ Comparatively, the husband enjoyed nearly absolute control over community property, both during life and at death.¹²⁸

Beginning in 1891, the California legislature initiated a thirty-year reshuffling of community interests such that by the mid-1920s, husbands and wives in California looked more like their community property counterparts in other states. First, a proviso to the management and control statute explicitly protected the wife's interest in the community by preventing the

¹²⁵ The 1864 statute also allowed the husband to override the usual succession pattern by providing that in the absence of disposition of the community by the husband upon death, one-half of the community property "shall go to his descendants" rather than to the wife. *Id.*

¹²⁶ *In re Estate of Rowland*, 74 Cal. 523, 525-26 (Sup. Ct. 1888) (emphasis in the original).

¹²⁷ For example, the wife gained the right to will her separate property (Stats. 1866, §1, *supra* note ???); husbands were prohibited from using wives' separate or community earnings to satisfy personal debts (Act of March 9, 1870, § 1 [1869-70] Cal. Stat. 226; codified in 1872 as Cal. Civ. Code § 168); and the legislature created a special presumption that property conveyed to a married woman by written instrument—but not to a married man in the same manner—was her separate property rather than property of the community (Act of March 19, 1889, [1889] Cal. Stat. 328; codified in 1872 as Cal. Civ. Code § 164).

¹²⁸ As Susan Prager observed thirty years ago: "The limitations on the husband's powers over the community were so minimal that his power was virtually indistinguishable from his authority with respect to his separate property." Prager, *supra* note ???, at 46. Between 1873 and 1874, the California legislature codified the earlier statutes. To the extent these Code Amendments further extended the rights of married men to the detriment of married women, the California Supreme Court held that they effectively altered prior rules of law. *See e.g., In re Estate of Rowland*, 74 Cal. at 525 (finding that Stats. 1850, ch. 103, § 11, pertaining to the vesting of community property in the wife's descendants upon her death, was amended by § 1401 such that upon the wife's death, "the entire community property, without administration, belongs to the surviving husband"). The Code Amendments also preserved the husband's complete dominion over the community during life and partial dominion at death. *See* Cal. Civ. Code §§ 172 and 1402.

husband from gifting or otherwise conveying community income and property without valuable consideration or the wife’s written consent.¹²⁹ According to the California Supreme Court, this restriction on the husband’s power protected the wife’s “undivided one-half interest in every item of property,” and reaffirmed that the husband must manage the community for the benefit of both spouses.¹³⁰ Second, in 1901, the legislature prevented the husband from transferring or encumbering all community household items and clothing, even for valuable consideration, without the wife’s written consent.¹³¹ The statute further chipped away at the notion that the community was effectively the husband’s separate property. It was “intended for the benefit of the wife,” the California Supreme Court found, and gave her a right in community property “which she may protect.”¹³² Third, in 1913, the legislature prohibited assignments of wages or salary of either spouse absent written consent of the spouse making the assignment, a change in the law that benefited wives more than husbands (because husbands generated the majority of community earnings) and that gave wives additional negative control over community income.¹³³

In 1917, two statutory changes carved out additional present ownership interests for the wife in community income and property. An entirely new section of the California Civil Code restricted the husband from conveying, selling, or encumbering the community’s real property, or leasing it for more than one year, without the wife’s written consent.¹³⁴ In conjunction with the 1901 amendment,¹³⁵ it challenged the earlier presumption that the husband possessed exclusive management of the marital community. The second relevant statute, the California Inheritance Tax Act of 1917, determined what interest in an estate—all, part, or nothing—was

¹²⁹ Act of March 31, 1891, [1891] Cal. Stat. 245 (amending Cal. Civ. Code § 172).

¹³⁰ *Dargie v. Patterson*, 176 Cal. 714, 720 (Sup. Ct. 1917).

¹³¹ Act of March 23, 1901, [1901] Cal. Stat. 258.

¹³² *Duncan v. Duncan*, 6 Cal. App. 404, 406 (Sup. Ct. 1907).

¹³³ **Stat. Cal. 1913, at 537.**

¹³⁴ Act of May 23, 1917, [1917] Stat. Cal. 829-30 (adding Cal. Civ. Code § 172a).

¹³⁵ *See supra* note ??? and accompanying text (amending § 172 pertaining to personal property).

subject to the state's inheritance tax statute. It recognized pre-existing ownership interests for the wife, and provided that widows took one-half of the community estate as survivors of the community rather than as heirs.¹³⁶ The community had two owners: the wife as well as the husband. Thus, upon the death of *either* spouse, the decedent's estate only included one-half of the community's income and property rather than all of it. As a federal court later found, the statute "reversed and repudiated" the doctrine that the wife's interest was a mere expectancy.¹³⁷

The most significant change to the wife's interest in California community income and property came in 1923. In that year, the wife gained the right to make testamentary disposition of one-half of the community property in the event she predeceased her husband.¹³⁸ Old § 1401 provided that on the wife's death the entire community property belonged to the husband without administration, as it did in the community property states of Nevada¹³⁹ and New Mexico.¹⁴⁰ By will, the wife could transfer her separate property, but no portion of the community.¹⁴¹ Amended § 1401 gave the wife testamentary rights in community property that were equal to her husband's.¹⁴² Each spouse could will one-half of the community upon death, with the other half belonging to the surviving spouse as co-owner of the whole. If the decedent spouse failed to execute a will, his or her one-half of the community passed to the surviving spouse. The 1923 amendments returned California community property law to common ownership principles that prevailed in 1850,¹⁴³ and reflected the treatment in a plurality of community property states that also emphasized shared ownership between spouses.¹⁴⁴

¹³⁶ Act of May 23, 1917, § 1(2) [1917] Cal. Stat. 880.

¹³⁷ *Robbins v. United States*, 5 F.2d 690, 701 (N.D. Cal. 1925).

¹³⁸ Act of April 16, 1923, 18, § 1 [1923] Cal. Stats. 29 (amending Cal. Civ. Code § 1401).

¹³⁹ *See* Rev. Law Nev. § 2164.

¹⁴⁰ *See* Code N.M. § 1840 (1915).

¹⁴¹ Stats. 1865-66, §1, *supra* note ???

¹⁴² Stats. 1923, § 1, *supra* note ???.

¹⁴³ The amendment survived a constitutional challenge. *See In re Estate of Phillips*, 203 Cal. 106 (Sup. Ct. 1928).

¹⁴⁴ *See e.g.*, Civ. Code Ariz. § 1100, Comp. Stat. Idaho § 7803 (1919), Gen. Stat. Washington § 1342.

Thus, by the mid-1920s, California wives enjoyed significant ownership interest in community property that equaled or exceeded the ownership interests of wives in other community property states. A California husband's power of management and control over CP was restricted in multiple ways. He was prevented from using his wife's earnings to satisfy his debts¹⁴⁵; from transferring community property without his wife's written consent¹⁴⁶; from transferring or encumbering community household items and clothing¹⁴⁷ or community real property¹⁴⁸ without her written consent; and from assigning his wife's wages or salary without her written consent.¹⁴⁹ Moreover, with respect to disposition of community property at death, the California legislature treated husbands and wives precisely the same: one-half of the community belonged to each as survivors of the other,¹⁵⁰ and both were authorized to will the other half on their own deaths.¹⁵¹ In these and other respects, California community property law had evolved to embody common ownership principles.

B. The Wife's Property Interest in California: Mere Expectancy vs. Vested Rights

The sum total of the legislative changes to California's community property law between 1891 and 1923 created a regime that may have lodged management and control of the community in the husband, but that also obligated him to protect his wife's interest in the community. The California Supreme Court, however, was reluctant to interpret the statutes broadly or to radically reformulate family economics and property interests. Old habits died hard. And in this case, the Supreme Court had established over eighty years two parallel and ostensibly conflicting lines of cases with respect to the wife's interest in community property.

¹⁴⁵ See *supra* note ??? (1870) and accompanying text.

¹⁴⁶ See *supra* note ??? (1891 amendment to § 172) and accompanying text.

¹⁴⁷ See *supra* note ??? (1901) and accompanying text.

¹⁴⁸ See *supra* note ??? (1917) and accompanying text.

¹⁴⁹ See *supra* note ??? (1913) and accompanying text.

¹⁵⁰ See *supra* note ??? (1917 inheritance tax statute) and accompanying text.

¹⁵¹ See *supra* note ??? (1923) and accompanying text.

One line considered the wife's interest a "mere expectancy" while the other considered it "vested." Jurists following the "mere expectancy" case law interpreted the statutory changes restrictively, finding that they failed to create in the wife new property interests. For these judges, a wife's interest in community income and property was contingent and ripened, if at all, upon termination of the marriage. Jurists following the "vested" interest case law, on the other hand, viewed the various restrictions on the husband's disposition of the community as qualifying his ownership and effectively transferring ownership interests to his wife. As co-owner of all community income and property, the wife possessed an existing and immediate interest in the community. Given California's schizophrenic community property statute, it is not surprising that two distinct lines of interpretation developed in the first place; their persistence over several generations, however, is nothing short of amazing.

The very first community property case heard under the California constitution mentioned neither "mere expectancy" nor "vested interest" to describe the wife's ownership in marital property.¹⁵² In a case involving whether a predeceasing wife could will a portion of the community, the court said no, because the wife's "dominion" (i.e., her ownership) was "revocable and feigned" until divorce or by the husband's death.¹⁵³ Subsequent decisions did not interpret the opinion to mean that the wife had no rights during marriage. To the contrary, they held that husband and wife were "jointly seised of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives."¹⁵⁴ The wife's interest was "present, definite, and certain," and it became "absolute" upon the husband's

¹⁵² *Panaud v. Jones*, 1 Cal. 488 (Sup. Ct. 1851).

¹⁵³ *Id.* at 515.

¹⁵⁴ *Beard v. Knox*, 5 Cal. 252, 256 (Sup. Ct. 1855).

death¹⁵⁵ or upon divorce.¹⁵⁶ These cases emphasized co-ownership of community property during marriage rather than the wife's inchoate interests in the property prior to dissolution.¹⁵⁷ Until, that is, *Van Maren v. Johnson*.¹⁵⁸

In the case that would come to stand for the “mere expectancy” proposition, the California Supreme Court held that “[t]he interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestors.”¹⁵⁹ This from the same court that had already recognized the wife's “present, definite, and certain” interests as well as co-ownership during marriage. Professor Susan Prager has tried to explain the “radical inconsistency” in decisions from a court that “granted and confirmed to [the wife] rights utterly and absolutely different from those of a mere heir at law.”¹⁶⁰ Perhaps it was a lack of familiarity with community property precepts among judges reared in the common law.¹⁶¹ Perhaps it was a wrong-headed and unhelpful application of common-law principles to civil-law questions.¹⁶²

¹⁵⁵ *Id.*

¹⁵⁶ *Kashaw v. Kashaw*, 3 Cal. 312, 322 (Sup. Ct. 1853).

¹⁵⁷ *See e.g.*, *Estate of Buchanan*, 8 Cal. 507, 510 (Sup. Ct. 1857) (holding that property acquired during marriage “belonged to the community, and upon the death of the husband the widow took one half”); *Meyer v. Kinzer*, 12 Cal. 247, 251 (Sup. Ct. 1859) (finding that each spouse contributes equally to the community during its existence, and both “possess an equal right to succeed to the [community] property after dissolution”); *Smith v. Smith*, 12 Cal. 216, 225 (Sup. Ct. 1859) (emphasizing the wife's “half interest in the common property”).

¹⁵⁸ *Van Maren v. Johnson*, 15 Cal. 308 (Sup. Ct. 1860).

¹⁵⁹ *Id.* at 311.

¹⁶⁰ Prager, *supra* note ???, at 36.

¹⁶¹ *See infra* notes ??? and accompanying text; William A. Reppy, Jr., *Retroactivity of the 1975 California Community Property Reforms*, 48 S. CAL. L. REV. 977, 1055-59 (1975) (exploring the inability of common law trained lawyers to fully comprehend and embrace co-ownership under marital property law); DE FUNIAK, *supra* note ???, at 258-59 (“Many lawyers trained in the common law, and viewing the matter in the light of common-law concepts, seem to feel that if the husband, under the Spanish community property system, had ‘control,’ i.e., the administration of the community property, he must have been the virtual owner of the property; that the wife, accordingly, was not an owner in any real sense.”); Evans, *supra* note ???, at 66 (stating that it was “difficult for the courts to divest themselves wholly of the common way of regarding estates”).

¹⁶² Susan Prager, for one, has attributed the seemingly inconsistent rulings, at least in part, to borrowing here and there from the common law—including the wills statute, the intestacy regime, “and other laws which disabled married women from the traditional common law”—which was not compatible with community property principles. Prager, *supra* note ???, at 33. *See also* J. Emmett Seabee, *Federal Taxation of Community Property*, 12 TEX. L. REV. 273, 275, 281 (1933-34) (calling community property “the stepchild of American jurisprudence,” and concluding that “the wife's interest [under community property law] 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.”); Recent Cases, *Federal Taxation of Income as Affected by Community Ownership*, 39 HARV. L. REV. 762, 763 (1925-26) (finding

And perhaps it was male judges' discomfort with extending to married women "an interest in what the common law viewed as the husband's property."¹⁶³ Whatever the reasons, the "mere expectancy" doctrine flourished in subsequent decisions.¹⁶⁴ It also proved incredibly resilient, even after being repudiated by the U.S. Supreme Court,¹⁶⁵ and explicitly challenged by legislative enactments.¹⁶⁶

While the "mere expectancy" lineage emphasized the husband's absolute ownership and the wife's unripened interest during marriage, the "vested" interest genealogy emphasized shared ownership. Property acquired during marriage "belonged to the community," not to either spouse.¹⁶⁷ Husband and wife were equal partners in the community, co-owners of all its contents.¹⁶⁸ The statute gave the husband management and control over the community during its

that the wife's interest in community property "has occasioned endless dispute, because of an attempt by the courts and writers to explain an alien mode of ownership by terminology applicable only to common law tenancies").

¹⁶³ *Id.* See also Schuele, *supra* note ???, 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.").

¹⁶⁴ See e.g., *Packard v. Arellanes*, 17 Cal. 525, 538 (Sup. Ct. 1861) (finding that "so long as the community exists [the wife's] interest is a mere expectancy, and possesses none of the attributes of an *estate*, either at law or in equity." Emphasis in the original.); *de Godey v. Godey*, 39 Cal. 157, 164 (Sup. Ct. 1870) ("mere expectancy"); *Greiner v. Greiner*, 58 Cal. 115, 119 (Sup. Ct. 1881) (same); *In re Roland*, 74 Cal. 523, 525-26 (Sup. Ct. 1888) (finding that the "*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 the original.); *Estate of Burdick*, 112 Cal. 387, 393 (Sup. Ct. 1896) (finding that the wife takes by succession rather than right of survivorship due to her "mere expectancy" interest); *Spreckels v. Spreckels*, 116 Cal. 339, 344, 347 (Sup. Ct. 1897) (doubting whether a "happier phrase" than "mere expectancy" exists to describe the wife's interest in the community). Decisions that did not explicitly use the phrase "mere expectancy" managed to find that the wife did not take as survivor or co-owner of the community but rather as an "heir" or "by succession." See e.g., *Sharp v. Loupe*, 120 Cal. 89, 93 (Sup. Ct. 1898) (as "heir"); *Cunha v. Hughes*, 122 Cal. 111, 112 (Sup. Ct. 1898) ("by succession"); *Spreckels v. Spreckels*, 172 Cal. 775, 780 (Sup. Ct. 1916) (as "heir").

¹⁶⁵ See *Arnett v. Reade*, 220 U.S. 311, 320 (1911) (evaluating the New Mexico community property statute, and finding "it is very plain that the wife has a greater interest than the mere possibility of an expectant heir."). *But see* *Roberts v. Wehmeyer*, 191 Cal. 601, 614 (Sup. Ct. 1923) (distinguishing *Arnett* by finding that under California law a wife had no existing ownership in the community due to her husband's "absolute ownership").

¹⁶⁶ The easiest way for "mere expectancy" proponents to restrict application of the new statutes was to give them no retroactive effect. See e.g., *Spreckels*, 116 Cal. at 342-43 (refusing to give retroactive effect to 1891 amendment to § 172); *Duncan v. Duncan*, 6 Cal. App. 404, 407 (Sup. Ct. 1907) (finding no retroactivity to the 1901 amendment to § 172); *Wehmeyer*, 191 Cal. at 612 (finding no retroactive effect to § 172a).

¹⁶⁷ *Estate of Buchanan*, 8 Cal. at 510. See also *Meyer v. Kinzer*, 12 Cal. 247, 251 (Sup. Ct. 1859) ("To the community all acquisitions by either, whether made jointly or separately, belong."); *Godey*, 39 Cal. at 164 (stating that community property "belongs to the matrimonial community, and not less to the wife than to the husband").

¹⁶⁸ See e.g., *Beard v. Knox*, 5 Cal. 252, 256 (Sup. Ct. 1855) (finding husband and wife "jointly seised of the property"); *Galland v. Galland*, 38 Cal. 265, 271 (Sup. Ct. 1869) (finding that a California wife possessed "a joint and equal interest with the husband in all property acquired during the marriage").

existence, but his managerial powers did not entitle him to a larger ownership share or greater equitable rights in community income or property. Indeed, they imposed on him multiple obligations to the non-managing partner of the community.¹⁶⁹ The wife's interest was "present, definite, and certain."¹⁷⁰ Moreover, as we have seen, she could exercise those interests in various ways, including preventing the husband from (i) transferring community income and property without valuable consideration or her written consent, (ii) transferring or encumbering community household items and clothing without her written consent, (iii) assigning her wages or salary without her written consent, and (iv) conveying, selling, or encumbering the community's real property, or leasing it for more than one year, again, without her written consent. In the event she "surrender[ed] those rights" by not exercising them, the California Supreme Court found that her restraint amounted to "valuable" and "adequate consideration for the transfer."¹⁷¹ At dissolution of the community, her existing interest became "absolute"¹⁷² and "vested."¹⁷³ She took her "undivided"¹⁷⁴ one-half interest or "title"¹⁷⁵ as the "survivor"¹⁷⁶ or "surviving"¹⁷⁷ member of the community "by virtue of survivorship."¹⁷⁸

¹⁶⁹ See e.g., *Smith v. Smith*, 12 Cal. 216, 225 (Sup. Ct. 1859) (holding that "the common property could not be disposed of by the husband by will, so as to defeat the rights of the surviving wife"); *Peck v. Brummagim*, 31 Cal. 440, 446-47 (Sup. Ct. 1866) (finding that notwithstanding the husband's "absolute power of disposition of the common property...there is this necessary restriction upon his power, that he cannot make a voluntary disposition with the view of defrauding or defeating the claims of the wife").

¹⁷⁰ *Beard*, 5 Cal. at 256. See also *Godey*, 39 Cal. at 164 (explaining that the wife's "mere right in the community property is as well defined and ascertained in contemplation of law, even during the marriage, as is that of the husband").

¹⁷¹ *Estate of Brix*, 181 Cal. 667, 676 (Sup. Ct. 1919). Compare *Spreckels*, 172 Cal. at 781 ("The limitation upon the husband's testamentary power contained in the code was not understood to vest in the wife, during the marriage, any interest or estate whatever in the community property, but merely to constitute a restriction upon the husband's power.").

¹⁷² *Beard*, 5 Cal. at 256.

¹⁷³ *Scott v. Ward*, 13 Cal. 458, 469 (Sup. Ct. 1859); *Estate of Silvey*, 42 Cal. 210, 214 (Sup. Ct. 1871); *Estate of Moffitt*, 153 Cal. 359, 363 (Sup. Ct. 1908); *Estate of Prager*, 166 Cal. 450, 453 (Sup. Ct. 1913).

¹⁷⁴ *Payne v. Payne*, 18 Cal. 291, 301 (Sup. Ct. 1860); *Morrison v. Bowman*, 29 Cal. 337, 348-49 (Sup. Ct. 1865).

¹⁷⁵ *Estate of Wickersham*, 138 Cal. 355, 363 (Sup. Ct. 1902).

¹⁷⁶ *King v. La Grange*, 50 Cal. 328, 332 (Sup. Ct. 1875); *Estate of Gwin*, 77 Cal. 313, 314-15 (Sup. Ct. 1888); *In re Gilmore*, 81 Cal. 240, 242 (Sup. Ct. 1889).

¹⁷⁷ *Estate of Silvey*, 42 Cal. at 214; *Estate of Frey*, 52 Cal. 658, 660 (Sup. Ct. 1878); *In re Smith*, 108 Cal. 115, 119 (Sup. Ct. 1895).

Even those decisions of the California Supreme Court that termed the wife's interest a "mere expectancy" acknowledged that she was no ordinary heir. Her interest was certainly greater than that which "an heir may possess in the property of his ancestors," as the *Van Maren* court had held.¹⁷⁹ Though her "impalpable interest" may have been "difficult of definition," it was "no doubt, more tangible" than the right of an expectant heir.¹⁸⁰ It was "so vested in her" that the husband could not wrongly deprive her of it while serving as the agent of the community.¹⁸¹ It may not have been an "actual estate,"¹⁸² but it was at least a "nominal estate,"¹⁸³ that "vested"¹⁸⁴ with certainty upon termination of the community. Indeed, her interest was so real and existing that upon her husband's death she took at least half the community.¹⁸⁵ Meanwhile, upon divorce, she automatically took one-half the community property,¹⁸⁶ and, "in a proper case, [could] be awarded even the whole of it."¹⁸⁷ In the event of a divorce granted without disposition of the community, she became owner of one-half of the community property as tenant in common with her former husband.¹⁸⁸

Inexplicably, the wife's "mere expectancy" continued to coexist alongside her multiple and undeniable interests in the community. By statute, that was impossible. Expectant heirs did not have any interests according to the California Civil Code, which provided that "[a] mere possibility such as the expectancy of an heir apparent is not to be deemed an interest of any

¹⁷⁸ Estate of Rossi, 169 Cal. 148, 149 (Sup. Ct. 1915).

¹⁷⁹ *Van Maren v. Johnson*, 15 Cal. 308, 311 (Sup. Ct. 1860).

¹⁸⁰ *Directors of Fallbrook District v. Abila*, 106 Cal. 355, 361-62 (Sup. Ct. 1895).

¹⁸¹ *Godey v. Godey*, 39 Cal. 157, 164 (Sup. Ct. 1870). *See also Greiner v. Greiner*, 58 Cal. 115, 119 (Sup. Ct. 1881) (stating that husband cannot "deprive" wife of her interest in community property").

¹⁸² *Spreckels v. Spreckels*, 116 Cal. 339, 344 (Sup. Ct. 1897).

¹⁸³ *Id.*

¹⁸⁴ Estate of Moffitt, 153 Cal. 359, 363 (Sup. Ct. 1908).

¹⁸⁵ Cal. Civ. Code § 1402. The wife could receive more than half the community if her husband left her any part of his half by will or if he died intestate. *See also Estate of Rossi*, 169 Cal. 148, 149 (Sup. Ct. 1915).

¹⁸⁶ *Supra* notes ??? and accompanying text.

¹⁸⁷ Estate of Brix, 181 Cal. 667, 676 (Sup. Ct. 1919). Under Cal. Civ. Code § 146, the wife could receive the entire community upon a divorce granted on grounds of extreme cruelty or adultery.

¹⁸⁸ *Biggi v. Biggi*, 98 Cal. 35, 38 (Sup. Ct. 1893); *Hirschner v. Dietrich*, 110 Cal. 502, 505 (Sup. Ct. 1895).

kind.”¹⁸⁹ As we have seen, the Code provided the wife a litany of interests in community property during marriage, yet judges continued to describe her rights as a “mere expectancy.” Moreover, judges continued to view her husband’s rights during marriage as “absolute” even though her statutory interests significantly limited his power over community income and property, restrictions that the Code explicitly said resulted in a “qualified” property right.¹⁹⁰

Perhaps these inconsistencies should not surprise us. After all, the same court—indeed, the same judge—that determined a wife’s interest was “a mere expectancy, like the interest which an heir may possess in the property of his ancestors,”¹⁹¹ expressed in the very same 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.”¹⁹² Heirs did not usually take by right of survivorship. But they did in California. No wonder the U.S. Attorney General,¹⁹³ the Treasury Department,¹⁹⁴ and members of Congress¹⁹⁵ were confused by California’s community property law. So were California 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 U.S. Attorney General on the federal tax treatment of income and property reported by married couples living in community property states. In particular, the Commissioner wanted to know, first, whether community property spouses, based on their ownership interest in

¹⁸⁹ Cal. Civ. Code § 700.

¹⁹⁰ Cal. Civ. Code § 780.

¹⁹¹ *Van Maren v. Johnson*, 15 Cal. 308, 311 (Sup. Ct. 1860).

¹⁹² *Payne v. Payne*, 18 Cal. 291, 301 (Sup. Ct. 1860). Justice Stephen Field served on the California Supreme Court from 1857-63, and then as Associate Justice of the U.S. Supreme Court from 1863-97.

¹⁹³ See *infra* notes ??? and accompanying text.

¹⁹⁴ See *infra* notes ??? and accompanying text.

¹⁹⁵ See *infra* notes ??? and accompanying text.

community income and property, were permitted to make separate income tax returns each reflecting one-half the community income, and, second, whether the gross estate of a decedent spouse in community property states for federal estate tax purposes 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 a co-owner not as an heir.¹⁹⁶ The Treasury had previously examined similar questions with respect to Texas community property law. It had concluded that Texas husbands and wives could render separate income tax returns reflecting one-half the community’s income from earnings and property,¹⁹⁷ 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 was already the outright owner of the other half.¹⁹⁸ The Attorney General now had to make a determination as to the federal tax treatment of married couples in the remaining seven community property states.

Ownership interest in income and property would determine taxability of these couples, the Attorney General said.¹⁹⁹ And state property law would determine ownership.²⁰⁰ 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.”²⁰¹ 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

¹⁹⁶ 32 Op. Att’y Gen. 435, 435 (1921); T.D. 3138, 4 Cum. Bull. 238 (1921).

¹⁹⁷ 32 Op. Att’y Gen. 298, 307 (1920); T.D. 3071, 3 Cum. Bull. 221 (1920). The opinion concluded that marriage in Texas was a “conjugal partnership” (id. at 302) 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).

¹⁹⁸ See T.D. 2450 (1917).

¹⁹⁹ See 32 Op. Att’y Gen. at 462, *supra* note ???.

²⁰⁰ *Id.* at 461-62.

²⁰¹ *United States v. Crosby*, 11 U.S. 115, 116 (1812).

construction of wills and other conveyances.”²⁰² 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.”²⁰³ Thus, in its opinion, 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.”²⁰⁴

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 therein.”²⁰⁵ In Arizona, wives enjoyed “an equal interest” with husbands in community property.²⁰⁶ The opinion noted that 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 makes her an equal factor in matrimonial gains.”²⁰⁷ The interest of the wife was “not a mere possibility—not the expectancy of an heir.”²⁰⁸ Similarly, the Attorney General found equal ownership interests in the marital communities of Idaho,²⁰⁹ Louisiana,²¹⁰ New Mexico,²¹¹ and Nevada.²¹² Only in California did the wife suffer less than

²⁰² De Vaughn v. Hutchinson, 165 U.S. 566, 570 (1897).

²⁰³ Warburton v. White, 176 U.S. 484, 496 (1900).

²⁰⁴ 32 Op. Att’y Gen. at 462, *supra* note ???

²⁰⁵ *Id.* at 454.

²⁰⁶ *Id.* at 438.

²⁰⁷ *Id.*, quoting La Tourette v. La Tourette, 15 Ariz. 200, 208 (Sup. Ct. 1914).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 440.

²¹⁰ *Id.* at 445.

²¹¹ *Id.* at 449.

²¹² *Id.* at 452.

equal ownership in community property. Rather than viewing the wife as co-owner of the community, “the rule established by the highest courts of that State is that during coverture the wife has no vested interest in the community property, her interest therein being a mere expectancy.”²¹³ Nor did recent changes to the California statute alter the unequal interest in community property.²¹⁴

Therefore, the Attorney General concluded (and the Treasury Department accepted²¹⁵) that for married residents in community property states except California, “the ownership in one-half of all community property vests in each spouse.”²¹⁶ That meant 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.²¹⁷ Equal ownership under community property law was not a prohibited tax avoidance device.

A. *The Treasury Department and California Tax “Evaders”*

Subsequent events in California prompted the federal government to reconsider its 1921 ruling less than three years later. In 1923, the Treasury Department requested the Attorney General to reexamine the nature of a wife’s interest in California as a result of amendments to its community property statute and recent judicial interpretations finding the wife’s interest in the California community to be considerably greater than a mere expectancy. The Attorney General

²¹³ *Id.* at 456.

²¹⁴ The Attorney General found that § 172a (see *supra* note ??? and accompanying text) failed “to make so revolutionary a change in the existing rule of property in California as to divest [sic] the husband of his ownership in the community property.” *Id.* at 458. It also found it “obvious” that the 1917 changes to the California inheritance tax statute (see *supra* note ??? and accompanying text) did “not change the rule of community property in the State nor vest in the wife any interest thereto prior to the dissolution of the community; rather it emphasizes the existing rule that the wife has no vested interest in community property.” *Id.* at 458.

²¹⁵ See T.D. 3138, *supra* note ???.

²¹⁶ *Id.* at 462.

²¹⁷ *Id.* at 463.

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 in view of “the restrictions placed on the husband’s control of community property by Sections 172 and 172a [requiring the wife’s written consent to transfers or conveyances of, respectively, community personal property or real property],” the Attorney General concluded “it is difficult to see how the judicial mind can conceive of his possessing the elements of absolute ownership over the community estate.”²¹⁸ When added to the numerous other statutory qualifications to the husband’s interest in community property—including the 1917 Inheritance Tax Act exempting the wife’s share of community property in the husband’s gross estate “on the ground that she took it as a purchaser and not as heir”²¹⁹ as well as the 1923 amendment to the California Civil Code granting the wife testamentary rights in community property equal to her husband²²⁰—it was clear to the Attorney General that the husband’s interest was “only qualified and partial,”²²¹ while the wife’s far exceeded that of an expectant heir.²²² One line of California decisions may have described the wife as an “heir expectant,” but another “recognized her property interest in community gains.”²²³ More importantly, the “heir expectant” line of cases got it wrong, particularly given the “numerous amendments” to California’s community property law since 1917 revealing “the intent of the legislature to protect what

²¹⁸ 34 Op. Att’y Gen. 376, 383-84 (1924); T.D. 3569, III-1 Cum. Bull. 91 (1924).

²¹⁹ *Id.* at 385. *See also* Act of May 23, 1917, *supra* note ???.

²²⁰ *See supra* notes ??? and accompanying text.

²²¹ 34 Op. Att’y Gen. at 385.

²²² Legal scholars agreed with this conclusion. *See e.g.*, Hooker, *supra* note ???, at 305 (“If the wife can get half the community property on divorce; if she gets that half by operation of law where the decree 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.”); Recent Cases, *supra* note ???, at 764-65 (discussing cases holding that the California wife possessed a vested interest in the community); Esmond Schapiro, *Status of Federal Income and Estate Taxes on Community Property in California*, 12 CAL. L. REV. 99, 100 (1923-24) (arguing that the 1923 amendments left no doubt that the wife’s interest in California community property was vested).

²²³ *Id.* at 378.

[those] California decisions had failed to recognize—the vested interest of the wife in community estate.”²²⁴

The “expectant heir” line of cases lost additional precedential value in light of recent federal court decisions ascertaining “the real nature of a wife’s interest” in California.²²⁵ 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.”²²⁶ The Ninth Circuit further held that the 1917 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 were not controlled by the California statute of 1917...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, “It is very plain that the wife has a greater interest than the mere possibility of an expectant heir.”²²⁷ The district court had condemned even more strongly the “expectant heir” line of cases. In finding the 1917 amendment to the inheritance tax law retroactive, the district court opined, “if 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.”²²⁸

Based on the *Blum* decision and a thorough review of California community property law, the Attorney General concluded that its 1921 opinion “cannot stand.”²²⁹ It “must be

²²⁴ *Id.* at 379. The California community property statute was “clear, and plainly bottomed upon a recognition of a property interest in the wife.” *Id.* at 385.

²²⁵ *Id.* at 378.

²²⁶ *Id.* at 378. *See also* *Wardell v. Blum*, 276 Fed. 226, 228 (9th Cir. 1921), *cert. denied*, 258 U.S. 617 (1921) (finding that “the 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”).

²²⁷ *Id.* at 377-78. *Wardell*, 276 Fed. at 228-29, quoting *Arnett v. Reade*, 220 U.S. 311, 320 (1911).

²²⁸ *Id.* at 391-92. *Blum v. Wardell*, 270 Fed. 309, 314-15 (D. Cal. 1920).

²²⁹ *Id.* at 378.

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, and which “clearly recognize[s] that the wife’s half of community property is not a part of the property of the deceased husband.”²³⁰ The former opinion was thereby amended, approved by the Treasury Department, and incorporated into official field guidance for revenue agents around the country.²³¹ 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 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 its opinion within two months for further consideration.²³² Several additional months later it reaffirmed and reestablished its earlier opinion, but with palpable reluctance. “I am constrained to reestablish and reaffirm that opinion,” the Attorney General concluded.²³³ After “a full review” of its conclusions, as well as “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*,²³⁴ 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

²³⁰ *Id.* at 378 and 393.

²³¹ See T.D. 3568, III-1 Cum. Bull. 84 (1924).

²³² T.D. 3596, III-1 Cum. Bull. 101 (1924).

²³³ 34 Op. Att’y Gen. at 405, *supra* note ???

²³⁴ Two decisions had been handed down by the California Supreme Court since the *Blum* decision, *Roberts v. Wehmeyer*, 191 Cal. 601, 612 (Sup. Ct. 1923) (finding no retroactive effect to § 172a) and *Taylor v. Taylor*, 172 Cal. 71 (Sup. Ct. 1923) (holding that upon dissolution by divorce and without disposition of community property in a decree the wife becomes owner of one-half of community property as tenant in common with the husband). The Attorney General noted that the two decisions reflected the historically 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.” *Id.* at 400.

conclusion...and in which the Government's position was fully presented."²³⁵ However, this finding was "limited to the precise question presented in [the earlier] opinion as to the incidence of the Federal estate tax upon the interest of the wife in community property on the death of the husband," and the Attorney General "express[ed] no opinion with respect to the principles which govern the taxation of income derived from community property."²³⁶

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. But it also 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."²³⁷ The Commissioner expressed "grave doubt of the legality" of the earlier Treasury decisions "since 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 the 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."²³⁸

²³⁵ *Id.* at 404-05.

²³⁶ *Id.* at 405. The qualified holding raised questions about the authority of the guidance issued a few months earlier (see T.D. 3568, *supra* note ???) directing revenue agents to treat California spouses the same as other community property spouses for purposes of the federal income tax.

²³⁷ T.D. 3670, IV-1 Cum. Bull. 19, 19 (1925).

²³⁸ *Id.* The Commissioner was undeterred by contrary conclusions of the Supreme Court. *See Warburton*, 176 U.S. at 497 (calling it a "misconception" of community property laws "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"); *Arnett*, 220 U.S. at 320 (finding that notwithstanding the 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").

The Commissioner was particularly concerned about the tax avoidance opportunities created by the “valuable privilege” of separate filing.²³⁹ Consider a married couple, the Commissioner explained, with taxable income of \$100,000. If that couple aggregated its income and filed a joint return, it would owe \$17,020. If it filed separate returns, by comparison, and paid tax on two \$50,000 incomes rather than one \$100,000 income, it would owe \$7,080, for a tax savings of nearly \$10,000. If California spouses prevailed in the courts and were found to have a right to file separate returns, the government would already owe tax refunds for previous years exceeding \$77,000,000.²⁴⁰ 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.”²⁴¹ “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, “true” resolution.²⁴²

IV. THE LEGISLATIVE ATTACK AGAINST THE COMMUNITY PROPERTY TAX LOOPHOLE

The Treasury Department also sought to convince Congress that community property law created tax inequities. The civil law system perpetrated geographic tax discrimination, according to the Treasury, by providing significant tax savings to a minority of husbands and wives in a handful of states. In 1921, as part of its effort to root out the inequity, the Treasury Department crafted a legislative proposal for inclusion in that year’s Revenue Act to tax all marital income to the spouse “having the management and control of the community property.”²⁴³ The plan only 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

²³⁹ T.D. 3670, *supra* note ???, at 20.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ H.R. REP. NO. 67-350, at 11 (1921); S. REP. NO. 67-275, at 14 (1921).

separately or jointly.²⁴⁴ Moreover, as in its earlier rulings on the nature of a wife's interest in community property, the Treasury expressed no concern that the Supreme Court had already ruled that might was not synonymous with right.²⁴⁵ 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.²⁴⁶ Moreover, it 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 surtaxes are correspondingly reduced."²⁴⁷ The proposed change would "restore uniformity of treatment" to married taxpayers nationwide.²⁴⁸

Members of Congress required little convincing that such treatment was unjustified. Community property law was 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?"²⁴⁹ Similarly, Finance Committee Chair Boies Penrose charged that there was "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."²⁵⁰ Under current law,

²⁴⁴ See H.R. REP. NO. 67-350, *supra* note ??? at 13.

²⁴⁵ See *supra* note ??? and accompanying text. [-6] The Treasury also ignored the recent ruling in *Blum v. Wardell*, 270 Fed. 309, 314 (D. Cal. 1920), to which the Attorney General's 1921 opinion explicitly referred (see 32 Op. Att'y Gen. at 461, *supra* note ???), the latter of which the Treasury had republished as T.D. 3138 (see *supra* note ???) (finding that "the agency 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").

²⁴⁶ S. REP. NO. 67-275, *supra* note ???, at 14.

²⁴⁷ *Id.*

²⁴⁸ *Id.* Congressional supporters of the plan also touted its tax equalization qualities. See CONG. REC. (Oct. 1, 1921), at 5914 (statement of Sen. Penrose) (arguing that the plan "simply 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").

²⁴⁹ CONG. REC. (Oct. 1, 1921), at 5916 (statement of Sen. Smoot).

²⁵⁰ *Id.* at 5914 (statement of Sen. Penrose).

explained Senator Smoot, a community property husband and wife with \$100,000 in taxable income reported two \$50,000 incomes for federal income tax purposes while a common law husband and wife also with \$100,000 in taxable income reported one \$100,000 income. The result was that the common law married couple “shall pay a higher income tax on \$100,000, it falling in the higher bracket, than is paid on an income of the same amount by a husband and wife in Louisiana.”²⁵¹

Like the Treasury Department, supporters of the management-and-control proposal believed that dominion over marital income and property rather than technical legal title should determine taxability. Suppose a husband and wife own property jointly, suggested Senator James Watson, but the husband exercises the sole management and derives sole use and enjoyment from it. “Having that income,” Watson asked, “should he not pay the tax on that income?”²⁵² Watson answered his own question: “Ownership 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.”²⁵³ The gendered lens of the common law, as much as legislators’ lack of familiarity with the civil law, influenced Congress’s perception of the problem. “The only way” a wife can access her “half” of the marital income, stated 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.”²⁵⁴ In community property states, Smoot opined (inaccurately, as we have seen),²⁵⁵ the wife had no legal right to control the marital income. “It is not her income unless she dissolves the community interest.

²⁵¹ *Id.* at 5916, 5919.

²⁵² *Id.* at 5917 (statement of Sen. Watson).

²⁵³ *Id.* at 5920.

²⁵⁴ *Id.* at 5920-21.

²⁵⁵ *See supra* notes ??? and accompanying text.

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.”²⁵⁶

Even if the husband acted as “trustee” for his wife’s share, as some community property representatives analogized,²⁵⁷ he could still be made to pay the entire tax. “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.”²⁵⁸ The trusteeship argument for taxing the husband on only one-half the community income proved as unpersuasive as the partnership argument.²⁵⁹ “It is not the same as a partnership at all,” said Senator Smoot.²⁶⁰ “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.”²⁶¹ But “it is not her income. It is the husband’s income.”²⁶² And he should pay tax on it.

²⁵⁶ *Id.*

²⁵⁷ *See id.* (Oct. 27, 1921), at 6874 (statement of Sen. Ransdell) (finding that “the law merely permits” the husband to act as a “trustee” “to administer” his wife’s share); *Id.* (Oct. 1, 1921), at 5918 (statement of Sen. Ashurst) (“It 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.”).

²⁵⁸ *Id.* (Oct. 21, 1921), at 5916, 5919 (statement of Sen. Underwood).

²⁵⁹ Community property representatives likened the marital partnership in community property states to business partnerships. Senator Ransdell of Louisiana, read into the record a letter from a lawyer-constituent invoking the Attorney General’s 1921 opinion. The “marital community is a partnership” in which the marital partners “have an equal interest in the profits of the partnership.” Under this finding, “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.” CONG. REC. (Oct. 27, 1921), at 6873 (statement of Sen. Ransdell, inserting letter from S. L. Herold). Moreover, the marital partnership in community property states was “not a fiction,” explained Senator Ashurst of Arizona, but rather “a partnership imposed by law.” Co-ownership under this partnership justified the filing of separate returns each reflecting one-half the partnership’s taxable income. *Id.* (Oct. 1, 1921), at 5918 (statement of Sen. Ashurst).

²⁶⁰ CONG. REC. (Oct. 1, 1921), at 5920 (statement of Sen. Smoot).

²⁶¹ *Id.*

²⁶² *Id.*

Community property law did not reflect a more socially progressive property law regime, as its supporters suggested.²⁶³ Nor was it better aligned than traditional common law with recent political egalitarianism and ratification of the Nineteenth Amendment.²⁶⁴ Rather, to its critics in Congress, 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 warned ominously, by providing “that it shall not only apply to wife and husband but to every child they may have.”²⁶⁵ 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.”²⁶⁶ 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 and never pay a cent of income tax.”²⁶⁷ States would seek to benefit their own citizens at the expense of the national government, and tax revenues would shrink even more dramatically than they had in the immediate postwar period.²⁶⁸

Defenders of the community property system freely acknowledged its favorable tax effects. But similar tax saving was also widely available to common law married couples.

²⁶³ Community property representatives highlighted enlightened aspects of the civil law. Senator Ashurst quoted legal scholar Richard Ballinger as noting its “many commendable features” and as indicating “social advancement.” Traditional common law, Ballinger wrote, “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.” *Id.* (Oct. 1, 1921), at 5915 (statement of Sen. Ashurst). Married women certainly fared better under common ownership principles of community property law compared to traditional common law where wives possessed legal interests only through husbands. Under reformed common law, it was less clear whether wives possessed greater or lesser legal interests than wives in community property states. As Donna Schuele has written with respect to California community property law during the nineteenth century, “women’s legal status was at that time worse in California than in common law states with married woman’s property acts.” Schuele, *supra* note ???, at 262. Purer forms of co-ownership principles in other community property states, however, provided woman’s rights activists “a critical advantage” over their common law counterparts as a way to “empower women rather than simply to protect them.” Schuele, *supra* note ???, at 281.

²⁶⁴ See CONG. REC. (Oct. 1, 1921), at 5915 (statement of Sen. Ashurst) (arguing that civil law states had long guaranteed legal and economic rights for their female residents in the same spirit as the suffrage movement).

²⁶⁵ *Id.*, at 5919 (statement of Sen. Smoot).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ See H.R. REP. NO. 67-350, *supra* note ??? at 6 (stating that “excessively high tax rates” encouraged “various methods of tax evasion,” including income shifting under community property law).

Husband and wives in non-community property states could “execute a partnership agreement embodying the identical principles” of community property law, for instance, and thereby “enjoy all the benefits of separate returns for taxation purposes.”²⁶⁹ Moreover, to the extent Congress should be concerned about income shifting between spouses, these private law partnerships looked a lot 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. In addition, community property law “imposes serious property limitations on the husband in the nature of a marital partnership,” community property representatives explained.²⁷⁰ The “burdens and limitations” on the husband, moreover, “may well be considered sufficient to counterbalance taxation benefits that now exist and certainly justify the recognition of the community system by the Federal Government in its scheme of taxation.”²⁷¹ Common law husbands paid more tax than community property husbands on equal amounts of income, but they also enjoyed unfettered command over marital property. In fact, in many instances, the common law wife owned nothing, not even her own wages.²⁷²

Common law husbands enjoyed additional benefits. In the event of divorce, for instance, spouses under community property law split equally all community income and property, while the common law husband could take it all. In addition, a community property wife could “will

²⁶⁹ CONG. REC. (Oct. 27, 1921), at 6875-76 (statement of Sen. Ransdell, inserting letter from Charles E. Dunbar, Jr.).

²⁷⁰ *Id.* at 6876. Community property representatives hoped that support for the Treasury’s management and control proposal could be attributed to confusion over the civil law system. CONG. REC. (Oct. 1, 1921), at 5915 (statement of Sen. Broussard) (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 their intellects could not at once grasp this puzzling question of community property law”); CONG. REC. (Oct. 27, 1921), at 6873 (statement of Sen. Ransdell, inserting letter from Jesse Andrews to Sen. Borah) (“The principles which are peculiar to the law of the [community property] States are not so well known or understood by others from the common law States, and being so unlike anything found by them in their own States are not at once given the effect that should be accorded them.”).

²⁷¹ *Id.*

²⁷² Not all states enacted earnings statutes as part of married woman’s property legislation.

one-half of the property that may be acquired as a result of the marriage partnership to her twenty-second cousin or to a stranger” without her husband’s permission.²⁷³ 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 States.”²⁷⁴ Moreover, a community property husband could not give away his wife’s interest in the community, while a common law husband “is not subject to any limitation...for the very good reason that in common law States the wife has no interest in the property and therefore no control over its disposition.”²⁷⁵ Also, a community property husband could not defraud his wife of her interest in the community or act as a “reckless and dangerous trustee,” while a common law husband could dispose of marital property “by gambling or in as reckless and extravagant manner as he chooses, and the wife, of course, has no right to complain.”²⁷⁶

In the end, the Senate dropped the management and control plan from the Revenue Act of 1921, and the House receded to the Senate’s action.²⁷⁷ Whether it was the unified and concerted effort among community property representatives to educate their common law colleagues on the practical effects of the civil law²⁷⁸; unease or embarrassment that the plan contradicted recent advances in women’s legal and political rights²⁷⁹; the reality that only a fraction of married taxpayers filed separate income tax returns²⁸⁰ and that the Revenue Act of 1921 mitigated the tax benefits of separate filing by significantly lowering marginal tax rates²⁸¹; availability of alternative income-shifting devices allowing common law spouses to achieve tax savings similar

²⁷³ CONG. REC. (Oct. 27, 1921), at 6875 (statement of Sen. Ransdell).

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 6876.

²⁷⁶ *Id.*

²⁷⁷ H.R. REP. NO. 67-486, at 1, 11 (1921) (Conf. Rep.).

²⁷⁸ *See supra* notes ??? and accompanying text.

²⁷⁹ *See supra* notes ??? and accompanying text.

²⁸⁰ *See supra* note ??? and accompanying text.

²⁸¹ The law lowered the top marginal rate on individuals from 73 to 58 percent, and introduced for the first time the preferential treatment for capital gains. *See* Revenue Act of 1921, 42 Stat. 227 (1921).

to community property spouses²⁸²; wariness over impinging on states' sovereign and protected power to determine laws of a "domestic nature"²⁸³; or legitimate concern that Treasury's management and control plan was unconstitutional under both the due process clause of the Fifth Amendment (by taxing one person on the income and property of another)²⁸⁴ and the uniformity clause pertaining to Congress' taxing power (by imposing geographic discrimination in the application of direct taxes),²⁸⁵ the Treasury proposal went down to defeat.

Undeterred, Secretary Mellon urged Congress to include an identical version of the plan in the Revenue Act of 1924. The "unfair advantage" enjoyed by residents of community property states "over the citizens of the other states of this country" cost the Treasury \$8,000,000 annually, Mellon wrote to the chair of the House Ways and Means Committee.²⁸⁶ Taxing community income "to the spouse having control of the income" would "restore the equality" of taxation nationwide.²⁸⁷ The 1924 management and control plan fared even worse than the 1921

²⁸² See *supra* note ??? 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) (noting that "if 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"); Notes, *Disparity of Federal Tax Incidence Resulting from Division of Income Under Community Property Laws*, 40 YALE L. J. 665, 666 (1930-31) (observing that "[w]here 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").

²⁸³ *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).

²⁸⁴ See *e.g.*, CONG. REC. (Oct. 1, 1921), at 5918 (statement of Sen. Broussard) (arguing that "no man may be required to return property which is not vested in him or does not belong to him, and to pay taxes on it").

²⁸⁵ See *e.g.*, *Id.* at 5918-19 (statement of Sen. Underwood) (arguing that the 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 division, and if it be a geographical division then the proposal is unconstitutional."). This argument was unavailing. Although "the constitutional requirement of uniformity [was] not intrinsic, but geographic" (*Poe v. Seaborn*, 282 U.S. 101, 117 (1930)), the Supreme Court had held that "[a]ll 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." *Florida v. Mellon*, 203 U.S. 12, 17 (1927) (involving the process by which federal estate tax liability was credited with the amount of state or local inheritance taxes paid upon property that was also subject to the federal tax).

²⁸⁶ 67 CONG. REC. 175-76 (Nov. 10 1923). The estimated \$8,000,000 cost associated with community property separate returns was a fraction of the total budget, which exceeded \$3,000,000,000 in 1924. See DAVID GREENBERG, CALVIN COOLIDGE: THE 30TH PRESIDENT, 1923-29 77 (2007).

²⁸⁷ *Id.* The plan would not "restore the equality" among the states, but rather continue allowing common law spouses to file separate returns while preventing community property spouses from doing the same.

proposal, failing to make it out of committee. Congress was preoccupied with other aspects of the omnibus revenue bill, the so-called “Mellon Plan.”²⁸⁸ Moreover, by increasing taxes on married taxpayers in community property states, the plan conflicted with the tax-cutting tenor of the Treasury bill, which called for across-the-board rate reduction.²⁸⁹ As important, community property representatives mobilized quickly against the plan, marshalling opposition from elected officials, Chambers of Commerce, taxpayer associations, and citizen committees, and bombarding Congress with letters, testimony, and legal briefs.²⁹⁰

Even in defeat, Mellon was steadfast in his desire to end the “unfair advantage” of community property taxpayers. He wrote once more to the Ways and Means Committee, stating, “There is a serious question in my mind as to whether or not any state, which as 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.”²⁹¹ For the time being, there was no need for legislative action, Mellon explained. The question concerning how to tax spouses in community property states was presently before the Supreme Court. Perhaps the Court could accomplish what Congress had failed to do: “restore the equality” between taxpayers nationwide.²⁹²

²⁸⁸ See Revenue Act of 1924, 43 Stat. 253 (1924).

²⁸⁹ The 1924 law continued the work of the Revenue Act of 1921, further slashing tax rates and lowering the top marginal rate from 58 to 46 percent. *Id.*

²⁹⁰ See e.g., *Hearings before the House of Representatives, Revenue Revision, 1924* (1924) (statement of Rep. O’Connor), at 194-97; (statement of Walter Parker, General Manager, New Orleans Association of Commerce), at 195; (statement of R. C. Fulbright, Representing the Texas Industrial Traffic League, the Chamber of Commerce of House, Texas, and the Texas Taxpayers), at 348-61; (statement of Rep. Black), at 362-63; (statement of John J. Underwood, Seattle Chamber of Commerce), at 363-71; (statement of Walter Mossaman, Counsel for Association of Washington Taxpayers), at 371-74; (statement of Charles E. Dunbar, Representing Citizens Committee and New Orleans Association of Commerce), at 375-87; (statement of Rep. Miller), at 478-82; (statement of Rep. Summers), at 482-85. After its passage, the Treasury issued regulations pertaining to the Revenue Act of 1924 that explicitly recognized 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).

²⁹¹ *Hearings before the House Ways and Means Committee, Revenue Revision, 1925* (1925), at 9.

²⁹² *Id.*

V. THE SUPREME COURT AND FAMILY TAXATION: DEFINING OWNERSHIP

The Ninth Circuit's decision in *Wardell v. Blum*²⁹³ and the Treasury Department's acquiescence to the court's holding²⁹⁴ created a split decision. For federal estate tax purposes, a California wife was said to possess a one-half vested interest in community income and property, but for federal 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 the distinction.

In *United States v. Robbins*,²⁹⁵ the Court considered for only the fifth time in its history the nature of a wife's interest under community property law.²⁹⁶ 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. As a result, she could not make a separate income tax return reporting one-half of the community income. Rather, all income of the community was taxable wholly the husband. In so holding, the Court reversed the district court's lengthy decision that statutory changes since 1891 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 in California was "no broader than it is in some of the other community property states, and it has been

²⁹³ See *Wardell v. Blum*, 276 Fed. 226 (9th Cir. 1921), *supra* notes ??? and accompanying text.

²⁹⁴ See 34 Op. Att'y Gen. 395, *supra* notes ??? and accompanying text.

²⁹⁵ 269 U.S. 315 (1926).

²⁹⁶ See *Garrozi v. Dastas*, 204 U.S. 64 (1907) (holding that 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 that a Washington wife possessed a present vested interest in community property); *Moffitt v. Kelly*, 218 U.S. 400 (1910) (holding that even if a California wife owned one-half the community property prior to her husband's the death, the federal constitution did not prevent the state of California from imposing a tax on the wife's share in the community property upon the husband's death); *Arnett v. Reade*, 220 U.S. 311, 320 (1911) (finding that a New Mexico wife possessed a present vested interest in community property notwithstanding husband's management and control over the community).

growing less and less broad.”²⁹⁷ Unlike the district court, the Supreme Court conducted a cursory examination of California community property statutes, relied on dated case law, and disregarded subsequent acts of the legislature that enhanced the wife’s interest and revealed a legislative intent to provide vested rights in the wife.²⁹⁸

The holding was a blow to married taxpayers in California. But the dictum was a bombshell for married taxpayers in every state, 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.”²⁹⁹ 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.”³⁰⁰ 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.”³⁰¹

²⁹⁷ *Robbins v. United States*, 5 F.2d 690, 697, 702 (N.D. Cal. 1925). *See also id.* at 705 (also finding, “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.”).

²⁹⁸ The Court relied, in particular, on *Spreckels v. Spreckels*, 116 Cal. 339 (1897) (holding that the W’s interest was a mere expectancy, that there was no distinction between community estates and the separate estate of the husband, even subsequent to the 1891 amendment to § 172).

²⁹⁹ *Robbins*, 269 U.S. at 326.

³⁰⁰ *Id.* at 327.

³⁰¹ *Id.*

Congress,³⁰² the Attorney General,³⁰³ and previous courts³⁰⁴ had felt constrained by state law characterizations of ownership in locating “the most obvious target for the shaft.”³⁰⁵ The Court was liberating them. Community income could “be in two places at once,”³⁰⁶ both “wholly the income of the husband and half the income of the wife.”³⁰⁷ In deciding whom to tax, courts now had a choice, because both husband and wife could be said to own rights in community income and the property from which it flowed. Indeed, both husband and wife possessed “some rights and privileges in relation to the proceeds and the property producing them and there is merely a question of the importance of these privileges.”³⁰⁸ 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

³⁰² See *supra* notes ??? and accompanying text. In the same year the Court decided *Robbins*, Congress included a provision in the Revenue Act of 1926 indicating its allegiance to state law as the final arbiter of ownership with respect to marital property. See Revenue Act of 1926, ch. 27, § 1212, 44 Stat. 9, 130 (“Income for any period before January 1, 1925, of a marital community in the income of which the wife has a vested interest as distinguished from an expectancy, shall be held to be correctly returned if returned by the spouse to whom the income belonged under the *state law* applicable to such marital community for such period.” Emphasis added).

³⁰³ See 32 Ops. Att’y Gen. at 461, *supra* note ??? (citing to Supreme Court precedent).

³⁰⁴ Including the Supreme Court. See *supra* notes ??? and accompanying text (*Crosby, De Vaughn, Warburton*). The Supreme Court had been particularly clear on this subject with respect to determining the respective interest of spouses in marital property. See *Moffitt v. Kelly*, 218 U.S. 400, 406 (1910) (finding that “the 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 Supreme Court had also recognized that if state decisions were in conflict or failed to establish a definitive rule, it was authorized to exercise its own judgment and determine the local law. 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 that “an Act of Congress has its own criteria, irrespective of any particular characterization in the local law”); *Burk-Waggoner Oil Association v. Hopkins*, 269 U.S. 110 (1925) (disregarding state classification of a business enterprise as a partnership, and abrogating the “legal significance” of local law “upon the power of Congress to determine how and at what rate the income of the joint enterprise shall be taxed”); *Iowa Loan & Trust Co. v. Fairweather*, 252 Fed. 605, 608 (1918) (invalidating a state’s attempt to levy a tax on exempt U.S. Liberty Bonds, and warning that to “all such attempts the court will look to the end sought to be reached, and, if that would trench upon a power of the government, the law creating it will be set aside, or its enforcement restrained”).

³⁰⁵ *Robbins*, 269 U.S. at 328.

³⁰⁶ Developments in the Law—Taxation, *To Whom Income May Be Taxed*, 47 HARV. L. REV. 1273, 1278 (1933-34) (referring to *Robbins*).

³⁰⁷ Douglas B. Maggs, *Community Property and the Federal Income Tax, Part II*, 14 CAL. L. REV. 441, 442 (1926). Commentators questioned the result. See Maggs, *supra* note ???, at 365-66 (“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? And how could Congress, by expressly taxing the wife, convert half of what under the Sixteenth Amendment is the husband’s income into income of the wife?”).

³⁰⁸ *Surrey*, *supra* note ???, at 829.

wanted to tax the husband on all of the 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.”³⁰⁹ In other words, income could include “not only property the legal ownership of which is acquired by the taxpayer during the tax period,” but, if Congress so desired, “also property, the beneficial ownership of which is thus acquired.”³¹⁰ 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.”³¹¹ That possibility meant that husbands in all states—community property as well as common law—could be taxed on the whole of marital income, whatever the wife’s interest under state law.³¹² It also meant that if the husband could be taxed on the whole under the federal income tax, he could also be taxed on the whole under the federal estate tax.³¹³

The immediate aftermath of *Robbins* provided ominous signs for community property spouses. First, the Attorney General announced that it was considering applying Holmes’s dictum to states other than California.³¹⁴ To help him better understand the nature of the wife’s interest in community income, he invited community property representatives “to state their

³⁰⁹ Maggs, *supra* note ???, at 368. Legal commentators noted the pro-government features of Holmes’ opinion. *See id.* at 366 (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.”).

³¹⁰ Maggs (*Part II*), *supra* note ???, at 441.

³¹¹ Surrey, *supra* note ???, at 811.

³¹² *See* Donworth, *supra* note ???, at 159 (discussing whether *Robbins* could be applied to other community property states, but concluding that Holmes’ dictum applied only to California law).

³¹³ *See* Maggs, *supra* note ??? at 357 (arguing that even if the wife received her half of the community upon her husband’s death as survivor rather than as 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).

³¹⁴ Donworth, *supra* note ???, at 164. George Donworth was a Washington lawyer, federal district court judge, founding member of Perkins Coie, and, ultimately, counsel for the taxpayer in *Seaborn*.

views on the subject” and to file briefs.³¹⁵ In 1927, the Attorney General issued his opinion, withdrawing his earlier opinions from 1920³¹⁶ and 1921,³¹⁷ and concluding that the “problems presented” could not be “settled by any opinion of the Attorney General” nor by congressional action.³¹⁸ 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.”³¹⁹ 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, and therefore her interest was properly subject to federal estate taxes.³²⁰ The Ninth Circuit had already followed the *Robbins* holding 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.³²¹ Other courts were also influenced by *Robbins*, and found that the California community property statutes did not vest sufficient interest in the wife to treat her as co-owner of the community during marriage.³²² Indeed, it appeared as if the federal

³¹⁵ *Id.*

³¹⁶ See 32 Op. Att’y Gen. 435, *supra* note ???.

³¹⁷ See 32 Op. Att’y Gen. 298, *supra* note ???.

³¹⁸ 35 Op. Att’y Gen. 265, 267-68 (1927).

³¹⁹ *Id.* at 271. In the meantime, 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 Mr. Tarleau to Mr. Sullivan, *Legislative history of the Treasury’s position with respect to compulsory joint returns and community property income* (June 10, 1941), OTA/DTR Files, Box 54, reproduced and available at <http://taxhistory.tax.org/Civilization/Documents/marriage/hst28693/28693-1.htm>.

³²⁰ *Talcott v. United States*, 23 F.2d 897 (9th Cir. 1928), *cert. denied*, 277 U.S. 604 (1928). See also *Henshaw v. Comm’r*, 12 B.T.A. 1441 (1929), *aff’d* 31 F.ed 946 (C.C.A. 1929).

³²¹ See *Blair v. Roth*, 22 F.2d 932 (9th Cir. 1927). See also *Belcher v. Comm’r*, 11 B.T.A. 1294 (1928) (holding that in the absence of an ante-nuptial agreement dividing future income and property, the whole of community earnings was taxable solely to the husband). *But see* *Harris v. Comm’r*, 10 B.T.A. 1374 (1928) (finding that a valid written agreement between husband and wife stipulating the wife’s salary as her separate property permitted the wife to report her income separately); *Randall v. Comm’r*, 4 B.T.A. 679 (1926) (holding that wife domiciled in California was entitled to file a separate income tax return reflecting her separate earnings).

³²² See e.g., *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 the 1917 and 1923 amendments). See also *Appeal of Cerutti*, 4 B.T.A. 682 (1926) (1917 amendments); *Hirsch v. United States*, 62 F.2d 128 (9th Cir. 1932) (1917 and 1923 amendments), *cert. den.*, 53 Sup. Ct. 595 (1933). *But see* *Cutting v. Ryan*, 206 Cal. 254, 258 (Sup. Ct. 1929) (finding the wife’s interest “vested” under 1923 amendments).

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 had become increasingly attentive as reports from the Treasury and Congress indicated that noncompliance threatened federal receipts.³²³ In 1918, in an opinion authored by Justice Holmes, the Court held that stock dividends did not constitute income within contemplation of the federal income tax.³²⁴ Two years later, the Supreme Court reached the same conclusion, but with Holmes dissenting strongly. The earlier decision, he argued, 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.’”³²⁵ “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.”³²⁶ Justice Brandeis also reversed course over the same period, and like Holmes, 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.”³²⁷

³²³ For these reports, see *supra* notes ??? and accompanying text.

³²⁴ See *Towne v. Eisner*, 245 U.S. 418 (1918).

³²⁵ *Eisner v. Macomber*, 252 U.S. 189, 220 (1920) (internal citations omitted).

³²⁶ *Id.*

³²⁷ *Macomber*, 252 U.S. at 237.

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 non-traditional indicia of ownership that went well beyond legal title. Control or 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.”³²⁸ 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,³²⁹ effectively taxing the grantor of certain trusts on income the grantor never received. Section 219(g) 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,”³³⁰ while section 219(h) taxed the grantor on trust income which may be distributed to him or may be accumulated for future distribution to him or used to pay his life insurance premiums.³³¹ Commentators at the time observed that the provisions amounted to “a statutory application of the principle of constructive receipt,”³³² and that they appropriately addressed overaggressive tax avoidance.³³³ Taxpayers argued that the provisions were unconstitutional, amounting to a tax on

³²⁸ Randolph E. Paul and Valentine B. Havens, *Husband and Wife Under the Income Tax*, 5 BROOK. L. REV. 241, 248 (1935).

³²⁹ Roswell F. Magill, *Notes on the Revenue Act of 1924: Income Tax Provisions*, 24 COLUM. L. REV. 836, 858 (1924).

³³⁰ Revenue Act of 1924, § 219(g), *supra* note ???, at 277.

³³¹ *Id.*, § 219(h), at 277.

³³² Roswell F. Magill, *The Taxation of Unrealized Income*, 39 HARV. L. REV. 82, 98 (1925-26).

³³³ *See* Magill, *supra* note ???, at 860-61 (opining that the Treasury was appropriately “seeking to prevent evasion” in cases where the taxpayer maintains control over income or property “whether he exercises it or not”).

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*,³³⁴ the Court considered a revocable trust established by a husband, income payable to the wife, 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.”³³⁵ Income “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.”³³⁶ Legal commentators praised the decision for “prevent[ing] tax avoidance,”³³⁷ while others condemned it for violating the taxpayer's due process by taxing him on income of another.³³⁸ 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.”³³⁹ Here, too, the Court acted boldly.

In *Reinecke v. Smith*,³⁴⁰ a grantor husband created trusts for the benefit of his wife and children. The trustees were the settler, one of his sons (also the direct beneficiary of one trust and a contingent beneficiary of the others), and a bank. Each trust contained a provision authorizing

³³⁴ *Corliss v. Bowers*, 281 U.S. 376 (1930).

³³⁵ *Id.* at 377.

³³⁶ *Id.* at 378.

³³⁷ Recent Cases, *Taxation—Income Tax—Transfer of Right to Future Income—Revocable Trust Taxable to Settlor*, 15 MINN. L. REV. 129, 130 (1930-31). See also Notes, *Tax Dodging by the Assignment of Future Income*, 40 YALE L. J. 661, 665 (1930-31) (calling the 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 (1929-30) (finding the 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”).

³³⁸ See Recent Cases, *supra* note ???, at 441.

³³⁹ *Surrey*, *supra* note ???, at 819.

³⁴⁰ 289 U.S. 172 (1933).

the settler to revoke it with the consent of one additional trustee. The Court held the settler taxable on the trust income. “To tax the income of such a trust to the grantor while he and the trustee jointly retain the power to revoke or modify the trust,” Justice Jackson wrote for another unanimous Court, “is consistent with the Fifth Amendment, and helps to make the income tax system complete and consistent and prevent evasions.”³⁴¹ 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 one person’s consent, neither of whom possessed an interest or reason to withhold consent. “A contrary decision would make evasion of the tax a simple matter,” the Court said.³⁴² “[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.”³⁴³ Congress reached a similar conclusion the previous year when it added language to section 219(g) indicating 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.³⁴⁴ Congress’s power was not unlimited.³⁴⁵ But where the taxpayer “retains for himself so many of the attributes of ownership,” he cannot claim to be “the victim of despotic power when for the purpose of taxation he is treated as owner altogether.”³⁴⁶

³⁴¹ *Id.* at 177.

³⁴² *Id.* at 178.

³⁴³ *Id.* Or, as one commentator put it, “If the statute is constitutional only when the power is lodged completely in the settler, evasion would be a simple matter—amenable relatives or friends are always at hand.” Magill, *supra* note ???, at 820. *See also* Developments in the Law, *supra* note ???, at 1276 (stating that “the premise of the decision was the justice of taxing men on income where they had an economic power substantially equivalent to it”).

³⁴⁴ Revenue Act of 1932, §§ 166, 47 Stat. 169, 221 (1932) (emphasis added).

³⁴⁵ *See* Reinecke v. Northern Trust Co., 278 U.S. 339 (1929) (invalidating estate tax levy where grantor’s power to revoke was dependent on the acquiescence of a trust beneficiary who was deemed to possess an adverse interest).

³⁴⁶ Du Pont v. Comm’r, 289 U.S. 685, 689 (1933).

But what if the taxpayer retained no attributes of ownership? That is, when 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. According to the Supreme Court, the taxpayer could still be subject to taxation if he received the 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.³⁴⁷ 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.”³⁴⁸ 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.”³⁴⁹ 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.”³⁵⁰ There was value in disposing of income that was tantamount to ownership of income.

2. Assignments: Relinquishing Control, Part II

³⁴⁷ *Burnet v. Wells*, 289 U.S. 670 (1933) (upholding § 219(h) of the Revenue Acts of 1924 and 1926).

³⁴⁸ *Wells*, 289 U.S. at 678.

³⁴⁹ *Id.* at 678-79.

³⁵⁰ Developments in the Law, *supra* note ???, at 1277. *See also* *Surrey*, *supra* note ???, at 824 (writing that “while there is no legal obligation on the part of an insured person to pay his premiums...the creation of an irrevocable funded insurance trust is indicative of an intent to retain the policies and have the premiums paid, and to this end he has dedicated a part of his income.”). Similarly, if a husband created a 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).

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,”³⁵¹ and “the enjoyment and benefit derived by a person from the payments to an intended beneficiary is taxable income” to the assignor. The taxpayer is 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.”³⁵² Also as with trusts, the Court’s approach to the cases involved its “fear of tax avoidance.”³⁵³ 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.”³⁵⁴

This inquiry was particularly difficult in the context of the family, where “the intimate relations of husband and wife sometimes enable the consummation of transactions perfect in form, but wholly lacking in substance.”³⁵⁵ The Court was well aware of the heightened opportunity to avoid tax.³⁵⁶ A disproportionate number of assignment cases involved intrafamily transactions, and included attempted assignments of partnership interests,³⁵⁷ trust estates,³⁵⁸

³⁵¹ *Surrey*, *supra* note ???, at 828.

³⁵² *Paul and Havens*, *supra* note ???, at 244 (emphasis in original).

³⁵³ *Surrey*, *supra* note ???, at 793. 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”).

³⁵⁴ *Id.* at 796.

³⁵⁵ *Paul and Havens*, *supra* note ???, at 255. “‘Bed chamber’ arrangements,” tax lawyers Paul and Havens observed, “are difficult to prove or disprove, and diligence is necessary where tax avoidance is easy.” *Id.* at 264.

³⁵⁶ *See Burnet v. Wells*, 289 U.S. 670, 677 (1933) (observing that 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) (“fully recogniz[ing] 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”).

³⁵⁷ *See e.g.*, *Balkwill v. Comm’r*, 77 F.2d 569 (6th Cir. 1935) (holding assignor partner-sibling taxable rather than assignee brothers and sisters), *cert. denied*, 296 U.S. 574 127 (1935); *Rosevear v. Comm’r*, 31 B.T.A. 146 (1934) (holding assignor husband-partner taxable on distributed earnings rather than assignee wife). *But see Humphreys v. Comm’r*, 88 F.2d 430 (2d Cir. 1937) (holding assignee wife taxable on partnership earnings).

³⁵⁸ *See e.g.*, *Brewster v. United States*, 9 F.Supp. 686 (Ct. Cl. 1935) (holding assignor sibling taxable rather than assignee sibling on trust income); *McDonald v. Helvering*, 74 F.2d 1005 (D.C. Cir. 1934) (same, assignor husband/assignee wife); *Porter v. United States*, 52 F.2d 1056 (Ct. Cl. 1931) (same, assignor parent/assignee child).

rents,³⁵⁹ securities,³⁶⁰ and commissions on insurance premiums.³⁶¹ 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.”³⁶² State law continued to define property as well as who owned it. But federal law determined when and how to tax the property’s legal interests. 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.”³⁶³ 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 embrace Congress’s broad taxing powers.

In *Burnet v. Leininger*, the Court held that an assignment of partnership interests from a husband to his wife without a change in partnership documents or ownership interests did not defeat taxation of the husband on distributed partnership earnings.³⁶⁴ In language reminiscent of *Robbins*’ dictum that Congress could levy tax on the basis of control over income, 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 only had a derivative interest.”³⁶⁵ Assigning his interest in the partnership was not the same as transferring “the *corpus* of the partnership property to a

³⁵⁹ *Bing v. Bowers*, 22 F.2d 450 (S.D.N.Y. 1928), *aff’d* 26 F.2d 1017 (2d Cir. 1928) (holding assignor son taxable rather than assignee mother); *Woods v. Comm’r*, 5 B.T.A. 413, 415-16 (1926) (holding assignor father-husband taxable on rents and royalties rather than assignees wife and daughter).

³⁶⁰ *Van Brunt v. Comm’r*, 11 B.T.A. 406 (1928) (holding assignor husband taxable on dividends rather than assignee wife); *Le Blanc v. Comm’r*, 7 B.T.A. 256, 259 (1927) (holding assignor father-employer taxable on dividends rather than assignee employee-son).

³⁶¹ *Parker v. Routzahn*, 56 F.2d 730 (6th Cir. 1932) (holding assignor husband taxable on future commissions rather than assignee wife), *cert denied*, 287 U.S. 606 (1932); *Bishop v. Comm’r*, 54 F.2d 298 (7th Cir. 1931) (same).

³⁶² *Surrey*, *supra* note ???, at 796.

³⁶³ 287 U.S. 103, 110 (1932).

³⁶⁴ 285 U.S. 136 (1932). *See also* *Battleson v. Comm’r*, 62 F.2d 125 (9th Cir. 1932) (same). *But see* *Rose v. Comm’r*, 65 F.2d 616, 617 (6th Cir. 1933) (holding a declaration of a trust of partnership interests and properties sufficient to relieve the partner husband-father from tax on grounds that trustee family members received “rights of partners” and not simply “rights to a distribution of the [partnership] income”).

³⁶⁵ 285 U.S. at 141.

new firm with a consequent readjustment of rights in that property and management.”³⁶⁶ Indeed, 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 taxation.³⁶⁷ Assignment of “profits” alone did not relieve the assignor of the tax,³⁶⁸ nor did merely assigning an “interest” in the firm.³⁶⁹ Similarly, assignment of unearned future income, by itself, did not free the assignor from tax on that income,³⁷⁰ nor did an assignment of income already earned.³⁷¹ Control of income in these cases, and thus taxability, involved both “the right to demand or obtain the income and the right to control it after it has been received.”³⁷² If the assignor retained both these rights, he was taxable on the income when it accrued.³⁷³ Conversely, if the assignor relinquished both rights in an irrevocable assignment, he was no longer taxable on the income.³⁷⁴

More than anything, an effective assignment required the assignor to relinquish control, not only over the income stream, but also over the source of the income and any beneficial enjoyment over the income.³⁷⁵ Thus, taxpayers could not assign income from a spendthrift trust,

³⁶⁶ *Id.*

³⁶⁷ Current Decisions, *Income Taxation—Assignment of Partnership Profits*, 41 YALE L. J. 925, 926 (1931-32).

³⁶⁸ See e.g., *Rossmore v. Anderson*, 1 F.Supp. 35 (S.D.N.Y. 1932); *Harris v. Comm’r*, 39 F.2d 546 (2d Cir. 1930); *Meyers v. Allen*, 34 F.2d 883 (8th Cir. 1929).

³⁶⁹ See e.g., *Battleson*, *supra* note ???; *Balkwill v. Comm’r*, 25 B.T.A. 1147 (1932) (holding that distributive share of partnership income is taxable to partner, notwithstanding declaration of trust with respect to beneficiaries).

³⁷⁰ See e.g., *Lucas v. Earl*, 281 U.S. 111 (1930) (holding assignor husband taxable on assignment of future earnings); *Bing v. Bowers*, 22 F.2d 450 (S.D.N.Y. 1928), *aff’d* 26 F.2d 1017 (2d Cir. 1928) (holding assignor son taxable on mere promise to pay future income to mother).

³⁷¹ See e.g., *Daugherty v. Comm’r*, 63 F.2d 77 (9th Cir. 1933) (holding husband taxable on assignment to wife of undivided one-half interest in contingent fee for which he had fully performed).

³⁷² Recent Cases, *supra* note ???, at 129.

³⁷³ See e.g., *Mitchel v. Bowers*, 9 F.2d 414 (S.D.N.Y. 1925), *aff’d* 15 F.2d 287 (2d Cir. 1926), *cert. denied*, 273 U.S. 759 (1927) (holding husband partner taxable on partnership profits assigned to wife who had no present interest in the partnership assets).

³⁷⁴ See e.g., *Rosenwald v. Comm’r*, 33 F.2d 423 (7th Cir. 1929), *cert. denied* 280 U.S. 599 (1929) (holding husband not taxable on 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 on grounds each of them remained within his control).

³⁷⁵ See e.g., *Comm’r v. Field*, 42 F.2d 820 (2d Cir. 1930) (holding assignor husband not taxable on assignment of trust income to beneficiary wife on grounds he effectively transferred his equitable estate); *Shellabarger v. Comm’r*, 38 F.2d 566 (7th Cir. 1930) (holding assignor not taxable on trust income held in trust for sister and bank beneficiaries paid over pursuant to valid and binding assignment contract); *Clark v. Comm’r*, 16 B.T.A. 453 (1929)

because, by law, they never controlled either the income or the corpus of the trust.³⁷⁶ An effective assignment of profits from the sale of property, moreover, required relinquishing ownership control over the entire property prior to the sale.³⁷⁷ An assignor had to assign the contract and not just income from the contract.³⁷⁸ He had to transfer the corpus (i.e., tangible property),³⁷⁹ a property right (i.e., covering contract rights broader than property transfers),³⁸⁰ more than a mere promise,³⁸¹ and a right to collect income as well as to exercise interest in the property generating the income.³⁸² If the assignor failed to divest himself of all legal, equitable, and beneficial interests in income and income sources, it was said that he still enjoyed sufficient control to justify taxing him on the subject of the assignment.

3. Income as Consumption and Control as Ownership

(holding that assignment alienating an equitable life interest amounted to transferring a present property right to assignees sufficient to make assignees taxable on future income). *See also* *Surrey*, *supra* note ???, at 801 (when divesting right to trust income, the assignor “ceases to be a trust beneficiary; he has given his equitable estate (the right to income and its property rights) to another. As he is left with no rights in the trust or its income, the assignor is no longer taxable.”).

³⁷⁶ *See e.g.*, *Comm’r v. Blair*, 60 F.2d 340 (7th Cir. 1932) (holding beneficiary of spendthrift trust taxable on assignments of trust income); *In Appeal of Robinson*, 4 B.T.A. 504 (1926) (same).

³⁷⁷ *See e.g.*, *Wright v. Comm’r*, 26 B.T.A. 21 (1932) (holding assignee taxable on the pre-sale transfer of an undivided one-half interest in property); *Rogers v. Comm’r*, 15 B.T.A. 638 (1929) (holding assignor taxable on profits from sale of property assigned after rather than before sale transaction); *Walker v. Comm’r*, 6 B.T.A. 1142 (1927) (holding assignment of oil and gas lease from husband to wife an effective transfer of the husband’s interest).

³⁷⁸ *See Nelson v. Ferguson*, 56 F.2d 121 (3d Cir. 1932), *cert. denied*, 286 U.S. 565 (1932); *Hall v. Burnet*, 54 F.2d 443 (D.C. Cir. 1931), *cert. den.*, 285 U.S. 552 (1932); *Seetree v. Comm’r*, 25 B.T.A. 396 (1932).

³⁷⁹ *See e.g.*, *Van Brunt v. Comm’r*, 11 B.T.A. 406 (1928) (assigning rental and dividend income from property rather than assigning corpus); *Parshall v. Comm’r*, 7 B.T.A. 318 (1927) (holding husband’s transfer of partnership interest to wife sufficient to make subsequent partnership distribution taxable to wife).

³⁸⁰ *See e.g.*, *Leydig v. Comm’r*, 15 B.T.A. 124, 132 (1929) (finding that “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”). Commentators criticized the decision. *See Notes*, *supra* note ???, at 661 (calling the transfer “[a]n ingenious attempt to avoid taxation” by assignment whereby the assignor, “in consideration of one dollar and love and affection, conveyed to his wife by a written assignment of one-half interest in the oil and gas royalties reserved under an existing lease and to be reserved under contemplated future leases”).

³⁸¹ *See e.g.*, *Bing*, 22 F.2d 450, *supra* note ??? (emphasizing the difference 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).

³⁸² *See e.g.*, *Rose v. Comm’r*, 65 F.2d 616, 617 (6th Cir. 1933) (finding that assignment from husband-partner to assignee family members transferred right to partnership income as well as “rights of partners”); *Parshall*, 7 B.T.A. 318, *supra* note ??? (finding that assignee wife received right to partnership income as well as partnership interests).

By viewing control as tantamount to ownership, the Court defined the income tax in ways resembling a consumption tax. Indeed, cases like *Burnet v. Wells*,³⁸³ *Reinecke v. Smith*,³⁸⁴ *Du Pont v. Commissioner*,³⁸⁵ and *Burnet v. Leininger*³⁸⁶ 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.”³⁸⁷ Taxable income under this theory tracked not only increases and decreases in wealth but also increases and decreases in the value of personal satisfaction.³⁸⁸ 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.”³⁸⁹ Personal income, Simons wrote more pointedly, “connotes, broadly, the exercise of control over the use of society’s scarce resources.”³⁹⁰

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 now under special pressure to fill the fast emptying coffers.”³⁹¹ Several members of the Supreme Court were similarly worried that a definition of taxable income

³⁸³ 289 U.S. 670 (1933).

³⁸⁴ 289 U.S. 172 (1933).

³⁸⁵ 289 U.S. 685, 689 (1933).

³⁸⁶ 285 U.S. 136 (1932).

³⁸⁷ *Surrey*, *supra* note ???, at 828. *See also* *Developments in the Law*, *supra* note ???, at 1278 (noting the “unique contribution” of *Wells* and “its emphasis on a concept of taxable income not dissimilar to the economists’ ‘flow of benefits’ or satisfactions”).

³⁸⁸ *See* Paul and Havens, *supra* note ???, at 253 (writing that “this new 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”).

³⁸⁹ HENRY C. SIMONS, *PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY* 50 (1938). *See also* Robert M. Haig, *The Concept of Income—Economic and Legal Aspects* (1921), in *READINGS IN THE ECONOMICS OF TAXATION* 54 (Richard A. Musgrave & Carl Shoup eds., 1959).

³⁹⁰ SIMONS, *supra* note ???, at 49.

³⁹¹ Paul and Havens, *supra* note ???, at 253.

untethered to ownership as defined by legal title inappropriately broadened the powers of taxation. Justice Sutherland, for one, opined that taxing the grantor in *Burnet v. Wells* “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.”³⁹² While Congress enjoyed broad taxing powers, “the distinction between taxation and confiscation must still be observed.”³⁹³ In its zeal to protect the revenue, had the Court blurred this 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” by arguing that B controls A’s property or income.³⁹⁴ The Supreme Court first considered this issue under the Fourteenth Amendment rather than the Fifth Amendment. In *Hoeper v. Tax Commission*,³⁹⁵ 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 deeply 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. “We have no doubt,” the Court held, “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

³⁹² 289 U.S. 670, 683 (1933) (Sutherland, J. dissenting).

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ 284 U.S. 206 (1932).

which is not in fact the taxpayer's income cannot be made such by calling it income."³⁹⁶ 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.³⁹⁷ 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.

Three dissenting justices in *Hooper* 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.³⁹⁸ "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," he said, "the income taxed would belong to the husband, and there would be no question about it."³⁹⁹ 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."⁴⁰⁰ 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.⁴⁰¹ Under the prevailing gendered view of the

³⁹⁶ *Id.* at 215.

³⁹⁷ *Heiner v. Donnan*, 285 U.S. 312, 326 (1932) (involving the federal gift tax, and finding "the situation presented in the *Hooper* case...the same as that presented here").

³⁹⁸ *Hooper*, 284 U.S. at 220 (Holmes, J., dissenting).

³⁹⁹ *Id.* at 219.

⁴⁰⁰ *Id.* at 219-20.

⁴⁰¹ 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 (1931-32) (observing in the context of *Hooper* that the "family continues to operate as a unit and the property and income of all its members are still pooled for the benefit

family and its common law roots, the husband should bear the burden. Taxing combined family income was also justified, Holmes added, “by its tendency to prevent tax evasion.”⁴⁰² And 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.”⁴⁰³ Preventing tax avoidance, together with 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 EQUALS TAXABILITY

Holmes’ expansive definition of income went on trial in 1930. Three years earlier, the Attorney General had encouraged the Secretary of the Treasury “to arrange for test cases in the courts” to determine the nature of the wife’s interest under community property law and to further determine the proper tax treatment of that interest.⁴⁰⁴ By 1930, test cases had percolated through the court system.

In the lead case, *Poe v. Seaborn*,⁴⁰⁵ 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 deviating 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,’” Roberts wrote, “denotes ownership. It would be a strained construction, which, in the absence of further definition by Congress,

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 ???, at 860-61. Still others noted that “[t]here would seem to be no constitutional objections to taxing the use of income rather than the income itself.” *Recent Cases*, *supra* note ???, at 765.

⁴⁰² 284 U.S. at 220. *See also* *Recent Decisions*, *supra* note ???, at 811 (noting that the holding in *Hoeper* “will be to facilitate evasions of the higher rates imposed on those whose incomes are in the upper divisions of the graduated scale, evasions which may be effected through transfers between husband and wife”).

⁴⁰³ 284 U.S. at 220-21.

⁴⁰⁴ *Supra* note ??? and accompanying text.

⁴⁰⁵ 282 U.S. 101 (1930).

should impute a broader significance to the phrase.”⁴⁰⁶ The wife’s ownership interest in community property, in turn, “must be found in the provisions of the law of the State.”⁴⁰⁷

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; in words echoing earlier Supreme Court jurisprudence, the government asserted that “control without accountability is indistinguishable from ownership.”⁴⁰⁸ The *Seaborn* Court disagreed, finding that while the husband was relegated powers of management and control over community personal property, as well as “like power of disposition thereof as of his separate personal property,” his power was “subject to restrictions which are inconsistent with denial of the wife’s interest as co-owner.”⁴⁰⁹ In addition, the “community must act through an agent,” not only for public policy reasons related to discouraging 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.⁴¹⁰ More 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.”⁴¹¹

The Court’s decision was a definitive blow to the position that control determined ownership. “Power is not synonymous with right,” the opinion held.⁴¹² 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

⁴⁰⁶ *Id.* at 109.

⁴⁰⁷ *Id.* at 110.

⁴⁰⁸ *Id.* at 111-12.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 112.

⁴¹¹ *Id.* at 111.

⁴¹² *Id.* at 113.

another.”⁴¹³ “The law’s investiture of the husband with broad powers, by no means, negatives the wife’s present interest as co-owner.”⁴¹⁴ 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.”⁴¹⁵ Thus, married couples in Washington could file separate returns, “each treating one-half of the community income as his or her respective income.”⁴¹⁶

The Court held similarly in the companion cases accompanying *Seaborn*. Specifically, it found that the community property laws of Arizona,⁴¹⁷ Louisiana,⁴¹⁸ and Texas⁴¹⁹ 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*,⁴²⁰ 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?”; 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?”⁴²¹ California law had changed since the Court last considered these questions. Prompted by the adverse decisions in *Robbins*⁴²² and *Stewart v. Stewart*,⁴²³ the California legislature in 1927 had

⁴¹³ *Surrey*, *supra* note ???, at 828.

⁴¹⁴ *Seaborn*, 282 U.S. at 113.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* at 118.

⁴¹⁷ *See Goodell v. Koch*, 282 U.S. 118, 121 (1930).

⁴¹⁸ *See Bender v. Pfaff*, 282 U.S. 127, 131 (1930).

⁴¹⁹ *See Hopkins v. Bacon*, 282 U.S. 122, 126 (1930).

⁴²⁰ *United States v. Malcolm*, 282 U.S. 792 (1931).

⁴²¹ *Id.* at 793.

⁴²² *See supra* notes ??? and accompanying text.

enacted a statute identifying the “respective interests of husband and wife in community property” during marriage as “present, existing, and equal.”⁴²⁴ The Supreme Court considered the above questions in light of this recent legislative declaration.⁴²⁵ Citing to *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 tax 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.⁴²⁶ 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: Idaho, Nevada, and New Mexico.⁴²⁷ By the close of 1931, married couples residing in all eight community property states reported income for federal income tax purposes as co-owners of marital income and property.

In the same year that the Supreme Court decided *Seaborn*, it heard another seminal tax case, *Lucas v. Earl*.⁴²⁸ 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

⁴²³ *Stewart v. Stewart*, 199 Cal. 318, 339 (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,’” quoting *Spreckels*, 172 Cal. at 782, emphasis in original.) On appeal, and in light of the 1927 amendments, the California Supreme Court found no retroactivity to the 1927 statutes. See *Stewart v. Stewart*, 204 Cal. 546 (Sup. Ct. 1928).

⁴²⁴ Act of April 28, 1927, § 1, Cal. Stat. 484 (1927). For the connection between these cases and the 1927 legislative changes, see William M. Simmons, *The Interest of a Wife in California Community Property*, 22 CAL. L. REV. 404, 417 (1933-34); Kirkwood, *supra* note ???, at 12.

⁴²⁵ Some commentators argued that the 1927 amendments simply clarified longstanding policy and case law. See e.g., Recent Legislation, *Community Property*, 16 CAL. L. REV. 68, 68 (1927).

⁴²⁶ *United States v. Malcolm*, 282 U.S. 792, 794 (1931).

⁴²⁷ INTERNAL REVENUE SERVICE, INTERNAL REVENUE BULLETIN, MIMEOGRAPH 3853, Cumulative Bulletin X, pt. 1, at 139-40.

⁴²⁸ *Lucas v. Earl*, 281 U.S. 111 (1930).

divide equally all present and future income and property. 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. In language reminiscent of *Corliss*' "refinements of title,"⁴²⁹ Holmes said that the case was "not to be decided by attenuated subtleties."⁴³⁰ Rather, "[i]t turns 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."⁴³¹ 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."⁴³² 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*.⁴³³ But the Court itself noted the distinction. "The very assignment in [*Earl*]," the Court wrote in *Seaborn*, "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."⁴³⁴ In other words, *Earl* was not a community property case, but rather a contract case. In the context of contract law, the tree which bore the fruit was Mr. Earl, while in the context of community property law, the tree was

⁴²⁹ *Supra* note ??? and accompanying text.

⁴³⁰ *Earl*, 281 U.S. at 114.

⁴³¹ *Id.* at 114-115

⁴³² *Id.* at 115.

⁴³³ See e.g., *Surrey*, *supra* note ???, at 813 ("As far as community property is concerned, *Lucas v. Earl* has been overruled by *Poe v. Seaborn*.").

⁴³⁴ 282 U.S. 101, 117 (1930).

the community, comprised equally of husband and wife. *Earl* stands for the proposition that one cannot assign income to a third party who does not already own the income and expect to avoid tax. *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*, one hundred percent of family income flowed from Mr. Earl's employer to Mr. Earl and then, a nanosecond later by virtue of state contract law, fifty percent of the income passed to Mrs. Earl; comparatively, in *Seaborn*, and by virtue of general property law rather than private contract law, one hundred percent of the income flowed to the community in which both Mr. and Mrs. Seaborn enjoyed equal, fifty-percent ownership interests. The interests of the spouses in *Seaborn* "spr[un]g by operation of law," while those in *Earl* were created "by agreement of the parties."⁴³⁵

One could argue this view creates a distinction without a difference.⁴³⁶ 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, thought that the distinction between income shifting by general law versus private law was real. Moreover, the difference had nothing to do with whether a marriage contract was more or less sacred than contracts governing market-based transactions. Rather, 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.

⁴³⁵ Decisions, *supra* note ???, at 1081.

⁴³⁶ See e.g., *Surrey*, *supra* note ???, at 813 (noting that *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.").

As Randolph Paul, the primary “architect of the modern federal tax system,”⁴³⁷ 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.”⁴³⁸ The federal income tax laws taxed the “net income of every individual,”⁴³⁹ and the word, “of,” the Supreme Court had held in *Seaborn*, “denote[d] ownership.”⁴⁴⁰ 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.

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 percent and the top estate tax rate from 20 to 45 percent, while lowering the estate tax exemption from \$100,000 to \$50,000.⁴⁴¹ The new law had the effect of doubling the effective tax rate on the

⁴³⁷ Joseph T. Thorndike, *Profiles in History: Randolph E. Paul*, 105 TAX NOTES 529, 529 (2004).

⁴³⁸ Paul & Havens, *supra* note ???, at 243.

⁴³⁹ Revenue Act of 1926, *supra* note ???, §§ 210(a) & 211(a), at 21-22.

⁴⁴⁰ *Seaborn*, 282 U.S. 101, 109 (1930). This rule applied equally to the federal estate tax. *See e.g.*, *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1936) (holding grantor’s estate taxable on the value of a trust corpus over which grantor exercised considerable control); *Helvering v. Hemholz*, 296 U.S. 93 (1936) (holding administrator and beneficiary of trust not taxable on trust corpus due to insufficient control).

⁴⁴¹ Revenue Act of 1932, 47 Stat. 169, 174-77, 243-44 (1932). The new law also raised gift tax rates. *Id.* at 245-47.

richest one percent of households, from 3.4 percent to 6.8 percent.⁴⁴² 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.⁴⁴³ In particular, it lowered personal exemptions for singles from \$1,500 to \$1,000 and for married couples from \$3,500 to \$2,500,⁴⁴⁴ and it raised tax rates throughout the middle-income range.⁴⁴⁵ But that was just the beginning. Congress upped taxes again in 1934 and 1935, and then almost annually between 1940 and 1944. By war's end, the top marginal rate reached a staggering 94 percent while personal exemptions provided a tax-free threshold of only \$500 for singles and \$1,000 for married couples.⁴⁴⁶

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.”⁴⁴⁷ In the 1940 term, the Court heard an astonishing 34 cases,⁴⁴⁸ and an equally high number by

⁴⁴² Brownlee, [*Historical Perspective on...*] *supra* note ???, at 51.

⁴⁴³ See Carolyn Jones, *Mass-Based Income Taxation: Creating a Taxpaying Culture, 1940-1952*, in *FUNDING THE MODERN AMERICAN STATE, 1941-1995: THE RISE AND FALL OF THE ERA OF EASY FINANCE* 107 (W. Elliot Brownlee ed., 1996); Carolyn 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).

⁴⁴⁴ Revenue Act of 1932, *supra* note ???, at 184.

⁴⁴⁵ *Id.*, at 174.

⁴⁴⁶ See Revenue Act of 1934, 48 Stat. 680 (1934) (raising rates in most brackets while holding the top rate at 63 percent); Revenue Act of 1935, 49 Stat. 1014 (1935) (raising taxes on all incomes above \$50,000 and upping the top rate to 79 percent); Revenue Act of 1940, 54 Stat. 516 (1940) (adjusting brackets for upper-middle incomes, and lowering personal exemptions for singles from \$1,000 to \$800 and for married couples from \$2,500 to \$2,000); Revenue Act of 1941, 55 Stat. 687 (1941) (raising rates across the board with top rate reaching 81 percent, and lowering personal exemptions for singles from \$800 to \$750 and for married couples from \$2,000 to \$1,500); Revenue Act of 1942, 56 Stat. 583 (1942) (raising rates across the board with top rate reaching 88 percent, and lowering personal exemptions for singles from \$750 to \$500 and for married couples from \$1,200); Individual Income Tax Act of 1944, 58 Stat. 231 (1944) (raising rates across the board with top rate reaching 94 percent, and lowering personal exemption for married couples from \$1,200 to \$1,000). During the war, the government transformed the federal income tax into a mass-based tax. Between 1939 and 1943, the number of income taxpayers jumped from 4 million to 43 million. The broad base and progressive rates (ranging from 22 to 94 percent) generated a near-majority of all federal tax receipts. By 1945, the income tax generated \$19.7 billion, which represented 45 percent of all federal tax revenues. Scott Moody, ed., *THE TAX FOUNDATION, FACTS AND FIGURES ON GOVERNMENT FINANCE* 85 (1998).

⁴⁴⁷ Stanley S. Surrey, *The Supreme Court and the Federal Income Tax: Some Implications of Recent Decisions*, 35 *ILL. L. REV.* 779, 779 (1941).

⁴⁴⁸ *Id.* at 781. The Court sided with the government in 27 of the 34 cases. *Id.* at 780.

historical standards, 24, in the 1939 term.⁴⁴⁹ Taxation, law professor Roswell Magill observed, was “by all odds the chief matter of concern of the Court at the present time.”⁴⁵⁰ As it was with other courts. In 1946, one-third of U.S. Tax Court cases involved issues of family taxation.⁴⁵¹

To counteract the avoidance efforts that produced the 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.”⁴⁵² Others noted the Court’s increased willingness to explore the outer reaches of Congress’ 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.”⁴⁵³ Quite consciously, the Court “resorted to sweeping theoretical observations to prevent the obvious escape from the surtax.”⁴⁵⁴ “While it is true that economic gain is not always taxable as income,” the Court offered in *Helvering v. Bruun*, “it is settled that the realization of gain need not be in cash

⁴⁴⁹ 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 perspective, consider that the Court decided only 23 federal tax cases between 1996 and 2008. See <http://pubs.bna.com/ip/bna/lwt.nsf/TopicalCasesDecided?OpenView&Start=1&Count=100&Expand=63#63>.

⁴⁵⁰ *Id.* at 1.

⁴⁵¹ Stanley S. Surrey, *Family Income and Federal Taxation*, 24 TAXES 980, 982 (1946). See also John W. Erwin, *Federal Taxes and the Family: A Plan for Optional Joint Returns for Husband and Wife with Equal Division of Their Combined Incomes for Federal Income Tax Purposes*, 20 S. CAL. L. REV. 243, 249-50 (1947) (detailing U.S. Tax Court statistics).

⁴⁵² Surrey, *supra* note ???, at 781.

⁴⁵³ 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 ???, at 2 (asking whether in situations “not explicitly covered [by statute], is the income of the particular trust taxable under the general rule to the beneficiary who receives it; or should the Court 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 that “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 through statutory construction”).

⁴⁵⁴ Surrey, *supra* note ???, at 791.

derived from the sale of an asset.”⁴⁵⁵ “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.”⁴⁵⁶ In the face of aggressive tax avoidance behavior, “[l]egislative ingenuity need not be the sole response to taxpayer ingenuity.”⁴⁵⁷

Judicial ingenuity was also necessary to protect the revenue, particularly with respect to family taxation. When analyzing the Court’s family tax 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.”⁴⁵⁸ Ownership remained the lodestar of the 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 issue involved “the normal

⁴⁵⁵ *Helvering v. Bruun*, 309 U.S. 461 (1940) (holding lessor taxable on the value of a building erected by lessee in the year of lessee’s default rather than upon disposition of the property).

⁴⁵⁶ *Surrey*, *supra* note ???, at 792. According to *Surrey*, the reasoning in *Bruun* reflected “a complete denial of the doctrine that is the heart of *Eisner v. Macomber*” (id. at 783), which had articulated a very limited definition of taxable income as income derived from capital, labor, or the two combined. *Macomber*, 252 U.S. 189 (1920). By comparison, *Bruun* provided a considerably broader view of taxable income reflecting the “economists’ definitions which recognize income in a mere increase in value of the property itself within the taxable year.” Magill, *supra* note ???, at 7. Indeed, the decision “mark[ed] the end of one era in our tax history. What had commenced as a highly conceptual view of the realization of income has in the intervening twenty years become no more than a recognition of an expedient procedure.” *Surrey*, *supra* note ???, at 783.

⁴⁵⁷ *Surrey*, *supra* note ???, at 810.

⁴⁵⁸ *Paul and Havens*, *supra* note ???, at 241. The Court acknowledged very explicitly what it was doing. Defining taxable income 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 (1930).

consequences of family solidarity.”⁴⁵⁹ 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.”⁴⁶⁰

Adhering to the letter of the law did not guarantee validation by the Court.⁴⁶¹ 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 and to the trust if not distributable, but never to the grantor.⁴⁶² The Court largely this directive, and examined the transaction under Congress’ general taxing power. The question was not whether the taxpayer fit into the form of the trust statutes, but “whether the grantor after the trust had been established may still be treated, under this statutory scheme, as the owner of the corpus.”⁴⁶³ 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 by devices which, though valid under state law, are not conclusive so far as § 22(a) is concerned.”⁴⁶⁴

⁴⁵⁹ *Helvering v. Clifford*, 309 U.S. 331, 334, 337 (1940). One year later, the Court noted that in previous assignment of income cases “we have not allowed the form to obscure the reality” of the transaction in question. *Harrison v. Schaffner*, 312 U.S. 579, 583 (1941).

⁴⁶⁰ *Surrey*, *supra* note ??? at 803. *See also* *Magill*, *supra* note ???, at 19 (“In general, it seems the Court will work out its own interpretation of the revenue laws, without too much regard for legislative, or even judicial, history or Treasury regulations; and its approach will be to give the laws a broad application. 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.”).

⁴⁶¹ This was also true in areas of federal taxation 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); *Helvering v. Bashford*, 302 U.S. 454 (1938) (holding that transferors in a tax-free reorganization must have a continuing proprietary interest in the assets transferred); *Gregory v. Helvering*, 293 U.S. 465 (1935) (requiring a reorganization to have a business purpose to qualify for tax-free treatment).

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

⁴⁶³ *Id.* at 334.

⁴⁶⁴ *Id.* at 335. Section § 22(a) corresponded to modern 26 U.S.C. § 61.

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 that the trust will not effect any substantial change in his economic position.”⁴⁶⁵ In similar fashion, the Court looked beyond the statute to probe the outer reaches of the Sixteenth Amendment in holding the grantor taxable in cases involving trusts established for the payment of alimony,⁴⁶⁶ the support of minor children,⁴⁶⁷ and the satisfaction of debts.⁴⁶⁸ Control over income, enjoyment in the power of its disposition, and satisfaction in delivering it to intended recipients also guided the Court taxing donors on gifts of interest-bearing coupons⁴⁶⁹ and assignor-beneficiaries on assignments of trust income.⁴⁷⁰

Under its expansive definition of ownership, the Court could choose whomever to give the “shaft.”⁴⁷¹ The assignee of future salary payments was taxable due to an increase in wealth as the new owner, for instance, 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

⁴⁶⁵ *Id.* Commentators noted the importance of “control” in determining ownership of income and of taxability. *See e.g.*, Pavenstedt, *supra* note ???, at 230 (“quantum of control” as “the all-important—and perhaps, it may be ventured, the solely decisive—factor when considering” taxability). *See also id.* at 230-37.

⁴⁶⁶ *See e.g.*, Douglas v. Willcuts, 296 U.S. 1, 9 (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 grantor husband not taxable on income from alimony trust where the trust discharged completely his duty of support). *Compare* Helvering v. Leonard, 210 U.S. 80 (1940) (holding grantor husband taxable on income from alimony trust where the state granting the divorce retained the power to modify the divorce decree).

⁴⁶⁷ *See e.g.*, Helvering v. Schweitzer, 296 U.S. 551 (1935); Helvering v. Stokes, 296 U.S. 551 (1935).

⁴⁶⁸ *See e.g.*, Helvering v. Blumenthal, 296 U.S. 551 (1935).

⁴⁶⁹ *See* Helvering v. Horst, 311 U.S. 112, 117-18 (1941) (finding that the “power to dispose of income is the equivalent of ownership of it,” and although the donor “never receives the money, he derives money’s worth from the disposition of the coupons which he has used as money or money’s worth in the procuring of a satisfaction which is procurable only by the expenditure of money or money’s worth”). Legal scholars noted that *Horst* “pushes the definition of income somewhat beyond previously recognized boundaries. Here the assignor realizes income, though he does not receive it, does not control its receipt, and benefits by its receipt by another only in the intangible sense that anyone benefits by the payment of a sum to one of his choice.” Roswell Magill, *The Federal Income Tax on the Family*, 20 TEX. L. REV. 150 (1941-42). *See also* the companion case to *Horst*, Helvering v. Eubank, 311 U.S. 122, 124 (1941) (holding assignor husband taxable on assignment to wife of renewal insurance commissions payable in the future).

⁴⁷⁰ *See* Harrison v. Schaffner, 312 U.S. 579, 581-82 (1941) (holding assignor mother taxable on income assigned to children from a trust of which she was the beneficiary, and noting generally that “the exercise of his power to command the income” justifies taxability).

⁴⁷¹ *United States v. Robbins*, 269 U.S. 315, 328 (1926).

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.

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."⁴⁷² 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.'"⁴⁷³ Both were "inequitable and undemocratic," and both had been getting worse.⁴⁷⁴ 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."⁴⁷⁵ 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."⁴⁷⁶

Roosevelt's Treasury Department identified eleven "principal devices" used by taxpayers "with large incomes for the purpose of defeating the income taxes."⁴⁷⁷ Chief among them were three techniques used by married couples to shift income within the family: trusts, partnerships, and community property law, the last of which Treasury Secretary Henry Morgenthau called

⁴⁷² Franklin D. Roosevelt, *A Message to the Congress on Tax Revision* (June 19, 1935), in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, 1935 VOLUME 271 (Samuel I. Rosenman ed., 1938).

⁴⁷³ Roosevelt, *The Two Hundred and Twenty-Fifth Press Conference* (July 21, 1935), in id. at 313.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Tax Evasion and Avoidance: Report of the Joint Committee on Tax Evasion and Avoidance 1* (1937) (Message from President Roosevelt to Congress).

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* at 3-4 (statement of Henry Morgenthau, Secretary, Treasury Department).

“unjustifiable.”⁴⁷⁸ All told, \$193 million in tax revenue was lost annually to separate returns: \$159 million from income shifting among common law spouses and another \$34 million from community property couples.⁴⁷⁹ As a solution to the revenue loss, the Treasury recommended that Congress enact mandatory 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.⁴⁸⁰ Congress took no action on the recommendation,⁴⁸¹ but Treasury pushed ahead in solving longstanding family tax problems.

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 to all separate returns and not just those filed by community property spouses.⁴⁸² It quantified the number of separate returns filed by married couples nationwide,⁴⁸³ the lost revenue associated with separate filing,⁴⁸⁴ and which families it benefited the most.⁴⁸⁵ Treasury also evaluated “the

⁴⁷⁸ *Id.* at 4. Randolph E. Paul, *The Background of the Revenue Act of 1937*, 5 U. CHI. L. REV. 41, 71-77, 84-85 (1937-38) (discussing family tax avoidance techniques in the context of the 1937 bill).

⁴⁷⁹ *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). **What % of revenues or budget?**

⁴⁸⁰ *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 of liability between husband and wife was designed to overcome due process concerns raised in *Hooper* (see *supra* note ???) pertaining to taxing one spouse on the income of another.

⁴⁸¹ See H.R. Rep. No. 75-1546 (1937).

⁴⁸² See e.g., Carl Shoup, *Suggestions for Study of Taxation of Community Property* (Sept. 19, 1939), at 1-2, 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”).

⁴⁸³ See e.g., Ms. Coyle, *Joint Returns of Income of Husbands and Wives*, Table 1: Number of joint and of separate returns (including community property returns), 1913-1939, *supra* note ???, (finding the number of separate returns jumped nearly 60 percent 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), OTA/DTR Files, Box 54, Folder GA-5/41.3; Ms. Coyle and Staff, *Present distribution of separate returns of husbands and wives classified by size of their combined net incomes, 1936* (June 7, 1941), OTA/DTR Files, Box 54, Folder GA-5/41.12.

⁴⁸⁴ See e.g., *Revenue Act of 1942: Hearing on H.R. 7378 before the S. Comm. on Fin.*, 77th Cong. 8 (1942) (statement of Henry Morgenthau, Secretary, Treasury Department) (separate returns costing \$400,000,000 annually); Mr. Haas to Mr. Blough (Nov. 13, 1941), cited in Coyle, *Joint Returns of Income of Husbands and Wives*, *supra* note ??? (separate returns costing \$353 million annually, more than 40 percent of federal income tax collections).

⁴⁸⁵ See e.g., TREASURY DEPARTMENT, *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*

complexity of the marital relationship”⁴⁸⁶ and fundamental questions such as “how marital status should affect tax liability,”⁴⁸⁷ how to treat economies of scale in households of varying size,⁴⁸⁸ and how to account for imputed income of stay-at-home spouses⁴⁸⁹ and for additional expenses of two-earner families.⁴⁹⁰ It also attempted to measure income sharing and power relationships within families,⁴⁹¹ and it monitored changes in community property laws across the country,⁴⁹² particularly once common law states began converting to community property solely for the tax saving.⁴⁹³ Treasury’s comprehensive approach accounted for economic, legal, and philosophical considerations. As important, it was aided by a stable of legal and economic talent that included

Division of Income for Tax Purposes (Dec. 6, 1946), at 5, OTA/DTR Files, Box 54, Folder GA-5/46.7; Mr. Turner to Dr. Atkeson, *Analysis of effects on tax revenue and individual burdens, and on simplification, of Chief Counsel’s recommendation to equalize tax treatment accorded recipients of community and noncommunity income by providing, in effect, that the combined income, deductions, and exemptions on a joint return filed by husband and wife be equally divided between the two spouses* (July 13, 1946), at 2-6, 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), OTA/DTR Files, Box 54, Folder GA-5/43.4; *Community Property Income: Hearings on H.R. 8396 Before the H. Comm. on Ways and Means, 73rd Cong.* 16 (1934) (statement of Lovell H. Parker, Chief of Staff, Joint Committee on Internal Revenue Taxation) (the tax advantage of filing community property returns was “confined principally to the persons with substantial income”).

⁴⁸⁶ Roy Blough to Mr. Hanes, *Comment on Mr. Wood’s “Alternative Plan for Eliminating Inequalities in Income Tax on Married Couples”* (Sept. 27, 1938), at 5, OTA/DTR Files, Box 54, Folder GA-5/37.3.

⁴⁸⁷ Roy Blakey, “Federal Income Tax, Section VII: Joint versus Separate Returns,” in *The Federal Income Tax System: A Report to the Secretary of the Treasury* (Carl Shoup, et al., 1934), OTA/DTR Files, Box 62, reproduced at <http://taxhistory.tax.org/Civilization/Documents/Surveys/hst23735/23735-1.htm>.

⁴⁸⁸ See e.g., Roy Blough and Carl Shoup, “Chapter 3: Income Taxation, 3. Joint vs. Separate Returns,” in Roy Blough and Carl Shoup, *A Report on the Federal Revenue System Submitted to Undersecretary of the Treasury Roswell Magill* (Sept. 20, 1937), OTA/DTR Files, Box 63, reproduced at http://products.tax.org/civsite/Documents/Surveys/b&s_1937/CH1.HTM.

⁴⁸⁹ See e.g., id; Roy Blough to Mr. Sullivan, *Compulsory Joint Returns* (June 10, 1941), at 1, OTA/DTR Files, Box 54, Folder GA-5/41.9.

⁴⁹⁰ See e.g., *Revenue Act of 1942: Hearing on H.R. 7378, supra* note ???, at 31 (statement of Randolph Paul) (proposing a working wife tax credit to offset additional expenses); Richard Slitor, *Special income tax allowance for earnings of wife or head of family* (Nov. 10, 1943), OTA/DTR Files, Box 54, Folder GA-5/43.10 (same).

⁴⁹¹ TREASURY DEPARTMENT, *supra* note ???, at 859 (noting that existing empirical data indicated spouses consumed family income “for the joint benefit of both spouses”); Mr. Fefferman, *Issues Involved in the Income-Splitting Plan* (Feb. 18, 1947), at 1, OTA/DTR Files, Box 54, Folder GA-5/46.7 (examining sharing and consumption patterns within families); Blough to Hanes, *supra* note ??? (concluding that it was impossible to learn the “actual truth” of these relationships).

⁴⁹² See e.g., Anita Wells, *Community Property* (July 24, 1941), at 12, OTA/DTR Files, Box 54, Folder GA-5/41.23; Ellis W. Manning, *Oklahoma Community Property Law of 1939* (1940), at 4, OTA/DTR Files, Box 54, Folder GA-5/41.23; Anita Wells to Roy Blough (Nov. 6, 1939), Box 54, Folder GA-5/39.6 (discussing Oklahoma elective community property law).

⁴⁹³ See *infra* note ??? and accompanying text.

Roy Blough,⁴⁹⁴ Milton Friedman,⁴⁹⁵ Roswell Magill,⁴⁹⁶ Herman Oliphant,⁴⁹⁷ Randolph Paul,⁴⁹⁸ Carl Shoup,⁴⁹⁹ Stanley Surrey,⁵⁰⁰ William Vickrey,⁵⁰¹ and Jacob Viner.⁵⁰²

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.⁵⁰³ Taxing the family as an entity, on the other hand, equalized taxes among similarly situated families, prevented shifting income among family members, and raised 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,”⁵⁰⁴ including “relief, subsidized housing and minimum wage determination.”⁵⁰⁵ For “the bulk” of Americans, the Treasury opined, “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.⁵⁰⁶

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”⁵⁰⁷ that

⁴⁹⁴ Economist, University of Chicago, Columbia University; Member, Council of Economic Advisors; Assistant Secretary and Director, Division of Tax Research, Treasury.

⁴⁹⁵ Economist, University of Chicago; Nobel Laureate.

⁴⁹⁶ Law professor, Columbia University; Chief Attorney, Assistant Secretary, and Undersecretary, Treasury.

⁴⁹⁷ Law professor, University of Chicago, Columbia University; General Counsel, Treasury.

⁴⁹⁸ General Counsel, Treasury; Director, New York Federal Reserve Bank; Founder, Paul Weiss.

⁴⁹⁹ Economist and lawyer, University of Chicago; Led multiple tax missions after World War II, including the “Shoup Mission” to Japan; Credited with inventing the concept of value-added taxation.

⁵⁰⁰ Law professor, Harvard University; Assistant Secretary and Tax Legislative Counsel, Treasury; “Father” of the tax expenditure budget.

⁵⁰¹ Economist, Columbia University; Nobel Laureate.

⁵⁰² Economist; University of Chicago; Special Advisor, Treasury; Early proponent of monetarism.

⁵⁰³ See e.g., TREASURY DEPARTMENT, *supra* note ???, at 849, 851-52 (stating that the individual tax unit produced “substantial tax differences between families with equal incomes,” and the “objective is to find an alternative method of identifying the taxpayer unit which will be better fitted to the application of the doctrine that taxpayers equally situated as to income and size of family should pay equal taxes”).

⁵⁰⁴ Haas to Blough, *supra* note ???. See also WILLIAM VICKREY, AGENDA FOR PROGRESSIVE TAXATION 74-75 (1947) (arguing that families made consumption expenditures “for the joint benefit of all members of the family”).

⁵⁰⁵ Blough to Sullivan, *supra* note ???, at 1.

⁵⁰⁶ *Id.*

⁵⁰⁷ Pavenstedt, *supra* note ???, at 216.

achieved “multiplication of the taxpayer’s personality.”⁵⁰⁸ Families acted in “every other vital economic and social respect...on a consolidated basis,” but not under the tax law.⁵⁰⁹ 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.”⁵¹⁰ 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.⁵¹¹ The law should be changed “to require husbands and wives and minor children living together to file a composite return.”⁵¹² Treating families as a unit, scholar-practitioner Harry Rudick remarked, 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.”⁵¹³

The Supreme Court had already begun recognizing the family as a taxable unit. In *Wells*, the Court emphasized the “solidarity of the family,”⁵¹⁴ while in *Clifford* it found a “temporary reallocation of income within an intimate family group.”⁵¹⁵ In *Hormel v. Helvering*,⁵¹⁶ 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.⁵¹⁷ The Court also validated the unity of the family with respect to loss deductions from sales of property between family members,⁵¹⁸ combined charitable deductions from aggregate income,⁵¹⁹ and different exemption

⁵⁰⁸ Paul, *supra* note ???, at 48.

⁵⁰⁹ Paul and Havens, *supra* note ???, at 264.

⁵¹⁰ Paul, *supra* note ???, at 48-49.

⁵¹¹ Surrey, *supra* note ???, at 982.

⁵¹² Harry J. Rudick, *The Problem of Personal Income Tax Avoidance*, 7 LAW & CONTEMP. PROBS. 243, 264 (1940). See also Paul and Havens, *supra* note ???, at 253 (considering “the taxation of family units as affiliated groups of persons”).

⁵¹³ *Id.*

⁵¹⁴ *Burnet v. Wells*, 289 U.S. 670, 677 (1933).

⁵¹⁵ *Helvering v. Clifford*, 309 U.S. 331, 335 (1940).

⁵¹⁶ *Hormel v. Helvering*, 312 U.S. 552 (1941).

⁵¹⁷ Pavenstedt, *supra* note ???, at 220 (writing that the Court considered “one spouse the *alter ego* of the other”).

⁵¹⁸ See *Helvering v. Janney*, 311 U.S. 189 (1940) (prohibiting such sales).

⁵¹⁹ See *Taft v. Helvering*, 311 U.S. 195 (1940) (permitting such deductions).

levels for single and married taxpayers.⁵²⁰ These and other decisions prompted observers to predict that the Court would uphold a tax statute treating the family as a unit.⁵²¹

Congress appeared willing to consider such a statute. It noted the Court's receptivity to taxing the family as a unit,⁵²² and it debated policy alternatives to tax families on aggregate rather than individual income.⁵²³ A number of income 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 (1921, 1924, 1934).⁵²⁴ Mandatory joint returns had fared as poorly, failing to pass in 1941 and 1942.⁵²⁵ And although concerns over the plan's constitutionality had ebbed,⁵²⁶ the prevailing wisdom was that "you cannot get the votes to make a law out of it."⁵²⁷

⁵²⁰ See *Brushaber v. Union Pacific Railroad*, 240 U.S. 1 (1916).

⁵²¹ See e.g., George E. Ray, *Proposed Changes in Federal Taxation of Community Property: Income Tax*, 30 CAL. L. REV. 397, 432 (1942) ("In view of the overwhelming authority indicating how the Supreme Court would feel on the question were it presented to that tribunal at the present time, there can be little doubt as to the constitutionality of a statutory provision taxing the income of a family as a unit."); Surrey, *supra* note ???, at 814 (concluding that "the Court will not place a constitutional barrier" to taxing the family as a unit); Magill, *supra* note ???, at 164 (stating that the constitutionality of taxing the family as a unit "seems reasonably clear").

⁵²² See H.R. Rep. No. 77-1040 (1941), at 10 (noting that 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"). See also *id.* at 17-22 (revealing Congress' understanding of the constitutional issues).

⁵²³ See *Revenue Revision of 1942: Hearing before H. Comm. on Ways and Means*, 77th Cong. (1942) (mandatory joint return with pro-rata liability); *Revenue Act of 1942: Hearing before the S. Comm. on Finance*, 77th Cong. (1942) (same); H.R. Rep. No. 77-1040 (1941) (same); 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).

⁵²⁴ See *supra* notes ??? and accompanying text.

⁵²⁵ See *supra* notes ??? and accompanying text.

⁵²⁶ See *supra* note ???. See also Ray, *supra* note ???, at 429.

⁵²⁷ *Reduction of Individual Income Taxes: Hearing on H.R. 4790 before S. Comm. on Fin.*, 80th Cong. 282 (1948) (statement of Eugene Millikin).

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.”⁵²⁸ The idea of universalizing community property for tax purposes floated around Congress in the early 1940s,⁵²⁹ and tax experts also discussed the concept.⁵³⁰ Universalizing community property even made its way into the public discourse.⁵³¹ Common law states sought tax saving for their married residents without adopting community property laws. In 1947, ten states⁵³² petitioned Congress for a law universalizing community property for purposes of filing federal income taxes, and individual legislators responded by introducing twenty bills providing income-splitting privileges to spouses nationwide.⁵³³ Public opinion polls reflected the widespread support, with 74 percent 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?”⁵³⁴

⁵²⁸ Blough and Shoup, *supra* note ????. See also Mr. Haas to Mr. Magill (Oct. 27, 1937), OTA/DTR Files, Box 54; Jacob Viner, *Detailed Comments on Randolph Paul’s Recommendations for Income Tax Increases* (Dec. 14, 1939), OTA/DTR Files, Box 54.

⁵²⁹ *Revenue Revision of 1942*, *supra* note ???, at 32-33 (statement of Robert Taft) (“It seems to me, if you want to eliminate [disparate tax treatment 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”). See also *id.*, at 2731 (statement of Ellsworth C. Alvord, Chairman, Committee on Federal Finance, U.S. Chamber of Commerce) (urging Congress to “bring[] the other States up to the level of community property States”).

⁵³⁰ See George T. Altman, *Community Property: Avoiding Avoidance by Adoption in the Revenue Act*, 16 TAX MAG. 138, 141 (1938) (arguing for taxing similarly situated families equally “without touching the community property system, without running the blockage of the Constitution, and with a fairness that cannot be challenged—by recognizing the family as a positive unit and thereby extending to all the benefits now limited to the few”); ERWIN N. GRISWOLD, CASES AND MATERIALS ON FEDERAL TAXATION 427 (1940) (querying “would it be feasible to extend to all of the country the tax benefits of the community system without forcing the adoption of that system in fact?”).

⁵³¹ See Stephanie Hunter McMahon, *To Save State Residents: States’ Use of Community Property for Federal Tax Reduction, 1939-48*, LAW & HIST. REV. (forthcoming 2009); Jones, *supra* note ???, at 266-74.

⁵³² Colorado, Illinois, Iowa, Kansas, Missouri, Nebraska, North Dakota, Oregon, South Dakota, and Wisconsin.

⁵³³ See Anita Wells, *Community property States* (Sept. 1, 1947), OTA/DTR Files, Box 54, Folder GA-5/47.15. Ten additional bills would have granted similar privileges to married residents in specific states.

⁵³⁴ *Individual Income Tax Reduction: Hearing on H.R. 1 before S. Comm. on Fin.*, 80th Cong. 551 (1947) (statement William Fulbright).

By 1948, five states and one territory decided they could wait no longer for Congress to intervene.⁵³⁵ They took the drastic step of converting from longstanding common law regimes to community property law, while twelve more states considered similar measures.⁵³⁶ 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.”⁵³⁷ 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.⁵³⁸

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.⁵³⁹ Income 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, saying they offered “the

⁵³⁵ Hawaii (1945), Michigan (1947), Nebraska (1947), Oklahoma (1939), Oregon (1943), and Pennsylvania (1947). See McMahon, *supra* note ??? (discussing states’ efforts to reduce federal taxes on their residents).

⁵³⁶ Alabama, Colorado, Connecticut, Illinois, Indiana, Massachusetts, New Hampshire, New Jersey, New York, North Dakota, Wisconsin, and Wyoming. Some common law residents took equally drastic measures to secure tax savings associated with community property law by migrating to neighboring community property states. For the tax-induced exodus from common law to community property states, see Statement of William Fulbright, *supra* note ???, at 557; CONG. REC. (May 27, 1947), at 5837-40 (statements of John McClellan, William Knowland, Kenneth Wherry, William Fulbright).

⁵³⁷ *Individual Income Tax Reduction: Hearing on H.R. 1, supra* note ???, at 490 (statement of Stanley Surrey, Tax Legislative Counsel, Treasury Department).

⁵³⁸ *Id.* See also Erwin G. Griswold, *Defense Emphasizes Our Need for Sound Tax System*, N.Y. TIMES (Jan. 12, 1941), at E8 (arguing that forcing common law states to adopt community property was “highly undesirable in view of complexity of that regime”).

⁵³⁹ See e.g., RANDOLPH PAUL, TAXATION FOR PROSPERITY (1947); COMMITTEE FOR ECONOMIC DEVELOPMENT, TAXES AND THE BUDGET: A PROGRAM FOR PROSPERITY IN A FREE ECONOMY (1947); HAROLD M. GROVES, POSTWAR TAXATION AND ECONOMIC PROGRESS (1946); Clark Warburton, *A Suggestion for Post-War Taxes*, 36 AM. ECON. REV. 882 (1946); Carl Shoup, *Three Plans for Post-War Taxation*, 34 AM. ECON. REV. 757 (1944).

wrong kind of tax reduction at the wrong time.”⁵⁴⁰ The Republican leadership repackaged tax cuts for a third time in a “veto-proof” bill that provided something for everyone.⁵⁴¹ It increased personal and dependent exemptions,⁵⁴² a move that appealed to Democrats, and it lowered tax rates across the board,⁵⁴³ a move supported by Republicans. The bill also permitted spouses nationwide to split marital income and property for purposes of filing federal income taxes,⁵⁴⁴ 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 estate and gift taxes that effectively had raised transfer taxes on community property spouses but not on common law spouses.⁵⁴⁵

Truman opposed the bill,⁵⁴⁶ but there was little he could do to prevent its enactment. The only other policy alternative before Congress was a measure providing “marital partnership agreements,” which allowed spouses nationwide to enter into legal contacts dividing all income and property in half.⁵⁴⁷ Supporters considered the proposal a much “fairer solution” than the split-income plan, which created “a wholly artificial division of income between husband and wife” and which erected a “barrier in the way of further economic advancement of the married

⁵⁴⁰ H.R. Doc. No. 80-322 (1947), at 1.

⁵⁴¹ RANDOLPH PAUL, *TAXATION IN THE UNITED STATES* 475 (1954).

⁵⁴² H.R. 4970, § 201, 80th Cong. (2nd Sess. 1948).

⁵⁴³ *Id.* at §§ 101 and 401.

⁵⁴⁴ *Id.* at § 301.

⁵⁴⁵ *Id.* at § 351. *See also* S. REP. NO. 80-1013 (Supplementary Report) (1948). The 1942 amendments ignored the separate ownership interests of spouses under community property law, and taxed the predeceasing spouse as full owner of the marital property as well as the surviving spouse on her share at death. With respect to the gift tax, the law treated community property spouses as a single entity, meaning community property husbands and wives received one gift tax exemption while common law spouses received two. In 1947, community property representatives made it clear that their support for the income splitting provision was contingent upon repeal of the 1942 amendments. *See e.g.*, Mr. Shere and Mr. DeWind to Under Secretary Wiggins (Oct. 2, 1947), at 1, in *Methods of Equalizing Income and Estate Tax Treatment of Spouses in Community and Noncommunity Property States (Meetings, Proposals, etc., July 11, 1947)*, OTA/DTR Files, Box 54, Folder GA-5/47.10.

⁵⁴⁶ As with the two previous tax bills, Truman charged that it primarily benefited the wealthy. He was certainly right with respect to the split income provision: 97.5 percent of its tax benefits went to less than four percent of taxpayers. *See Reduction of Individual Income Taxes: Hearing on H.R. 4790, supra* note ???, at 30 (statement of John Snyder, Secretary, Treasury Department).

⁵⁴⁷ H.R. 3842, 80th Cong. (1947).

women of the common law States.”⁵⁴⁸ Opponents, including the Treasury Department, argued that these marital contracts would “give rise to...new legal and administrative problems,”⁵⁴⁹ and that determining “bona fide contracts” from “sham transactions” would threaten effective tax administration.⁵⁵⁰ The “better solution” from the standpoint of “simplicity of taxpayer compliance, ease of administration, and minimum of disruptive change in the local laws of States is a plan to give husbands and wives, in all States, the option of dividing their incomes equally for income tax purposes.”⁵⁵¹ Income splitting was a legal fiction, an administrative device that lowered and equalized taxes nationwide.⁵⁵²

Indeed, income splitting prescribed the soothing pill of “tax reduction and tax equalization.”⁵⁵³ It avoided the pitfalls of previous proposals. It did not “do violence to the fundamental property laws” of states, nor raise constitutional concerns.⁵⁵⁴ It produced tax uniformity among married couples, discouraged income-shifting schemes, and minimized litigation over tax-saving devices. In addition, it stanching the “impetuous enactment” of community property laws.⁵⁵⁵ And, at least in theory, it promised tax saving for all married

⁵⁴⁸ *Revenue Revisions, 1947-48: Hearing before the H. Comm. on Ways and Means*, 80th Cong. 811-12 (1948) (statement of James Ingerbretsen, Chairman, Citizens’ Committee of California Taxpayers).

⁵⁴⁹ Division of Tax Research Staff, *Major Issues in Drafting the 50-50 Family Income Splitting Proposal* (Oct. 2, 1947), at 1-2, OTA/DTR Files, Box 54, Folder GA-5/47.10.

⁵⁵⁰ Mr. Greenfield to Mr. Surrey, *Conference on Equalizing Income and Estate Tax Treatment of Spouses in Community Property and Non-Community Property States* (July 11, 1947), at 4, OTA/DTR Files, Box 54, Folder GA-5/47.10.

⁵⁵¹ DTR Staff, *supra* note ???, at 2. See also Division of Tax Research Staff, *Notes on H.R. 3842, The Gearhart Bill* (July 16, 1947), at 2-3, OTA/DTR Files, Box 54, Folder GA-5/47.11.

⁵⁵² Congress took no action on the marital partnership bill. Feminist legal scholars have explained this inaction by arguing that the proposal “violat[e] gender roles,” and “preserved a tax system incentive for giving married women what were perceived as enhanced legal rights to income and property.” Jones, *supra* note ???, at 295.

⁵⁵³ H.R. Rep. No. 80-1274, at 3 (1948); S. Rep. No. 80-1013, at 3 (1948).

⁵⁵⁴ *Reduction of Individual Income Taxes: Hearing on H.R. 4790, supra* note ???, at 305 (statement of Allan H. W. Higgins, Chairman, Committee on Equalization of Taxes in Community Property and Common Law States, Section of Taxation, American Bar Association).

⁵⁵⁵ S. Rep. No. 80-1013, at 23 (1948).

couples,⁵⁵⁶ a group that comprised 80 percent of all households.⁵⁵⁷ Common law spouses benefited from dividing income equally, while community property spouses benefited from dividing income from separate property, a source of income which was not split equally under community property laws.

Given its many merits, the income splitting provision, along with the rest of the Revenue Act of 1948,⁵⁵⁸ sailed through Congress, easily overcoming President Truman's third veto of tax legislation in less than a year.⁵⁵⁹ 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 would "add a chapter" to "the long history of the treatment of family income" that was "likely the last for many years."⁵⁶⁰ Moreover, Surrey noted, 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."⁵⁶¹

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

CONCLUSION

⁵⁵⁶ In 1948, the tax benefits associated with income splitting accrued disproportionately to a small cohort of wealthy taxpayers. *See supra* notes ???, and accompanying text. However, rising incomes and the declining value of tax-free thresholds in the postwar period meant that an increasing number of spouses realized income-splitting benefits. *See* COMMERCE DEPARTMENT, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 303 (1975) (showing median family income increasing nearly 70 percent from 1949 to 1959); C. EUGENE STEUERLE, THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA 20 (1992) (showing tax-exempt thresholds falling from 46.8 percent of per capita personal income in 1948 to 13.3 percent in 1981).

⁵⁵⁷ KAREN ANDERSON, WARTIME WOMEN: SEX ROLES, FAMILY RELATIONS, AND THE STATUS OF WOMEN DURING WORLD WAR II 5 (1981).

⁵⁵⁸ Revenue Act of 1948, 62 Stat. 110 (1948).

⁵⁵⁹ H.R. Doc. No. 80-589 (1948), at 2.

⁵⁶⁰ Stanley S. Surrey, *Federal Taxation of the Family: The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1105 (1948).

⁵⁶¹ *Id.* at 1113.

In 1935, tax lawyers Randolph Paul and Valentine Havens argued that treating husbands and wives as single tax units could solve the longstanding 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,” they wrote, “if the husband and wife were a tax unit or ‘unified welded entity.’”⁵⁶² 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”⁵⁶³ 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 would still require examining ownership interests of individual family members under state property law.

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 wife who file a joint return,” Treasury official Stanley Surrey told Congress in 1947.⁵⁶⁴ 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 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.”⁵⁶⁵

⁵⁶² Paul and Havens, *supra* note ???, at 245 (internal citations omitted).

⁵⁶³ *Id.*

⁵⁶⁴ Statement of Stanley Surrey, *supra* note ???, at 490.

⁵⁶⁵ S. REP. NO. 80-1013, at 4 (1948).

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.”⁵⁶⁶ 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.”⁵⁶⁷ Neither did it stop federal and state courts from subsequently invoking *Seaborn* over 125 times—and as recently as last year⁵⁶⁸—for the “ownership equals taxability” principle.⁵⁶⁹ 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.

Nearly eighty years after *Seaborn* and sixty years after passage of the income splitting provision, the “ownership equals taxability” principle still resonates. *Seaborn* is still good law. And, as will be shown in a subsequent Article, members of state-recognized civil partnerships—marriage, domestic partnerships, civil unions, reciprocal beneficiary relationships—can still invoke its precept of individual ownership when reporting federal income tax liability.

⁵⁶⁶ 282 U.S. 101, 110 (1930).

⁵⁶⁷ 26 U.S.C. (old) § 22. Current law reflects the same focus on individual ownership, even for married taxpayers. See 26 U.S.C. §§ 1(a)-(d) (the federal income tax imposes tax on 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 make a single return jointly with his spouse”).

⁵⁶⁸ See *Mitchell v. Comm’r*, 2008 U.S. Tax Ct. LEXIS 33 *8 (2008).

⁵⁶⁹ Cases on file with author.