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COMMENT

LISTEN TO THE DRUMS—THE COMPULSORY JOINT RETURN

By the time a professor of taxation met his eleven o'clock class on the morning of December the eighth, the events of the past twenty-four hours had entirely disrupted all student interest in the law. His pupils "remembered Pearl Harbor." They had tried to "carry on" and learn bankruptcy at eight o'clock, their nine o'clock class had been self-dismissed to listen to the declaration of war upon Japan, the ten o'clock hour had been devoted to lively bull-sessions. The professor of taxation knew he must either break the tension or dismiss the class. "From what I hear on the radio," he started, "many legal problems may be overshadowed by current events. But I'll give anyone here ten-to-one that taxation continues." Suddenly the class laughed, the circuit of electric suspense snapped, and the meeting was one of the finest in the course.

That taxation will continue and increase is an obvious truism. This accentuation will, however, have a peculiar interest to Washington taxpayers. A pronounced inequality exists in the application of the income tax to married persons similarly circumstanced but living in community property and non-community property states. The former much more frequently enjoy the privilege of the separate return, thereby avoiding higher surtax brackets, because their state has declared that the income of either, unless from separate property, belongs to both. Since the salary of the husband, for example, is community property, the Supreme Court has held that the spouses could each file separate returns on one-half of it.[1] The Court looked at the Revenue Act, which states that the tax is to be "levied and collected . . . upon the net income *of* every individual",[2] and decided that the "of" denoted ownership rather than procurement.[3]

The advantage enjoyed in community property states is easily perceived, and the unequal tax load on otherwise comparable families living in different states is evident. Upon looking deeper, however, a more general—and just as discriminatory—use of separate returns can be found. They are permissible whenever the wife has income which, under the law of the state of domicile, is separate. In most states, individual returns are used when the wife has her own income either from a salary or from her separate capital. In community property states, the privilege is more widely enjoyed because *by law* practically every wife has separate income, for example, one-half of her husband's salary.

Ignore the community property aspects for the moment, and consider the general operation of separate returns upon family *A* and family *B*. Each has a net income of $20,000; each consists of a husband, wife, and two children; each pays a considerable income tax. In family *B*, however, the wife contributes $10,000 toward the family wealth, either from a salary or from her investments—probably the latter through appropriate transfers of property from her tax conscious husband.[4] Two returns are filed by family *B*, and each spouse pays a

[1] The incongruity of such a holding is apparent. Separateness of husband and wife is the underlying theory of separate returns; yet community property is based upon the unity of spouses. As stated by Mr. Altman, "the division of community income between husband and wife in separate returns was a division allowed for the very reason that the income was indivisible." Altman, *Community Property in Peril* (1941) 19 TAX MAG. 262, 264.

[2] INT. REV. CODE § 11 (1939). Italics supplied.

[3] Poe v. Seaborn, 282 U. S. 101 (1930). Because the case turned upon construction of the income tax laws, the Court also relied upon the failure of Congress to adopt legislation *contra* the argument of the successful taxpayer.

[4] In non-community property states, most of the separate income of wives comes from capital rather than from salaries. The use of individual returns thereby works in favor of many persons enjoying "unearned" income. Compare this thought with the Congressional policy of lightening the tax load slightly on "earned" income through the earned income credit of 10 per cent. *See* INT. REV. CODE § 25 (a) (3) (1939).

surtax on income below the $10,000 bracket—about 13% of the income subject to surtax. Yet family *A*, although living costs and ability to pay are identical, must pay a tax of fifteen hundreds more dollars since its income is that only of the husband and falls just below the $20,000 bracket—about 21% of the income subject to surtax.[5]

Community property presents only a specialized form of this inequality. If family *A*, in which the husband earns all the income, lives in Washington, these spouses will now find to their convenience that they are in the same position as family *B* in the non-community property state. Thus American families discover that unless they have separate income as normally understood in non-community property states, or separate income by operation of law in community property states, their family coffers will be reached by the higher surtaxes.

The preceding examples purposely have been phrased in terms of discrimination against the non-community, one-income family. Since Congressional efforts are being directed more and more toward increased revenues, one may well suggest that our legislators will find no time to aid the "oppressed." Another approach, however, proceeds upon the premise that the tax load of the one-income family is fair, and is properly based upon ability to pay. It follows that those who can file separate returns have a windfall. One can conclude from this minor premise that equalization of the tax burden will increase the revenues by removing an *advantage* rather than decrease federal receipts by eliminating a *discrimination*. Thus the war will probably make triumphant heretofore unsuccessful efforts[6] to eliminate the favored position of the separate return.[7]

Five plans to balance the operation of the tax load upon families have been suggested:[8]

[5] Roughly, family *A* would pay a tax of $4,300.00, while husband and wife in family *B* would each pay only $1,400.00—a total of $2,800.00. This amounts to a $1,500.00 differential; family *A* pays over 50 per cent more tax than does family *B*.

[6] For example, see *Hearings Before a Sub-Committee of the Committee on Ways and Means*, 73d Cong., 2d Sess. (1934) 21; Paul, *The Background of the Revenue Act of 1937* (1937) 5 U. OF CHI. L. REV. 41, 84-5. Community property senators, helped by ignorance and indifference on the part of the rest of the country, have thwarted such attempts. GREEN, THEORY AND PRACTICE OF MODERN TAXATION (2nd ed. 1938) 51. Although the addition of Oklahoma to the ranks of those states having a community property standing swells this body of senators to 18, the present writer feels that the "ignorance and indifference" will disappear. *See* note 7, *infra*.

[7] *The Seattle Times*, Jan. 25, 1942, p. 1, col. 3, carried a story on the Treasury's program for "plugging loopholes" in the income tax laws. The community property law, said Secretary of the Treasury Morgenthau, costs the Treasury about $55,000,000 annually, and separate returns in other states decrease revenues by about $260,000,000 each year. As suggested above, his attack is on the ground of tax avoidance rather than on the basis of eliminating a discrimination.

[8] Community property creation of separate income is only a segment of a more general problem—"Whose Income Is It?" *See* GRISWOLD, CASES AND MATERIALS ON FEDERAL TAXATION (1940) 422 *et seq.* Poe v. Seaborn, 282 U. S. 101 (1930) established that community income is the separate income of each spouse, fifty-fifty. This holding, however, was by no means the end of litigation involving the impact of community property law. The issue has now become: What Is Community Property and Income? It amazes one to glance at the indices to recent volumes of Board of Tax Appeals Decisions and thus to realize the body of community

1. Adoption by all states of an elective community property system —the Oklahoma Plan.[9]
2. Extra deductions on the joint return which will make it so attractive that all families will choose the joint return.[10]
3. Division of income between husband and wife in *all* states permitting *all* to enjoy separate returns.[11]
4. Disregard of marital status for income tax purposes.[12]
5. The compulsory joint return of husband and wife.[13]

The first suggestion contemplates no federal action, and merely leaves to each state whether it will climb on the band wagon. Even if this motive of tax avoidance were sufficient to overcome the inertia of the *status quo* of property law in non-community states,[14] it seems absurd to force a complete change in property law upon states which desire it only for one purpose. This suggestion appears to be both ineffective and impractical.

The second and third suggestions seek the same result as the compulsory joint return—the placing of all families upon an equal tax level—by a different means which would not encounter a constitutional

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property law that is being considered by the Internal Revenue Bureau. Assignments between family members to create separate income have vexed the courts as well as the treasury department for years, and interfamily trusts have prompted numerous litigations. *See* Bruton, *The Taxation of Family Income* (1932) 41 YALE L. J. 1172 and recent cases, note 51, *infra*. This comment goes deeper than any of these specialized problems. The writer recognizes that under existing statutes and legal principles. separate returns are permissible. The quarrel is with the continuation of the separate return, regardless of *why* the income is separate. In the following discussion of the compulsory joint return, one will appreciate not only that inequality will be swept away, but also that the very trying problem of whether certain income is that of husband or wife will be eliminated, for it will make no difference whose income it is if the spouses have to file a joint return.

[9] A good discussion can be found in Daggett, *The Oklahoma Community Property Act—A Comparative Study* (1940) 2 LA. L. REV. 575.

[10] Gutkin and Lesnik, *Espousing Spouses for Taxation Purposes* (1940) 18 TAX MAG. 731, 735 *et seq.* Practical examples have been worked out to show the effectiveness of their plan in practice. See also Paul and Havens, *Husband and Wife Under the Income Tax* (1936) 5 BROOKLYN L. REV. 241. These authors feel that the compulsory joint return would be held unconstitutional and suggest the deduction plan as sound constitutionally, for deductions are a matter of legislative grace. Heiner v. Donnan, 285 U. S. 312 (1932), however, suggests that the fifth amendment prohibits arbitrary classifications by Congress just as the due process and equal protection clauses of the fourteenth amendment prevent unreasonable classification by state legislatures. As suggested later, p. 110, *infra*, the compulsory joint return should be treated as a classification problem. Under this approach, it would survive and fall exactly the same as the deduction proposal. *See* note 15, *infra*, suggesting that economic compulsion makes the joint return in fact mandatory.

[11] Altman, *Community Property; Avoiding Avoidance by Adoption in the Revenue Act* (1938) 16 TAX MAG. 138.

[12] Altman, *Community Property and Joint Returns* (1941) 19 TAX MAG. 588.

[13] Bruton, *The Taxation of Family Income* (1932) 41 YALE L. J. 1172; Comment (1941) 10 GEO. WASH. L. REV. 92; Comment (1941) 28 VA. L. REV. 88; Comment (1940) 49 YALE L. J. 1279. See also an expansion of this suggestion—a complete family return including all persons living in the same household, note 49, *infra*.

[14] Daggett, note 9, *supra*, recognizes that Oklahoma adopted its elective community property plan for income tax purposes.

problem presented by the latter.[15] Since this constitutional objection probably is of little weight today,[16] the simpler joint return proposal is an easier means to the same end. The second suggestion involves a highly complicated system of deductions and exemptions which would only add to the confusion of an already too complex tax measure. The third would necessitate a revision of surtax brackets, and would place a heavier burden upon unmarried persons. They both seek the same end, equality, but the second uses *joint* returns as the means while the third expands the availability of *separate* returns.

The fourth proposal wants to treat the income of spouses the same as the income of unmarried persons. The impact of community property laws—an incident of marriage which would be ignored—upon the status of income would be eliminated.[17] The availability of separate returns in community property states would be greatly curtailed, but the advantage of the separate return would still exist for "genuine"[18] separate incomes of spouses both in community and non-community property states. This suggestion differs from all the other proposals for the others would reach the end of putting *all* families on an equal basis *regardless of the source of the income.* Since the fifth suggestion, the compulsory joint return, is the least complex means to complete equalization, the remainder of this comment will concern itself with the choice between ends: Complete reform through the mandatory joint return v. Partial reform through disregard of the marital status for income tax purposes.

There is at least some possibility that the elimination of the favored position of families in community property states by use of the fourth proposal will be the extent of the 1942 amendments, since that aspect of the unequal application of the income tax law is the most commonly noticed.[19] If Congress enacts such legislation, the Washington taxpayer will have difficulty in determining the status of income from capital, and the Bureau of Internal Revenue will be confronted more and more often by other devices to keep the income separated. In Washington, would property purchased prior to the enactment of the suggestion be owned half-and-half for tax purposes? Or would its

[15] But can we say that the second (extra deductions) plan is not in fact the compulsory joint return? Certainly in *substance* the husband and wife are forced to file a joint return because of an economic saving greater than the avoidance of high surtax brackets in separate returns. Very logically, then, any arguments against the compulsory joint return apply as well to this "deduction" proposal. See note 10, *supra.*

[16] *See* discussion, p. 109, *infra.*

[17] One writer suggests the following amendment to the income tax laws to carry this suggestion into effect: "The amount reported on each return shall be determined without increase, diminution, or division because of any right, title, or interest created by or dependent on the marriage relation." Altman, note 12, *supra,* at 590.

[18] That is, the law would look more to the procurement of the income than to its ownership.

[19] Secretary of the Treasury Morgenthau is aware of the tax savings created by separate returns in other than community property states. *See* note 7, *supra.* Notice that the tax saving in non-community property states is considerably larger than that in community property states. Of course, there are 39 non-community states and only 9 community property states. *See also* Mr. Morgenthau's strong views before the Senate. *Hearings before Finance Committee on H. R. 5417,* 77th Cong., 1st Sess. (1941) 3, 12 *et seq.*

"tax ownership" be traced to the source of the funds used to buy it? What about income from capital acquired after the new act? The fourth suggestion lacks detail, and seems to be looking only at salaries. Its ramifications are unpredictable.[20]

The avoidance of peculiar and vexing problems would seem sufficient reason for Washington interests to favor the choice of the compulsory joint return since the favored position enjoyed up to the present must inevitably go before long.[21] Why not let the reform broom sweep clean? Are there any compelling reasons against complete equality through the compulsory joint return?

The privilege of filing separate returns creates discrimination between families. Nevertheless its advocates counter that the joint return would discriminate between two other classes. Mrs. *A* and Miss *B* each has a salary of $5,000 a year, but since Mrs. *A's* husband contributes $10,000 to the family funds, Mrs. *A*, under the joint return, finds her income tax computed in a higher surtax bracket. The joint return, continues the argument, discriminates between married and unmarried persons.

Even admitting the doubtful proposition that joint returns also result in a discrimination,[22] is the choice between evils difficult? Surely families with one source of income are more nearly comparable to families with two sources of income than single persons are to spouses.[23]

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[20] Commentators who favor merely the elimination of the community property advantage are attracted and incensed by the privilege in those states of separating the husband's salary for income tax returns. Certainly this particular advantage jars the one-income family in non-community states the hardest. The remedies suggested, therefore, are shooting at the removal of this peculiar form of tax avoidance, and the impact upon income from *capital* is overlooked. Such lobbyists must broaden their viewpoint; otherwise, Congress may commit the common legislative error of dropping two eggs while trying to catch one that has slipped.

Another suggestion which looks only at community property states would not be as confusing as that of Mr. Altman, but has even more bugs in it for the community property taxpayer. This scheme would levy the income tax upon "the *manager* of the property"—in Washington, the husband—and all community income would be included with his separate income. Notice particularly that community income includes the salaries of both spouses. Inequality between states would remain, for under this proposal the discrimination would be against community property taxpayers! The separate return would be unavailable in Washington unless the wife had separate, income-producing capital. *Report of Committee on Ways and Means, H. R. 350*, 67th Cong., 1st Sess. (1921) 11; *Hearings before Committee on Ways and Means*, 68th Cong., 1st Sess. (Revenue Revision) (1924) 194, 348, 349, 375, 478, 482.

[21] *See* discussion, p. 103, *supra*.

[22] Presumably the income tax is based upon ability to pay, and since Mrs. *A* has access to her husband's pockets, she is "better off" than Miss *B*.

[23] A brief on the compulsory joint return was prepared in August, 1941, by the New York County Lawyers' Association. Committee on Taxation. *Hearings before Finance Committee on H. R. 5417*, note 19, *supra*, at 176. They suggest that in families where the members' incomes are in the medium brackets, "their treatment of all the income of each of the members as common income is unusual. If a man with [considerable] income . . . should marry a woman with a little income of her own, which is not used toward the support of the family, why should the husband's tax burden be increased and the wife be subjected to tax at high rates on her small income?" The last thought, referring to the wife, is untenable, because, regardless of whether her income is pooled or used for her ex-

Only the joint return will place all *families* upon an equal basis.[24] Yet opponents of the compulsory joint return argue as follows:

> "That the innocent [genuine separate income taxpayers] often suffer with the guilty [community property separate income taxpayers] is a defect of life which has always harassed the preacher of virtue . . . . The innocent often suffer with the guilty because the legislator—or the perpetrator—of justice cannot distinguish the innocent from the guilty."[25]

This language is hard to follow. The only "guilt" in community property states rests upon the fact that more families are able to take advantage of the separate return than in other states. The basic difficulty is the different tax load on similarly circumstanced families. Community property creation of separate income is only one means that leads to inequality, and if our sense of fair play demands reform we should do more than merely amputate a finger to cure an infection which has spread from the wrist.[26]

Another objection has been raised to the sweeping provisions of the compulsory joint return suggested to Congress in 1941.[27] Joint returns were to be required of husband and wife for each taxable year during which at any time they lived together.[28] Marriage and living together were the two conditions that would require a joint return. By eliminating either condition, two socially undesirable means of tax evasion were thus to be made possible. First, a couple with substantial incomes might choose to live together but not to marry. Would any number of Americans with sufficient wealth to effect an appreciable income tax saving through separate returns incur the condemnation of society just to save a few hundred, or even a few thousand, dollars? To people of means, social ostracism—or perhaps just lifted eyebrows—would be more painful than the payment of a larger income tax. The compulsory joint return would promote free love in so few cases, or cause the morally prudent to "forget one another" in denial of fundamental principles so rarely, that the policy of all sovereigns to

traordinary whims, she is a part of the family unit and is better off than an unmarried woman because of her husband's support. Probably a husband has a better complaint than his wife when her income is not pooled. When one considers, however, that unless a man's wife has separate income for her caprices she will ask for an allowance above household expenses, is not this husband better off than the normal man who moans once a month about the "unnecessary" bills of his wife?

[24] As noted previously, other proposals will reach the end of complete equalization. The writer is now considering the joint return as the best nominee for the job.

[25] Altman, note 12, *supra*. One can fear just the opposite. Mr. Altman abhors the possibility that Congress may go all the way; the real injustice will continue if Congress only scratches the surface and does not get down to the basic "guilt"—the separate return.

[26] Compare the directly opposed view expressed in Mr. Altman's reference to the compulsory joint return: "It was a cure that would destroy the tissue with the germ." Altman, note 12, *supra*, at 589. His germ is the community property advantage; it is humbly suggested that the real germ is the separate return, and community property privileges merely part of the infected tissue.

[27] H. R. 5417, as introduced in the House, § 111 (a).

[28] Two exceptions were declared: The year in which the marriage occurred, and any year in which a reconciliation was effected if separation had prevented a joint taxable year immediately preceding.

protect marriage would not be contravened by the mandatory joint return.

Second, would the tempetation of separate returns lead otherwise happily married spouses to live apart? The thoughts expressed above negate such an idea, let alone the fact that the increased expenses of separate residences would probably be as great as, or even greater than, the income tax saving.

One administrative problem, however, would arise where for any reason separation had taken place without divorce. Mr. *A* files his separate return in Seattle, and Mrs. *A* files hers in Portland. Later the revenue department gets wind of the fact that on an evening last Fall, Mr. *A* was seen entering his wife's residence. Furthermore, the neighbors disclose that they did not see him leave—and they kept a close watch!—until the following morning. Think of the scandal created when it is proved that Mr. *A* spent a night with his wife! The Board of Tax Appeals may have to examine the evidentiary facts needed to prove adultery to determine tax liability. Yet this man is not a correspondent; he is the husband.

This difficulty has been over-emphasized.[29] It could be liquidated by eliminating "living together" as a factor forcing the joint return. Then the family tax would be imposed on all married persons unless separated or divorced *by law*. Such legislation, however, would discriminate against those spouses actually but not legally separated, for they would have separate expenses and yet pay a high surtax. Congress can choose between the administrative problem of the 1941 suggestion, and the arbitrariness of the above proposal. Neither alternative presents sufficient difficulty to classify the choice as one between evils.

Another objection can be dismissed summarily. Women's hard earned property rights and economic freedom[30] are no more injured by the requirement that they file a join return with their husbands, than is men's historical independence jeopardized by that which forces them to pay income taxes in conjunction with their wives. No one has suggested that the mandatory return would abridge *men's* rights.

The economic and social arguments against the joint return strike one as superficial and fanciful. A legal thorn, however, prompts one to hesitate before picking the rose of complete reform since the half-way measure is free from constitutional objection.[31] *Hoeper v. Wisconsin*[32] involved a state statute requiring the husband to report the income of his wife and minor children with his own, and to pay the tax on the entire amount. Since this imposed a tax liability on the husband for

[29] See especially Altman, note 12, *supra*.

[30] *New York Times*, July 19, 1941, p. 12, col. 2.

[31] Poe v. Seaborn, 282 U. S. 101 (1930) turned upon construction of the Revenue Act. *See* discussion, p. 102, *supra*. The indication is that if Congress specifically declared that community property laws are not to be considered in determining "Whose Income Is It?" no constitutional issues would be raised. Language in Burk-Waggoner Oil Ass'n v. Hopkins, 269 U. S. 110 (1925), is in point. It would indeed be difficult to argue that one-income families in community property states *must* be classified with two-income families in non-community states. If Congress emphasizes the spouse who earns or procures the income as the basis of classification, they will avoid the holding of the *Seaborn* case which felt that Congress had intended to tax upon a basis of ownership of the income.

[32] 284 U. S. 206 (1931).

income which was not his own,[33] the Supreme Court held that he had been deprived of property without substantive due process of law in violation of the fourteenth amendment. Apparently the fifth amendment would place the same limitation upon a federal compulsory joint return.[34] A provision allocating liability between husband and wife for the payment of the tax should meet and answer this constitutional objection. The spouses would be considered a unit for *computation,* but individuals for *payment.*[35]

A less obvious but more fundamental constitutional objection to the joint return was suggested in the *Hoeper* case. While allocation of liability, as suggested above, would meet the specific holding here, the court recognized by dictum a principle that the taxable value of one's property cannot be measured by another's.[36] Applying this principle, one can argue that since higher surtax brackets would be reached by treating husband and wife as a taxable unit for computation, the measure of the tax on each spouse is increased. Such a holding, however, would be an extension of constitutional principles,[37] and by analogy, discredit can be thrown upon the application of the doctrine to *reasonable* fact patterns.[38] Why not admit that the compulsory joint return measures the tax on one spouse partly by the income *legally* owned and controlled solely by the other, and then try to discover whether such a classification is reasonable? If we are to have a "measure principle" read into the Constitution, should not its restraint on Congress be determined by the traditional tests applied in due

[33] The husband's ownership and control over the wife's property had been abolished by statute.

[34] Heiner v. Donnan, 285 U. S. 312 (1932). Note, however, the strong dissent of Justice Stone.

[35] *Cf.* Note (1941) 55 HARV. L. REV. 145. The tax liability could be ascertained very simply. Each spouse would pay the proportionate share of the total tax that his income bore to the joint income. England, in effect, has the compulsory joint return. The spouses file separate returns, but the surtax is computed in each upon the combined income of husband and wife and divided between them in proportion to their respective incomes. Finance Act, 1927, 17 and 18, GEO. V., c. 10, § 42 (9). *See also* MAGILL, TAXABLE INCOME (1936) 288.

[36] ". . . because of fundamental principles . . . any attempt to measure the tax on one person's property or income . . . by reference to . . . another . . . [is unconstitutional] . . ." Hoeper v. Wisconsin, 284 U. S. 206, 215 (1931).

[37] Justice Roberts cited Knowlton v. Moore, 178 U. S. 41, 77 (1899) for this proposition. *He did not mention* that in the earlier case Justice White expressly stated: "On this question, however, in any of its aspects, we do not even intimate an opinion." Thus we find the dicta in the Hoeper case based only upon a suggested, but not accepted earlier dictum.

[38] *See* discussion, p 110, *infra,* especially notes 51 and 52. Maxwell v. Bugbee, 250 U. S. 525 (1919) offers one analogy. In that case, the surtax rates of the New Jersey inheritance tax were applied after taking into consideration assets outside New Jersey. It was unsuccessfully contended that the state could not consider other assets in determining the rate of tax because *situs* deprived it of jurisdiction. In the instant case of the compulsory joint return, the argument is that the income of a wife cannot be considered when determining the tax of the husband because *ownership* by the wife deprives Congress of "jurisdiction" (power) to act. *See also* United States v. Whyel, 19 F. (2d) 260 (W. D. Pa. 1927), *aff'd,* 28 F. (2d) 30 (C. C. A. 3d, 1928) *cert. denied,* 278 U. S. 664 (1929), sustaining in dictum the compulsory consolidated return for affiliated corporations on the basis of the unity of control present in such groups.

process and equal protection cases? Thus the rule might be stated: Congress cannot *arbitrarily and unreasonably* measure one's tax by reference to another's property. Principles resting upon degree create uncertainty, but the present writer feels that the compulsory joint return itself is so just that a flat rule of constitutional law vitiating such a statute would immediately demonstrate that rule to be unsound.

As a practical matter, the husband has indirect benefit from his wife's separate income just as she does from his, although legally each income is subject to the individual, unfettered control of only one of the spouses. The wife is not made to pay a higher income tax because her income is *measured* with her husband's; she has a greater tax liability simply because she is married and has a *greater ability to pay.* The "measure principle" crops up only because the joint return may be used by Congress as a means to measure this ability to pay. Since the joint return is only a means, the end—family equality—is the problem which should attract our constitutional scrutiny. Any attack upon the compulsory joint return should be made on the basis of the resulting *classification* rather than on the ground of how the tax load is determined. The futility of such an attack, however, has been indicated in the previous discussion,[39] and recent decisions of the Supreme Court, indicating a recognition of the family as a unit, coupled with the ever-increasing need for federal revenue, make one feel that the Court today would quickly limit the *Hoeper* decision to its own facts.[40]

Two of these recent cases have noted the unity of husband and wife in a joint return to the detriment of the Bureau of Internal Revenue, while numerous cases have stopped tax avoidance by recognizing transactions between members of the family as ineffectual.[41] The two holdings against the government, which recognized that Congress intended to unify husband and wife in the now optional joint return,[42] are a strong indication that Congressional classification of spouses as one taxing unit would be held reasonable. In *Janney v. Helvering,*[43] one spouse had a short term capital gain while the other suffered a short term capital loss. If by use of the joint return they could set these off against one another,[44] the unified return would be more advantageous despite the normal saving in separate returns by avoidance of high surtax brackets. Looking at the language of the Revenue Act and of the Regulations,[45] the Court held that the Congressional intent

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[39] *See* discussion, p 106, *supra.*

[40] Compare a brief attacking the constitutionality of the compulsory joint return compiled by a group of New York lawyers, note 19, *supra.* The *Hoeper* case was strongly relied upon, but consideration of the impact of a provision allocating actual liability for the tax between husband and wife to distinguish that decision was not given. Other grounds of unconstitutionality suggested in the brief are disputed throughout this paper. One ground, that "the provision for taxing separate incomes as joint income would effect an unconstitutional usurpation of the states' power to regulate property," seems too tenuous on its face to warrant the necessity of rebuttal.

[41] *See* particularly the discussion of the *Clifford* case, p. 111, *infra.*

[42] INT. REV. CODE, § 51 (b) (1939).

[43] 311 U. S. 189 (1940).

[44] A short term capital loss can be deducted only from a short term capital gain. INT. REV. CODE § 117 (d) (1939).

[45] INT. REV. CODE § 51 (b) and corresponding Regulation.

was to consider the spouses united into a single tax unit when they chose the joint return. *Taft v. Helvering*[46] also recognized solidarity in a joint return to permit charitable contributions of the wife greater than 15 per cent of her income[47] to be deducted from the joint income.[48] Since these two cases turned upon statutory construction, and involved merely *optional* use of the joint return to the taxpayer's advantage, they are not direct authority for the constitutionality of a *mandatory* joint return. However they do indicate judicial recognition of the family unit theory.[49]

Helvering v. Clifford[50] contains strong judicial pronouncements on family unity. A husband declared himself trustee of property for his wife with reverter to himself at the end of five years. Ownership of the income from the property was given absolutely. Justice Douglas, speaking for the Court, held that the income was still taxable to the husband on both legal and practical grounds. Retention of control was put forward as the controlling legal principle, but family unity seems to underlie the decision.

> "And where the grantor is the trustee and the beneficiaries are members of his family group, special scrutiny of the arrangement is necessary lest *what is in reality but one economic unit* be multiplied into two or more . . ."[51]

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[46] 311 U. S. 195 (1940).

[47] A taxpayer can deduct charitable contributions in filing his return to the extent of 15 per cent of his gross income. INT. REV. CODE § 23 (o) (1939).

[48] Perceive that in a few instances the joint return may be advantageous. Comment (1940) 35 ILL. L. REV. 320 suggests four possibilities under the present law. Unless separate property income is substantial in a community property state, however, it is never desirable to file a joint return because of the equal division of the income between husband and wife by operation of law.

[49] The family unit theory could be expanded to require not only the spouses but also all persons living in the same family group to make a joint return. The Wisconsin statute invalidated by the *Hoeper* case included minor children, as does the German law. MAGILL, TAXABLE INCOME (1936) 288. What about a widowed sister living with her brother and sister-in-law? Or the bachelor who still lives with his parents? Could the income tax law look so minutely at economic status that it would require two good friends, for example, school teachers sharing an apartment, to file a joint return? Such speculation leads beyond the scope of this paper, but may become more than mere speculation before too long.

[50] 309 U. S. 331 (1940).

[51] *Id.*, at 335. The same idea is manifested in Helvering v. Horst, 311 U. S. 112 (1940) and in Helvering v. Eubank, 311 U. S. 122 (1940). In his dissent to the *Hoeper* case, note 32, *supra*, at 220, Justice Holmes declared: "Taxation may consider not only command over but actual enjoyment of the property taxed," citing Corliss v. Bowers, 281 U. S. 376 (1930), where he had previously asserted: "But taxation is not so much concerned with the refinements of title as it is with . . . the actual benefit for which the tax is paid." *Corliss v. Bowers* involved the taxation of the grantor for the income from a revocable trust. From a practical standpoint, is not the benefit gained from marriage to an income-producing wife just as great as the legal right to revoke a trust in her favor? Holmes' "flow of benefit" test was picked up by the court in Burnet v. Wells, 289 U. S. 670 (1933) where Justice Cardozo declared that Congress can constitutionally tax income used for the payment of life insurance premiums although that income arises from an irrevocable trust created by the insured. Some of the dissenters in *Burnet v. Wells*, relying repeatedly upon the *Hoeper* case, are also found dissenting in *Helvering v. Horst*, *supra*, and *Helvering*

Other language adds succor to the proposition that classification of the spouses as a taxable unit would be reasonable.

> "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* . . . For where the head of the household has income in excess of normal needs, it may well make but little difference to him (except income-tax-wise) where portions of that income are routed—so long as it stays in the *family group*."[52]

Even the dissent does not quarrel with family unity. Justice Roberts merely complains that "legislation is not the function of the judiciary but of Congress." And later he adds:

> "If judges were members of the legislature, they might well vote to amend the act so as to tax such income in order to frustrate avoidance of tax but, as judges, they exercise a very different function."[53]

This language is a far cry from the statement in the *Hoeper* case that prevention of tax evasion does not serve as a basis supporting the reasonableness of a classification.[54] The compulsory joint return

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v. Eubank, supra. Arguably then, the dissent in the *Hoeper* case has had three strong affirmations and the majority holding has been considerably weakened.

[52] *Id.*, at 336. Italics supplied. [53] *Id.*, at 338, 341.

[54] Hoeper v. Wisconsin, 284 U. S. 206, 218 (1931). *Accord:* Heiner v. Donnan, 285 U. S. 312 (1932); Schlesinger v. Wisconsin, 270 U. S. 230 (1926). *But cf.* Helvering v. City Bank Farmers Trust Co., 296 U. S. 85 (1935) where the court condoned legislative attempts to avoid tax evasion, and held that Congress can constitutionally require a trustor to pay the income tax on transfers subject to revocation, even if the consent of a beneficiary is needed for the recovation. Complacent beneficiaries afforded an easy means of tax avoidance under the prior law, and to avoid this danger, Congress can tax the grantor even if the "revocation beneficiary" is *bona fide.* This is the *penumbra* doctrine of Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 201, 204 (1912). By analogy, the "genuine," salary-derived, separate income of the wife would be the "innocent" caught by the compulsory joint return, but the elimination of inter-spouse transfers of property for tax reduction would justify the application of the *penumbra* doctrine. Note also that future litigation on "Whose Income Is It?" would be greatly reduced by the compulsory joint return. *See* note 8, *supra.*

In *Helvering v. City Bank Farmers Trust Co., supra,* Justice Roberts distinguished both *Heiner v. Donnan, supra,* and the *Hoeper* case. "There are, however, limits to the power of Congress to create a fictitious status under the guise of supposed necessity . . . [A conclusive presumption that gifts two years before death are in anticipation of death] . . . is so grossly unreasonable as to violate the due process of the fifth amendment. Heiner v. Donnan . . . In the same category falls a statute seeking to tax the separate income of a wife *as income of her husband.* Hoeper v. Wisconsin . . . ." (Italics supplied).

No mention is made of the "measure" idea, and an allocation of tax liability on the join return should meet this *dictum* as well as provide a basis to distinguish the *Hoeper* case. *See* discussion, p. 109, *infra.* Traditional due process and equal protection tests are suggested by Justice Roberts: Is it a reasonable means to a proper end? Under this approach, the compulsory joint return should satisfy constitutional dogma.

For an interesting commentary on *Helvering v. City Bank Farmers Trust Co., supra, see* Lowndes, *A Day in the Supreme Court With the Federal Estate Tax* (1936) 22 VA. L. REV. 261. The author states that the not only would diminish tax avoidance by making irrelevant the division of income between husband and wife, but it also is a reasonable classification on its own merits.[55]

While in the trust and assignment cases the Court seems to be endeavoring to protect and improve our tax laws, it must be remembered that the benefits and control test always has been founded on some legal right; thus, the *Clifford* decision talked about the control of the husband through his trusteeship, and about his beneficial right of reverter. Some authorities feel that it is conjectural whether these tests could be extended to include a practical benefits and control test which has no basis on a legal right.[56] But in evaluating the compulsory joint return, and in determining its legal justification, does consideration whether one spouse has legal control over the other's income properly enter the discussion? Is there not a more appropriate legal basis to be found in terms of classification? Does not the additional fact that the compulsory joint return will eliminate quarrels, by reasonable means, between taxpayers and the Bureau of Internal Revenue as to whether certain income belongs to the husband or to the wife add greatly to the justifications for such legislation?[57] Since classification by families seems more just than present tax liabilities, and since the Court has indicated that it recognizes the family as a unit, constitutional objection to the mandatory joint return has faltered.

CONCLUSION

In a community property state where many citizens enjoy tax savings by use of separate returns, law review advocacy of the compulsory joint return may be heresy. One who evaluates without prejudice the present law must conclude that its distribution of the tax load has no economic justification; yet we cannot expect Washington taxpayers to beat the drums for reform.

Others, however, are beating those drums. Washingtonians should listen, for when the crusade is won, our battle-scarred senators should be ready to see that a desirable type of correction is made. Prejudices and pocketbooks motivate our resistance to any disturbance of the advantageous *status quo,* but when defeat is imminent, we should be ready to insure not only that the peace treaty strikes down the community property advantage, but also that it dooms separate returns regardless of why the income is classed as individual. The compulsory joint return will accomplish this reform simply and completely and, since it appears that the Supreme Court would uphold it if enacted by Congress, we should all favor it as the best means to an inevitable end.

ROBERT A. PURDUE.

City Bank case does not overrule *Heiner v. Donnan*—it merely reinterprets it, using the rationale of the dissenters!

[55] *See* discussion, p. 102 *supra,* as to inequality.

[56] Comment (1941) 28 VA. L. REV. 88, 92. A negative opinion has been expressed. *See* Paul and Havens, note 10, *supra.*

[57] Canadians thought of another means to reduce income tax avoidance through inter-spouse transactions. Their law ignores transfers of property from one spouse to another for income tax purposes and taxes the income from such property to the one who first acquired it. Canadian Income Tax Act, 1926, 16 and 17 GEO. V, c. 10, § 7. A possible precedent for such a statute in the United States is Reinecke v. Smith, 289 U. S. 172 (1933). *See Comment* (1940) 49 YALE L. J. 1279, 1288.