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THE IMPACT OF COMMUNITY PROPERTY LAW ON FEDERAL TAXATION

J. W. Riehm, Jr.*

The impact of the basic concepts of community property law upon the development of the law of federal taxation has been tremendous. The most recent, and perhaps most significant examples of this influence are the present income splitting and marital deduction provisions of the Internal Revenue Code. Other effects are to be found in the development of the devices used in common law states to split income among members of the family, viz., assignments, trust and family partnerships. These consequences have been the result, not of a single collision between the community property concepts and taxation concepts, but of a series of contacts which have served to deflect the law of federal taxation from its anticipated course.

1914-1930

The first contact between federal taxation concepts and community property concepts came in the very early days of the development of the former. In December 1914 and January 1915 the Treasury Department had said "the income of husband and wife should not be combined in a return of income for the purpose of assessing the additional or surtax" and "the additional or surtax imposed by the act will be computed on the basis of the income of each individual." When the question was raised of how the income of a husband and wife residing in Texas and Washington should be treated the Bureau published Office Decision 426 in April 1920. That OD stated that in Texas and Washington the husband wife might divide the income from community property

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and report it separately notwithstanding the husband's right of management and control because the husband and wife jointly owned the community property from which the income was derived. However, the OD stated that "[a] husband and wife may not divide the salary of the husband or the wife for the purpose of reporting such salary in separate returns for income tax purposes" and income from separate property had to be reported by the spouse owning the separate property. The latter statements were extracted almost verbatim from OD 285 which had been published a short time earlier. Thus, as of April 1920 there was only a partial recognition of the community property system for federal income tax purposes.

On August 12, 1920 the Secretary of the Treasury addressed a communication to the Attorney General in which he requested an answer to three questions, all pertaining to the filing of separate returns of husbands and wives in Texas, (1) are the earnings of the husband and the wife community income, (2) is income from separate property community income and (3) is income from community property community income? The Attorney General, A. Mitchell Palmer, in his opinion of September 10, 1920 answered all three questions in the affirmative, thus indicating that the husband and wife in Texas could file separate returns and split all their income between those returns. The opinion was adopted by the Bureau and promulgated as Treasury Decision 3071. The Secretary of the Treasury then requested an opinion as to the rule to be applied in all the other community property states, as well as the rule to be applied in determining what portion of the community property was to be included in the gross estate of a deceased spouse for estate tax purposes. On February
26, 1921 Attorney General Palmer replied to the Secretary, stating “that all the community property states except California [had held through] their courts that the wife has, during the existence of the marriage relations, a vested interest in one-half of the community property” and for that reason his conclusions as to Texas, formulated in his opinion of September 10, 1920, were applicable to all states except California. He further stated that in all community property states except California only one-half of the community property would be included in the gross estate of the deceased spouse. Immediately upon receipt of the Attorney General’s opinion it was adopted by the Bureau and promulgated as TD 3138. Thus, husbands and wives in all states except California were allowed to split the community income and to include only one-half of the community property in the gross estate of the first to die. The reason underlying the rule was the existence at that point in time in the evolution of the concept of taxable income that the tax was to be levied on the owner of the property. And since the state courts had said that the wife had a vested interest she was deemed to be the owner of one-half of the community property for tax purposes.

The Treasury was dissatisfied with the state of the law as interpreted by the Attorney General and attempted to change it by suggesting the insertion of a provision in the Revenue Act of 1921 to the effect that “income received by any community shall be included in the gross income of the spouse having the management and control of the community property.” That provision was included in the bill which was to become the Revenue Act of 1921 when it was sent from the House to the Senate. The provision was modified slightly in the Senate Finance Committee.

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9 Id., 458.
10 Id., 463.
12 §208 67th Cong. 1st Session, 1921, Report of the Senate Committee on Finance.
13 61 Cong. Rec. 5909 (1921).
and eliminated on the floor of the Senate.\textsuperscript{14} Another attempt to insert a similar provision in the Revenue Act of 1924 failed in the House Committee on Ways and Means.\textsuperscript{15}

The Treasury was not the only one dissatisfied with the Attorney General’s interpretation of the law; the married citizens of California were outraged that the Bureau had adopted the Attorney General’s opinion which had concluded that California wives did not have the same status as wives in other community property states. They found support for their contention that they should receive the same treatment as husbands and wives in the other community property states in the case of \textit{Blunt v. Wardell}.\textsuperscript{16} That was a California case which involved the question of whether the one-half of the community property taken by the wife on the death of the husband should be included in the latter’s gross estate for federal tax purposes. The U. S. District Court held that only one-half the community property should be included in the deceased husband’s gross estate, saying:

"The claim of the government is inequitable at best. It is conceded that the interest of the surviving wife in community property in other community property states is exempt from the estate tax under identical laws, and nothing short of some imperative controlling necessity would justify a court in upholding the tax in a single state. I find no such obstacle in the way of administering equal and impartial justice in this case, and the demurrer is overruled."\textsuperscript{17}

After affirmance by the Circuit Court of Appeals\textsuperscript{18} the Government petitioned the Supreme Court for a writ of \textit{certiorari} which was denied in March 1922.\textsuperscript{19} The outcome of the \textit{Blum} case

\begin{itemize}
\item \textsuperscript{14} 61 \textit{Cong. Rec.} 5922, 7229 (1921).
\item \textsuperscript{15} 67 \textit{Cong. Rec.} 175-176. Hearings before Committee on Ways and Means, House Reports, Revenue Revision 1924, pp. 194, 348, 349, 375, 478, 482.
\item \textsuperscript{16} 270 Fed. 309 (D.C., N.D. Cal. 1920).
\item \textsuperscript{17} \textit{Id.} at 314.
\item \textsuperscript{18} 276 Fed. 226 (CA -9, 1921).
\item \textsuperscript{19} 258 U. S. 617, 42 S. Ct. 271 (1922). In April 1922 the Solicitor General made a motion in the Supreme Court to revoke the order denying the petition for \textit{certiorari} and to allow the petition to remain unacted upon until the California Supreme Court decided a case, \textit{Roberts v. Wehmeyer}, 218 Pac. 22 (1923) which involved a determina-
prompted the Secretary of the Treasury to ask the Attorney General to reconsider that portion of the latter's opinion of February 26, 1921 which concluded that the wife did not have a vested interest in the community property in California. In his reply dated March 8, 1924 the Attorney General reviewed the earlier opinion, the legislative enactments of California, state court decisions and *Blum v. Wardell* and then amended the opinion of February 26, 1921 to comply with *Blum v. Wardell*. On the basis of that opinion the Bureau issued TD 3568 on March 26, 1924, which directed the Collectors in California to allow California husbands and wives to split the reporting of community income between their separate returns. However, the California victory was short-lived because the Secretary of the Treasury then asked the Attorney General to recall the opinion of March 8 for further consideration and review. That was done on May 27, 1924 and on May 31, 1924 the Bureau published TD 3596 which noted that the March 8 opinion had been recalled and directed that "the auditing and closing upon a community property basis of both income and estate tax cases arising in the State of California will be held in abeyance pending further consideration of the matter by the Attorney General." 

On October 9, 1924 the new Attorney General, Harlan F. Stone (later Associate Justice and Chief Justice of the Supreme Court) reaffirmed the opinion of March 8 but in so doing said:

"My action in so doing must be construed as limited to the precise question presented in that 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. I express no opinion with respect to the prin-
ples which govern the taxation of income derived from community property."

On receipt of Attorney General Stone's opinion the Secretary of the Treasury inquired of him as to the scope of the opinion. In a letter dated January 27, 1925 the Attorney General said:

"In reply to your inquiry, I have to say that my opinion of October 9, relating to community property in California, treats only of the incidence of estate tax upon the wife's share of such community property of which she assumes possession at her husband's death. In no way does it touch upon the question as to whether the husband and wife may make separate returns of the income from their community estate. That phase of the matter is therefore as open as it ever was in California and you are free to litigate it by appropriate legal proceedings."

Thus the opportunity to litigate the question was presented and the Bureau chose to proceed, giving notice by TD 3670, dated February 7, 1925.

The test case was immediately begun in the United States District Court for the Northern District of California and a judgment obtained in April 1925. It was an action by the executors of the estate of one R. D. Robbins against the United States to recover income taxes paid by the decedent for the year 1918 when the Collector refused to accept separate returns filed by the decedent and his wife (in which they had split the community income) and insisted that the tax be assessed as if the income all belonged to the decedent. The District Court held the wife had a vested interest in the community income and ordered the refund. The case was taken directly to the Supreme Court and argued in December 1925.

It must be noted at this point that prior to 1925 there had been little disagreement as to the underlying theory of taxability. While the various Revenue Acts had simply said that a tax should be

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25 Id. at 405.
28 Robbins v. United States, 5 F. (2d) 690 (1925).
levied, collected and paid for each taxable year upon the net income of every individual, etc., the phrase "income of" was interpreted to mean income owned by the individual. Ownership was the test of taxability, and one determined ownership by reference to established legal concepts. Consequently, reference to the law of the community property states was appropriate to determine who owned the income being received by the marital community, and one cannot say that the contact established between tax concepts and community property concepts resulted in a clash of theories at that time. However, it becomes apparent as we review the evolution of the concept of taxable income that at about that point in time some question arose as to whether taxability of income should be limited by the concept of ownership. The statement by the Commissioner in TD 3670 to the effect that:

"... there is grave doubt of the legality of these regulations, [which permit income splitting] 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 his wife. It is obviously a somewhat strained construction to consider that the husband has received only one-half of his earnings for income tax purposes although he controls for practical purposes the whole."

when viewed in retrospect indicates an intention to broaden the concept of taxable income which escaped the eyes of many at the time it was published. Consequently, it is not strange that neither Government counsel nor counsel for the taxpayers alluded to the question of control referred to by the Commissioner in TD 3670, in the course of their presentation of the Robbins case to the Supreme Court. Yet when the decision reversing the District Court was announced less than a month later Mr. Justice Holmes’ opinion contained the following significant statement:

"Even 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

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husband for the whole. Although restricted in the matter of gifts, etc.,
he 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.
See Garrozi v. Dastas, 204 U. S. 64. His liability for his wife's support
comes from a different source and exists whether there is community
property or not. That he may be taxed for such a fund seems to us to
need no argument. The same and further considerations lead to the
conclusion that it was intended to tax him for the whole. For not only
should he who has all the power bear the burden, and not only is the
husband the most obvious target for the shaft, but the fund taxed,
while liable to be taken for his debts, is not liable to be taken for the
wife's, Civil Code, § 167, so that the remedy for her failure to pay might
be hard to find. The reasons for holding him are at least as strong as
those for holding trustees in the cases where they are liable under the
law."

The responses to the decision were those we have come to ex-
pect, i.e., action by the Bureau, action by Congress and autopsies
in the form of law review articles. On February 3, 1926, the
Bureau asked the Attorney General to reconsider his opinions of
September 10, 1920 and February 26, 1921, referred to above.
Next, Congress added Section 1212 to the Revenue Act of 1926,
which provided as follows:

"Income for any period before January 1, 1925, of a marital com-
munity in the income of which the wife has a vested interest as dis-
tinguished from an expectancy, shall be held to be correctly returned
by the spouse to whom the income belonged under the state law appli-
cable to such marital community for such period. Any spouse who
elected so to return such income shall not be entitled to any credit or
refund on the ground that such income should have been returned by
the other spouse."

Thus, the question of the effect of the Robbins decision on tax-
payers in the other seven community property states was set at
rest for the tax years behind January 1, 1925.

Simultaneously, the Attorney General was engaged in gather-
ing evidence to determine whether the Robbins decision should

31 Id. at 327.
apply to the other seven community property states. To obtain
the information, he held public hearings and asked for and re-
ceived detailed briefs from attorneys in those states on the ques-
tion of the intrinsic nature of the wife’s interest in the community
income in each of the states. On July 23, 1927 the Acting At-
torney General, William D. Mitchell, addressed an opinion to
the Secretary of the Treasury in which he stated that his investi-
gation convinced him “that the problems presented can not be
settled by an opinion of the Attorney General and that the situation makes it inappropriate under established precedents for me
to express any conclusions,” whereupon he withdrew the opinions
of September 10, 1920 and February 26, 1921 “in order to leave
you free, as has been done in similar situations, to arrange for
test cases in the courts or otherwise deal with the matter as you
may think proper.” The Bureau immediately began test suits in
Texas, Louisiana, Arizona and Washington which culminated in
the Supreme Court decision in Poe v Seaborn and its companion
cases. Poe v. Seaborn involved the question of whether all the in-
come of a Washington community had to be included in the hus-
band’s return or might be split between the spouses. The Commissi-
oner denied the husband and wife the right to split the income,
Seaborn paid a tax on the entire income under protest and then
brought suit for refund. While the cases were pending the Bureau
issued Mimeograph 3723 which indicated that it did not propose
to go behind the tax year 1927 if it was successful in the test suit
and that attitude was affirmed by a letter from Secretary Mellon
to Congressman Garner in 1929.

The import of Mr. Justice Holmes’ words quoted above to the

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34 282 U. S. 101, 51 S. Ct. 58 (1930); Texas, Hopkins v. Bacon, 282 U. S. 122, 51 S.
Ct. 62 (1930); Louisiana, Bender v. Pfaff, 282 U. S. 127, 51 S. Ct. 64 (1930);
36 Note 32, supra, p. 169.
effect that the husband might be taxed on the whole of the income even though the California courts were to hold the wife had a vested interest was lost to most of the readers of his decision. The Attorney General in his opinion of July 16, 1927 to the Secretary of the Treasury said: “The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income tax on the community income if that income belongs to him . . .” 87 Of the legal authorities available to the writer for examination only one explored the scope of Mr. Justice Holmes’ words, and came to the conclusion that although there might be a constitutional ground for taxing income to the beneficial owner thereof, the husband in the Robbins case was not the beneficial owner of all the community income. 88 Only the Bureau seemed to grasp the significance of the words for it said in Mim. 3723: “The position of the Bureau is that community income can not be divided for income tax purposes but must be returned, and the tax in respect thereof paid, by the spouse (usually the husband) having under the laws of the State the management and control thereof.” 89 It must therefore have sounded strange to hear the Solicitor General arguing before the Supreme Court in Poe v. Seaborn that “[t]axation of income to the person who controls and enjoys it, rather than to the person who holds title to the property from which it is derived, is a principle which is recognized in various provisions of the Revenue Acts.” 90

The opinion of the Court in Poe v. Seaborn was the first written by Mr. Justice Roberts and indicated the approach he was to take to nearly every tax case presented to the Court during his tenure, whether expressed as a majority opinion or in a dissent. The decision was for the taxpayer, allowing the splitting of the community income between the spouses, and was based on the pre-

87 Note 33, supra, p. 266.
89 Note 35, supra, p. 90.
90 282 U. S. 101, 103.
mise that the word “of” in the phrase “tax upon the net income of the individual” denotes ownership. After stating his premise, and without offering proof to bulwark it, Mr. Justice Roberts then turned to the state law to show that the wife owned one-half the community income. In answer to the Government’s contention that the husband should be taxed because he had control Mr. Justice Roberts said that the control was merely that of an agent, and he then distinguished the Robbins case on the ground that the wife’s interest in California was a mere expectancy as compared with a vested interest in Washington.

The interesting question posed by Poe v. Seaborn is one which will never be answered, viz., what prompted, or why did Mr. Justice Holmes remain silent while the new Justice completely ignored a concept of taxable income which Holmes had apparently been developing with great care? A reference to Holmes’ dissenting opinion in Eisner v. Macober indicates that he did not feel the concept of taxable income should be limited by legal niceties. He said:

"I think that the word ‘incomes’ in the Sixteenth Amendment should be read in ‘a sense most obvious to the common understanding at the time of its adoption.’ Bishop v. State, 149 Indiana, 223, 230; State v. Butler, 70 Florida, 102, 133. For it was for public adoption that it was proposed. McCulloch v. Maryland, 4 Wheat 316, 407. The known purpose of this Amendment 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."  

He then made the statement in the Robbins case, quoted above, to the effect that he who has all the power should bear the burden of the tax. And in the very year in which Poe v. Seaborn was decided Holmes had further developed the concept that control could be the basis for levying the tax in his opinions in the cases

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41 252 U. S. 189, 40 S. Ct. 189 (1920).
42 Id. at 219.
of *Lucas v. Earl*[^42] and *Corliss v. Bowers*[^44]. In *Lucas v. Earl* he said:

"But this case is not to be decided by attenuated subtleties. It 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 skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no 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."[^45]

In *Corliss v. Bowers* he said:

"But taxation 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. * * * The income that is subject to a man's unfettered command 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."[^46]

In an article entitled *The Taxation of Family Income*[^47], Professor Bruton pointed out the underlying weakness of the rationale of the opinion in *Poe v. Seaborn* when he said:

"This 'vested interest' argument was based upon the common law theory of ownership embodied in the conception of legal title. It was a theory which was inept and inadequate to describe community property relations which were developed under an alien jurisprudence. It had no real connection with the tax problem involved which should have been approached from the standpoint of the taxpayer's actual relation to the income for which he was taxed."[^48]

An excellent case note on *Poe v. Seaborn* supports Professor Bruton.

[^47]: 41 YALE L. J. 1172 (1932).
[^48]: Id. at 1173.
Bruton's statement by pointing out the impossibility of differentiating between it and *Lucas v. Earl* on technical grounds. 49

The immediate effect of the decision in *Poe v. Seaborn* and its companion cases so far as the taxpayers in community property states were concerned was to secure the right of the husband and wife to divide the community income between them against the attack of the Bureau (California having finally patched up its law to conform with that of the other seven 50). The more far-reaching effects of the decision were not immediately significant. Yet when viewed in retrospect one can see that the decision constituted a climax, of a sort, in the conflict; the conflict between the evolving concepts of taxation and the older concepts of community property law, which had been increasing in intensity over the ten year period from 1920 to 1930, and from which the concepts of taxation emerged second best.

1931-1950

The next, and more dramatic climax in the conflict between the two sets of concepts was reached some fifteen years later, in 1945, after the conflict had died to a dull rumble in the early '30s and then began to intensify again. The period from 1932 to 1942 was marked by the initial criticism of the Supreme Court's decision in *Poe v. Seaborn* noted above, a series of attempts on the part of the Treasury and others to obtain uniformity of taxation between married individuals in community and non-community property states by Congressional action, a further development of federal tax concepts and a growing recognition that the theory underlying the decision in *Poe v. Seaborn* and those new tax concepts were irreconcilable.

The Bureau's answer to *Poe v. Seaborn* was encompassed within the broad scope of proposals submitted to Congress in connec-

49 44 Harv. L. Rev. 652 (1931).

tion with the Revenue Act of 1934. As Professor Bruton had pointed out in his article the depression had prompted individuals to use every method at their disposal to minimize their taxes. Such activity called for a tightening up of the tax laws, and in furtherance of that plan the Bureau submitted to the House Committee on Ways and Means in December 1933 a proposal that the Revenue Act of 1934 contain a provision for mandatory filing of joint returns. The proposal offered certain advantages not present in the earlier (1921 and 1924) proposals the Bureau had made for taxing the community income to the spouse who earned or controlled it. Thus, mandatory filing of joint returns would (1) remove, in the non-community property states, the discrimination against the family whose income was earned by one spouse rather than by both, (2) remove, in the non-community property states, the discrimination against the family which lived off earned income and could not achieve division of that income because of the rule of Lucas v. Earl as could the family whose income was derived from investments, (3) negate in larger measure the use of family partnerships, gifts and trusts used to obtain a division of income and (4) tax husbands and wives in community and non-community property states alike. The proposal was not adopted by the Ways and Means Committee. It was recommended by the Bureau again in 1937 but again the Committee failed to adopt it. On recommendation by the Bureau a third time in 1941 it was finally adopted by the Committee but it failed to pass the House. Congress also had before it during that period proposals for solving the community property dilemma by taxing the community income to the spouse who earned or controlled it (the proposal which had been submitted by the Bureau in 1921 and 1924) and by allowing the equal division of income between all

51 Note 47, supra.
spouses in all states. However, Congress did nothing to solve the problem until 1942.

During the 1930-1942 period the approach of the Supreme Court to the subject of federal taxation was undergoing a change which has profoundly influenced the development of the basic concepts of taxability. While the Court had only one case before it which dealt with a taxation-community property question during the period the reasoning expressed in its opinions in the field of federal taxation was clearly inconsistent with the rationale of Poe v. Seaborn and consistent with that expressed by Mr. Justice Holmes in Lucas v. Earl and Corliss v. Bowers, i.e., the opinions indicated an intention to disregard refinements of title and to tax the person who had control of the income or property and derived the actual benefit from it. Consequently, the writers dealing with the problem near the end of the period felt certain that if Poe v. Seaborn were presented to the Court in 1940 or 1942 instead of 1930 it would have been decided the other way. Had the Bureau presented the Court with another test case at that time the Court could doubtless have overruled Poe v. Seaborn if it felt the urge, by using the same procedure it had used in Helvering v. Hallock in overruling the St. Louis Trust cases. It could

53 For an excellent analysis of the arguments for and against each of the three proposals and the proposals for obtaining equality of treatment in estate and gift tax cases as well, see Ray, Proposed Changes in Federal Taxation, 30 CALIF. L. REV. 397, 408-425, 532-545 (1942); see also, Altman, Community Property and Joint Returns, 19 TAXES 588 (1941).

54 Lang v. Commissioner, 304 U. S. 264, 58 S. Ct. 880 (1938), involving the extent to which proceeds of life insurance policies purchased with community funds should be included in the gross estate of the insured.


56 3 MERTENS, LAW OF FEDERAL INCOME TAXATION, § 1901. Ray, Proposed Changes in Federal Taxation, 30 CALIF. L. REV. 397, 407 (1942); Oliver, Community Property and the Taxation of Family Income, 20 TEX. L. REV. 532, 555 (1942); Altman, Community Property in Peril, 19 TAXES 262 (1941); Lowndes, Community Income and Alimony, 20 TAXES 3 (1941).

57 309 U. S. 106, 60 S. Ct. 444 (1940).

have said that the decisions in *U. S. v. Robbins* and *Lucas v. Earl* furnish the “harmonizing principle” of which *Poe v. Seaborn* was but an incorrect application. And any contention that continued administrative practice and continued reenactment without change in the statute indicated legislative concurrence in the rule of *Poe v. Seaborn* would probably have been answered by a further reference to the *Hallock* decision wherein Mr. Justice Frankfurter had said: “We walk in quicksand when we try to find in the absence of corrective legislation a controlling legal principle.” Whether that would be a sufficient answer in a field in which our Congressmen had been forcefully expressing themselves (as evidenced by the reception the Bureau’s mandatory joint return proposal had received) is perhaps questionable. Certainly the Court would have been subjected to much criticism, and even if it had reversed its earlier position the result would not have been particularly desirable since imposition of a tax solely on the basis of control of the income would have reversed the hardship. Since the husband generally has control of the income in the community property states he would be taxed on the entire income even though the wife earned part of it. Similarly, he would be taxed on the entire income even though a portion of it was income from the wife’s separate property, while under like circumstances a couple in a common law state could file separate returns. Thus it was clear that the proper solution to the problem lay in legislative rather than judicial action.

It was at that point the Revenue Act of 1942, acclaimed the greatest tax bill in American history,\(^6\) was enacted. The Act contained sections\(^6\) which amended §§ 811 (e) and 811 (g) of the Internal Revenue Code by adding the following:

“(2) Community interests.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States,

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\(^6\) §§ 402(b) (2) and 404(a).
or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

§ 811(g) "(4) Community property.—For the purposes of this subsection, premiums or other consideration paid with property held as community property by the insured and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been paid by the insured, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse; and the term 'incidents of ownership' includes incidents of ownership possessed by the decedent at his death as manager of the community."

The Act contained a section which added § 1000 (d) to the Code. § 1000 (d) read as follows:

"(d) COMMUNITY PROPERTY.—All gifts of property held as community property under the law of any State, Territory, or possession of the United States, or any foreign country shall be considered to be the gifts of the husband except that gifts of such property as may be shown to have been received as compensation for personal services actually rendered by the wife or derived originally from such compensation or from separate property of the wife shall be considered to be gifts of the wife."

In the preparation of the Act the Bureau had once again done its best to obtain the enactment of the mandatory joint return provision. Secretary Morgenthau spoke not only of the discrimination between community and non-community property states but also of the great loss of revenue suffered by allowing married couples to file separate returns, pointing out that approximately $300,000,000 was being lost annually throughout the nation because of the ability of husbands and wives to split incomes by

61 § 453.
gifts of property to one another, by filing of separate returns in
community property states, etc.62 However, the plea of the Bureau
was not adopted by the committee and when the Bill was reported
out it contained only the estate and gift tax provisions set out
above.63

The new additions to the estate and gift tax law were soon made
the subject of biting criticism and suggestion that they be repealed
or declared unconstitutional.64 A part of the criticism was certainly
justified since the sections were not carefully drafted and were
approved without extended hearings or discussion. The result
was the presence of several technical defects65 which were partially
corrected by administrative action.66 The balance of the criticism,
the attack made on the constitutionality of the sections when
viewed in retrospect assumes the character of a last ditch stand
which never had a chance. An analysis of the developments in the
field of federal taxation up to that date shows an unbroken chain
of circumstances pointing to a holding by the Court that the new
sections were constitutional. Even if one had believed that the
rationale of Poe v. Seaborn still controlled the Court's thinking
in income tax cases involving community property questions no
such belief was justified in the estate tax field. The Court had
announced the basis on which the new section 811 (e) (2) would
be held constitutional as early as 1910 in Moffitt v. Kelly67 and
had reaffirmed it in the tenancy by the entireties cases68 and the
joint tenancy cases.69 Nevertheless, considerable care was exer-

62 Hearings before Committee on Ways and Means on H. R. 7378, 78th Cong. 2d
372.
64 Jackson. New Federal Estate and Gift Taxes on Community Property, 21 TAXES
535 (1943); Frieland, Community Property and Its Federal Tax Problems, 23 TAXES
326 (1945); de Funiak, Principles of Community Property, § 255 (1943).
65 See: Winstead, Estate Taxation of Community Property, 24 Texas L. Rev. 34,
footnote 32, and Winstead, Aftermath of the Herbst and Wiener Decisions, 24 Tex. L.
66 Note 65 supra, p. 449-453.
67 218 U. S. 400, 31 S. Ct. 79 (1910).
cised in the selection and presentation to the Court of two test cases, *Fernandez v. Wiener* and *United States v. Rompel.* In each case the decedent had been a resident of a community property state. (Wiener a resident of Louisiana, Herbst a resident of Texas). The decedents' executors had filed estate tax returns in which they had reported only one-half the value of the community property. The Commissioner thereupon assessed deficiencies which were paid in each case and suits for refund were instituted. In each case the District Courts gave judgment for the executors on the ground that the new code sections violated the due process clause of the Fifth Amendment. In two opinions delivered by Chief Justice Stone, the Court upheld the constitutionality of § 811 (e) (2) and 811 (g) (4) and reversed the District Courts; saying:

"The principles which sustain the present tax against due process objections are precisely those which sustained the California tax, measured by the entire value of community property in *Moffitt v. Kelly,* supra."

During the period in which the critics of the 1942 amendments to the Code were planning their attack which culminated in the *Fernandez v. Wiener* decision they suffered a blow at the hands of the Court which doubtless gave them an indication of the reception they were to receive. That blow was the Court's decision in *Commissioner v. Harmon.* In 1939 Oklahoma had adopted a consensual community property law, apparently for the purpose

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An attempt to test the constitutionality of § 811 (e) (2) indirectly by a state action involving Wiener failed when the U. S. Supreme Court dismissed the appeal from the Louisiana Supreme Court for want of jurisdiction, 321 U. S. 253, 64 S. Ct. 548 (1944); see, Jackson, *The Wiener Case,* 18 *Tulane L. Rev.* 525 (1944). For the background of the *Rompel* case, see, Weeks, *The Test Cases,* 18 *Tex. B. J.* 217 (1944).


72 Note 70, supra.

73 326 U. S. 340, 357.


of securing the advantages of income splitting to its married citi-
zens. Mr. Harmon immediately took advantage of the new law
and he and his wife filed separate returns on their community
income received between the effective date November 1, 1939 and
December 31, 1939. The Commissioner denied that right to split
the income and assessed a deficiency. The Tax Court and the
Court of Appeals for the Tenth Circuit held for the taxpayer.
On appeal the Supreme Court reversed the decisions of the lower
courts on the ground that the consensual aspect of the Okla-
ahoma Act served to distinguish the case from Poe v. Seaborn and
bring it within Lucas v. Earl. The writer of the opinion was Mr.
Justice Roberts, the author of Poe v. Seaborn. A dissent by
Mr. Justice Douglas, concurred in by Mr. Justice Black, indicated
what they thought of the desirability of retaining the rule of Poe
v. Seaborn when Mr. Justice Douglas said:

"I do not mean to defend Poe v. Seaborn. I only say that if we are to
stand by it, we should not allow it to become a 'vested' interest of only
a few of the states. The truth of the matter is that Lucas v. Earl and
Helvering v. Clifford on the one hand and Poe v. Seaborn on the other
state competing theories of income tax liability. Or to put it another
way, Poe v. Seaborn has been carved out as an exception to the general
rules of liability for income taxes. If we are to create such exceptions
we should do so uniformly. We should not allow the rationale of Poe
v. Seaborn to be good for one group of states and for one group only.
If we are to abandon the rationale of Poe v. Seaborn, we should do so
openly and avowedly. If the practical consequences of applying the
rationale of Poe v. Seaborn to other situations would be disastrous to
federal finance, it is time to reexamine the case. The rule which it
fashions is the rule of this Court. We have the responsibility for its
creation. If we adhere to it, we should apply it without discrimination.
If we are not to apply it equally to all states, we should be rid of it.
This is the time to face the issue squarely."

77 1 TC 40 (1942).
78 139 F (2d) 211, (CA-10, 1943).
79 Note 74, supra.
When the decisions in Commissioner v. Harmon and Fernandez v. Wiener are read together and one notes the unwillingness of even Mr. Justice Roberts to extend Poe v. Seaborn it is clear that by the end of 1945 a second climax in the struggle between community property and federal tax concepts had been reached and that this time the tax concepts stood in the paramount position. The victory was predicted on the now secure premise that federal tax law, not local law, determines what is to be taxed; but it was a hollow victory, for the Court was in no better position to overrule Poe v. Seaborn at that time than it was in 1942 when it faced the obstacles of stare decisis, administrative practice and continued reenactment, and Congress declined to act for reasons of its own. Thus, following the Harmon decision, Hawaii adopted a community property statute in 1945. Oklahoma corrected the defect in its community property statute by making it mandatory rather than consensual, whereupon the Bureau permitted Oklahoma spouses to split their income on separate returns. Oregon, which had followed Oklahoma’s lead in 1943, without waiting for the Harmon decision in the Supreme Court, repealed its law in 1945 and then reenacted it in 1947; and by 1948 Michigan, Nebraska and Pennsylvania had also joined the ranks of the community property states, though Pennsylvania immediately dropped out when its Supreme Court declared its law unconstitutional.

The rush of the common law states to the community property band wagon prompted a reexamination of the problem of taxing the family and was in large measure responsible for a study made by the Treasury in 1947 entitled “The Tax Treatment of Family Income.” The Treasury described five possible methods by which the dilemma might be resolved but did not recommend adoption of any one of them; they were (1) taxing earned income to the earner, (2) legalized family partnerships, (3) contractual

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82 Oregon Laws, 1943, ch. 440.
83 Oregon Laws, 1947, ch. 525.
splitting, (4) mandatory joint returns and (5) optional splitting. The relative merits of the proposals were reviewed by various writers, and while it appeared that the mandatory joint return might have been the most satisfactory solution to the problem, the consensus was that the optional splitting proposal had the best chance of congressional acceptance, particularly if coupled with a repeal of the 1942 amendments to §§ 811 (e), 811 (g) and § 1000, and the addition of split estate and gift provisions. The Special Tax Study Committee which had been appointed by the House Committee on Ways and Means to study tax problems generally, recommended incorporation of the optional splitting provisions in the 1948 revenue bill and that recommendation was followed by the Ways and Means Committee. The consensus proved to be correct and when the Revenue Act of 1948 was passed on April 2, 1948, over presidential veto, it contained the now familiar optional splitting provisions.

The enactment of the Revenue Act of 1948 confirmed the opinion of many that the non-community property states which had adopted community property laws in 1945, 1946 and 1947 had done so for the sole purpose of obtaining the tax advantages offered, for those states immediately began repealing their community property statutes. Since the enactment the taxpayers of the country have filed income tax returns for two years as well

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85 Lest anyone presume that the idea of allowing husbands and wives in non-community property states to split their income for tax purposes is of recent origin it should be noted that it was first suggested in Maggs, Community Property and the Federal Income Tax, 14 Wash. L. Rev. 351, 448 (1926).

86 See: Excellent comment, Proposals for Preventing Family Tax Avoidance, 57 Yale L. J. 788, 798-803 (1948); Foley, Federal Corrective for Community Property Inequity, 26 Taxes 236 (1948); James, The Income of Married Couples, 26 Taxes 311 (1948).


as many estate returns and to date there has been little criticism of the optional splitting provisions.\footnote{90}

**Conclusion**

It was noted in the course of the hearings on the 1948 revenue bill that it was politically impossible to take from the community property states the advantages accorded them by Poe v. Seaborn.\footnote{91} Consequently, if past experience is any guide to the future the fact that married couples in all forty-eight states have now had a taste of the advantages offered by the optional splitting provisions serves as an assurance that those provisions will remain in the Code indefinitely. Actually the same end result might have been reached via the mandatory joint return route which would have simultaneously closed the door on the use of family partnerships, interfamly gifts and trusts as income splitting devices;\footnote{92} but as Chairman Millikin reminded a witness during the hearing: "The only difficulty with it [the mandatory joint return proposal] is that you can not get the votes to make a law out of it."\footnote{93}

It is impossible to say whether the adoption of a mandatory joint return provision would have improved our federal tax structure more than the optional splitting provisions. It can, however, be stated with certainty that the optional splitting provisions which have been characterized as a "presently acceptable solution to the family income problem"\footnote{94} are a direct consequence of the

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\footnote{90}{There is some indication that the marital deduction provisions of the Code are defective and having created new inequalities of treatment as between taxpayers in community property and common law states. De Wind, The Approaching Crisis in Federal Estate and Gift Taxation, 38 Calif. L. Rev. 79, 86 (1950).}

\footnote{91}{Hearings before Committee on Finance on H. R. 4790, 80th Cong., 2d Sess., 282, 404-407.}

\footnote{92}{The disadvantage of mandatory joint returns were noted in Note 86, supra. The constitutionality of a mandatory joint return provision has been discussed \textit{ad nauseam}, the center of the discussion being the case of Hoeper v. Tax Commission, 284 U. S. 206. That such a provision would be constitutional is now generally accepted, the basis being Mr. Justice Douglas' statement in his concurring opinion in Fernandez v. Wiener, "But I see no reason why that which is in fact an economic unit [the family] may not be treated as one in law." 326 U. S. 340, 365.}

\footnote{93}{Note 91, supra, at 272.}

\footnote{94}{Note 87, supra, at 1106.}
conflict between community property law concepts and the concepts of federal taxation which began as a minor skirmish in 1920. It is difficult to credit a victory in the conflict to either community property law or federal tax law. While it might appear on the surface that community property law had won since it influenced legislation, beneath the surface one finds that the concept of taxable income which has been evolving through Supreme Court decisions since 1920 has not been affected by community property concepts except momentarily in 1930 by the decision in *Poe v. Seaborn*. However, of greater significance is the indictment which the history of the conflict levels at us for our failure to recognize the separateness of federal tax concepts. The statement by Mr. Altman in 1943 in the course of his analysis of the 1942 Act changes in the gift tax sections of the Code is an example. He said: "To federal taxation, riveted as it is to the common law, the law of community property has become an insoluble paradox." The apparent truth of that statement lies in our failure to use the common law and the law of community property as they should be used for tax purposes, simply as a guide to tell us what consequences flow from the application of those laws to any given transaction. Once the consequences are determined the task then becomes one of determining whether Congress intended to tax them, and determination of that intent is not reached by reference to local law.

Mr. Randolph Paul has recently reminded us of the responsibilities of the tax adviser and a review of the history of the community property-taxation conflict raises again the question of whether we are not attempting to escape that responsibility when we fail to apply objectively the concepts of taxable income announced by the Supreme Court.

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