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INVASIONS OF THE COMMUNITY PROPERTY INCOME TAX PRIVILEGES

FRANKLIN C. LATCHAM

For a period of over twenty years the eight community property states\(^1\) have enjoyed the privilege of dividing the total community income of the husband and wife between the spouses for income tax purposes and thus, in the higher income brackets at least, effecting a sizable reduction in tax liability.\(^2\) The basis for this benefit is found in the decisions of the United States Supreme Court, especially in the case of *Poe v. Sanborn*,\(^3\) wherein the court held that because under the local law of Washington a wife had a vested interest in one half of the community property she could therefore file a separate return on one half of all income earned by the community.

The income tax privilege of the community property states has long been under attack, both through attempts to induce the court to overrule the doctrine of *Poe v. Seaborn*, and through proposals made to Congress to amend the revenue acts so that the discrepancy would be eliminated. The purpose herein will be to investigate these attacks and to evaluate their merits and possibilities of success.

I. CASE LAW ATTACKS UPON COMMUNITY PROPERTY INCOME TAX PRIVILEGES

A case recently handed down by the Federal Supreme Court, *Commissioner v. Harmon*,\(^4\) has made the benefits and privileges of the community property states stand out in even bolder relief. In that decision a divided court refused to allow a husband and wife, who elected to come under optional Oklahoma Community Property Act,\(^5\) enacted in 1939, the right to divide the community income equally between them for federal income tax purposes. As a result of this decision, of course, the privilege of separate returns is also denied persons coming under the optional Community Property Act of Oregon passed in 1943.\(^6\)

A. The Harmon Case and What It Has Done.

In the *Harmon* case, the respondent and his wife filed their written election to have the Oklahoma Act, beginning on November 1, 1939, applied to them and their property. For the period from November 1 to December 31, 1939, they received certain sums constituting com-

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\(^1\) Arizona, California, Idaho, Nevada, New Mexico, Texas, Louisiana and Washington.

\(^2\) See the report of the House Ways and Means Committee to Congress, H.R. 5417, H.R. Rep. No. 1040, 77th Cong., 1st Sess. (1941), showing the relatively small number of spouses in community states making separate returns. The percentages range from 10 to 20 per cent.

\(^3\) 282 U. S. 101 (1930).

\(^4\) 65 Sup. Ct. 103, 89 L. ed. adv. ops. 71 (Nov. 20, 1944).

\(^5\) 32 OKL. STATS. ANN. §§ 51-46 (1941).

\(^6\) LAWS OF OREGON, 1943, c. 440.
munity income under the act and the taxpayer and wife filed separate returns on such income. The commissioner denied their right.

Both the Circuit Court of Appeals7 and the Tax Court8 disagreed with the commissioner. Each court found the act to be valid and the case to represent a close enough analogy to the situation in other community property states to warrant a holding for the taxpayer. But the Supreme Court reversed the decisions of the lower courts. Mr. Justice Roberts, speaking for a majority of the court, held that the provision in the Oklahoma Act allowing the spouses to elect to come within its provisions distinguished this case from Poe v. Seaborn and, instead, brought it within the rule of Lucas v. Earl.9 A dissenting opinion was written by Mr. Justice Douglas, with whom Mr. Justice Black concurred, in which he pointed out the similarities between the Oklahoma Act and the Washington community property law and also noted the peculiar position of Poe v. Seaborn in the body of federal income tax cases.

In order to better understand the Harmon decision, it will be necessary to obtain a clearer picture of the opinions in Lucas v. Earl and Poe v. Seaborn, for these were controlling cases in the court's opinion.

Lucas v. Earl concerned an agreement between a husband and wife, made in 1901, that any property "either of us now has or may hereafter acquire ... in any way ... shall be treated and considered, and hereby is declared to be received, held, taken, and owned by us as joint tenants, and not otherwise, with the right of survivorship."10

The taxpayer claimed that the income under this agreement must be taxed as the joint income of the husband and wife maintaining that the basic principle of the income tax law is that it is a tax on income beneficially received, and more technically, "the salary and fees became the property of Earl and his wife on the very instant when they were received."11

In regard to this last claim, which so closely touches the community property argument, the court made the passing remark that however the case might stand between the husband and wife, he was the only one who could fulfill the services which as a lawyer he had set about to perform and from which the income was being derived.

The real basis of the decision, however, is found in the broad statement that the matter is not to be decided upon "attenuated subleties" of property law. Instead, said Justice Holmes, it must turn upon a reasonable construction of the revenue act which taxes the net income of

7 Commissioner v. Harmon, 139 F. (2d) 211 (C.C.A. 10th, 1943).
8 C. C. Harmon, 1 T. C. 40 (1942).
9 281 U. S. 111 (1930).
10 Id. at 113.
11 Ibid.
every individual of whatever kind and from whatever source.  

It seemed to the court that the proper import of this act was that it levied a tax upon the salaries of those who earned them and 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."  

As we have noted, Poe v. Seaborn involved the community property law of the state of Washington. The claim of the taxpayer was again, of course, that any earnings of either spouse (principally, of course, the husband) subject to the community estate, became instantly that of the community and thus must be taxed as income of both.  

But the court immersed itself in the mysteries of the community property concept and found that the Lucas case "presents quite a different question from this, because here, by law, the earnings are never the property of the husband, but that of the community."  

In other words, the court was not dealing with a mere private, man-made theory for invoking the blessings of separate returns. On the contrary, here was a system, ancient in the law, which so affected the earnings of either spouse that immediately as earned they became one-half the property of the other. Nor did it matter that the husband had broad powers of control. For Warburton v. White had long ago pointed out that the husband enjoyed these powers merely as an agent, not as an owner.  

Into which slot, then, should the court fit the slug represented by the Harmon case: the one marked "Seaborn," or that marked "Earl"?  

In answer to this question the majority opinion in the Harmon case found that there are two types of communities—"consensual and legal." A consensual community, like that formed by the Oklahoma Act, arises out of contract and does not differ essentially from the contract in Lucas v. Earl. A legal community, however, the court pointed out is "one made an incident of marriage by the inveterate policy of the State." This was the type involved in Poe v. Seaborn. The fundamental distinction between the consensual and legal systems, said the court, is that the former is merely a policy of the state to allow spouses to alter,
by contract, the status which otherwise would have been the prevailing common law system, whereas the latter is a system dictated by state policy as an incident to marriage. Other similarities between the two systems were laid aside because this one factor was sufficient to distinguish the Oklahoma Act from the traditional community property systems.

The dissenting justices, however, were of the opinion that the Harmon case could be brought within the rule of Poe v. Seaborn. They were unable to see any essential difference between the act of marriage so as to come under the community laws or the act of filing an election to do so. Under the law of Oklahoma the dissenters found that once an election is filed the earnings are never those of the husband but are those of the community so the case of Lucas v. Earl should no more apply to the Harmon case than it did to that of Poe v. Seaborn. If by the law of the state, said Justice Douglas, the earnings of the husband are made the property of the community and not that of the husband then the federal courts should treat the law of Oklahoma the same as they do the law of other states making the same pro-

37 Both the Circuit Court of Appeals and the Tax Court distinguished the election provision in the act from the Earl case by finding that such an election changes, permanently and irrevocably while in force, the property rights of the spouses and is, therefore, the type of an agreement that must be distinguished from a mere private contract.

The courts, moreover, could find no distinction in legal effect between a statute under which a husband and wife elect to have the act apply to their property in the future and an act which automatically applies unless expressly revoked by the contract of the spouses. Here the C.C.A. cites cases and statutes of different community states, among them Tex. Rev. Civ. Stat. § 10572. There is still some doubt in Washington whether that section allows such a contract but agreements of this type are common. The courts might have also analogized the situation where a party moves from a non-community property state to a community state. It certainly could be said just as easily that a person, by his change of domicile, has elected to come under the community system, and incidentally, of course, the resultant tax benefits.

It is interesting to note that in the Tax Court the proponents of the Oklahoma Act frankly admitted that one of the underlying motives for the passage of the act was to keep wealthy Oklahomans from being attracted by the Texas community property benefits. However that may be, the idea that community property states present a "happy haven" for large income taxpayers now residing in common law property states is not borne out by the facts. There has been no mass exodus of wealth to community states as a whole. And, furthermore, except in Idaho and Texas where income from separate property is community property (See Daggett, The Oklahoma Community Property Act—A Comparative Study, 14 Law. L. Rev. 575 (1940); Arnold v. Leonard, 114 Tex. 535, 273 S. W. 799 (1925)) separate property brought into community property states will remain the separate property of each spouse, unless, as in Washington, separate property can be changed to community property. See Volz v. Zang, 113 Wash. 378, 194 Pec. 409 (1920). But notice that a change of separate property to community property affects the corpus as well as the income and thus the original separate owner loses his full control over the property. This factor presents a definite deterrent to such a change. See Altman, Community Property, Avoiding Avoidance by Adoption in the Revenue Act, 16 Tax Mag. 138 (1936), for a discussion of the problems here involved.
nouncement. The minority also points out that after the election is made the Oklahoma Act treats property the same as does the Washington law—a fact the majority concedes. And, furthermore, in most community states the spouses can change separate property to community property and separate returns are allowed on income from such property. Is this not a contract made after marriage they ask?

The dissenters deny that they are upholding Poe v. Seaborn; they merely state that if Poe v. Seaborn is good law then the court should follow it in this instance. If, however, the majority is refusing to follow Poe v. Seaborn because it has bad consequences, then, say the minority, that case, which has been carved out as an exception to the general rules of liability for income tax cases, should be reexamined.

As a result of the Harmon decision the status of the "old line" community property states remains the same. An attempt to reach their income tax benefits and privileges has failed. The basis for their privilege, Poe v. Seaborn, has again been upheld and followed. The minority opinion, however, makes it very clear that it does not approve of the holding in Poe v. Seaborn and points out in unmistakable language why. It must be remembered, too, that the Harmon case does not present a direct attack upon the Seaborn case, the majority were merely content to follow its doctrine without reexamining its validity. There is a possibility, then, that if, because of recent cases, the soundness of the court's position in Poe v. Seaborn should again come squarely before the court that it might overrule the case. The possibility is there and in order to present a more complete picture of the community property income tax problem, it should be briefly investigated.

B. The Possible Overruling of Poe v. Seaborn.

Such a possibility has been suggested more than once. The argument goes back to the "control theory" developed by Mr. Justice Holmes in several income tax cases preceding Poe v. Seaborn. To understand the "control theory," however, it is necessary to have a full picture of the federal government's treatment of the community property tax problem. Attorney-General Palmer, in 1920 and 1921, rendered two opinions for the Treasury Department in which he stated

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18 For this statement the court cites, among other authorities, Volz v. Zang, 113 Wash. 378, 194 Pac. 409 (1920); and 3 MERTENS, THE LAW OF FEDERAL INCOME TAXATION (1942) § 19.29. See 65 Sup. Ct. 103, 89 L. ed. adv. ops. 71, 76.

19 Justice Douglas says of Poe v. Seaborn that it is a "dubious" decision. He calls attention to the cases developing the "control theory" of taxation, that is, taxing him who has substantial control of the income, and which develop a rule contrary to that of Poe v. Seaborn. These cases are discussed infra, pp 49, 50, 56. See especially his comments in the last paragraph of the dissent.

that because the wife has a vested interest in the community income, the spouses in all community states, except California, should be allowed to make separate returns on such income.\textsuperscript{21} California was excepted because the highest court of the state had declared her interest to be a "mere expectancy."\textsuperscript{22}

Matters stood thus until 1924 when the test case of Robbins v. United States\textsuperscript{23} was instigated to determine the community property situation in California. In this decision the Supreme Court determined that under the California community property system (as it then existed) the husband had substantial ownership of the community property and the wife a mere expectancy upon dissolution of the community. Such being the case, Justice Holmes, speaking for the court, inaugurated his "control theory" and concluded that the husband should be taxed for the community income. Said he: "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 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 under the law."\textsuperscript{24}

The theory, that he who has the power and privilege to dispose of the income should bear the burden for its tax was next applied in a case we have noted before, Lucas v. Earl. Justice Holmes again held that under the general provisions of the tax law the intent was to tax income to those who earn it.

As Lucas v. Earl bore directly upon the situation of the earned income of the community, so did Corliss v. Bowers\textsuperscript{25} present a suggestive analogy to the taxation of income from community wealth. Here the taxpayer set up a revocable trust and he questioned the validity of a specific provision (now INT. REV. CODE § 166) which taxed the income from a revocable trust to the grantor. Justice Holmes swept aside "refinements of title," and upheld the statute using the following language which some writers think applicable to the community property situation under the law of most community states:

\begin{align*}
\text{21} \ & \text{32 Ops. ATT'Y GEN. 298 (1920)—as to Texas; 32 Ops. ATT'Y GEN. 435 (1921)—as to the other community property states.} \\
\text{22} \ & \text{See 32 Ops. ATT'Y GEN. 435 at 454-455.} \\
\text{23} \ & \text{269 U. S. 315 (1915).} \\
\text{24} \ & \text{Id. at 327, 328. Note, however, that in 1927 California added a section to their community property statutes providing that the interests of the husband and wife were equal in the community estate. CALIF. CIV. CODE, § 161a (Deering, 1941). This in no way diminished the husband's privileges of control as manager of the community. But the Supreme Court, per curiam, found that this change was sufficient to make the income of California spouses joint and thus confer the blessings of separate returns. United States v. Malcolm, 282 U. S. 792 (1931). See also, comment of Roberts, Jr., on the California situation in the Harmon case, 65 Sup. Ct. 103, 89 L. ed. adv. ops. 71, 73.}
\end{align*}
"The income that is subject to man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income." 26

But when the court came to consider the *Seaborn* case, 27 the practical "control theory" which Justice Holmes had developed in *Robbins v. United States* was not mentioned. The *Robbins* case was distinguished upon the fact of the wife's mere expectancy. And the *Corliss* and *Earl* cases were disposed of by holding that in these cases the husband had full original ownership of the property and was merely deprived thereof by private agreement, whereas the husband's earnings are never his under the community system but that of the community's. Despite the rather cavalier treatment of his control theory Justice Holmes registered no objection.

But the "control theory" has not been forgotten. On the contrary, recent supreme court cases which are discussed under subsequent headings 28 have greatly extended the application of this doctrine. The policy of placing the tax burden upon the one who "controls" the income has been developed sufficiently for one writer to conclude: "It seems likely that had *Poe v. Seaborn* not yet been decided the question presented in that case would now be decided the other way." 29

It is submitted, however, that the Supreme Court will not, nor should it, overrule *Poe v. Seaborn*. The writer realizes the frequent futility of such predictions, but, nevertheless, there are sound reasons for the above statement. Square decisions before may be a small enough barrier in view of *Helvering v. Hallock*, 30 for example, but *stare decisis* still has some weight with the court, even in tax cases. 31 Continued administrative practice and continued re-enactment of the income tax law without change may also be of questionable value in predicting

26 281 U. S. 376 (1930).
27 Id. at 378.
28 *Poe v. Seaborn*, 282 U. S. 101 (1930), represented the first of a series of cases instituted by the Treasury Department after the *Robbins* decision to determine the community property question in other interested states. The Attorney-General recognized that in each state the community property statutes varied as did the interest of the wife. And, also, there was the possibility that the *Robbins* case meant the control of the manager of the community was the important consideration. The Attorney-General therefore withdrew his former opinions in order that the question could be litigated in other states. 35 Ops. Atty Gen. 285 (1927). The other test cases all upheld the spouses' right to divide community income using Poe v. Seaborn as the guide: Goodell v. Koch, 282 U. S. 118 (1930) (Arizona); Hopkins v. Bacon, 282 U. S. 122 (1930) (Texas); Bender v. Pfaff, 282 U. S. 127 (1930) (Louisiana).
31 See the statement of Frankfurter, J., in *Helvering v. Hallock*, 309 U. S. 106, 118: "... *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decisions."
future court interpretation.\textsuperscript{32} However, the administrative difficulties in determining, merely from the effect of overruling the \textit{Seaborn} case, the methods in which not only income in the form of salaries, but also income from property held by the community should be taxed would be a strong reason for leaving the community property problem to legislative process.\textsuperscript{33} Also, an overruling of \textit{Poe v. Seaborn} would raise the difficult problem of taxing the past years—a matter which might prove extremely burdensome.\textsuperscript{34}

And not the least among the reasons for the predicted judicial reticence is the fact that this is a delicate problem of state and federal relationships in which the court might well wish for Congressional interpretation before committing itself.

The greatest danger to the community property tax privileges, it seems to the writer, arises not from a possible overruling of the \textit{Seaborn} case, but from amendment of the Internal Revenue Code. It is submitted, moreover, that from the standpoint of equality in federal taxation, this presents the most expedient method for eliminating special community benefits.

II. LEGISLATIVE ATTEMPTS TO REACH THE COMMUNITY PROPERTY PRIVILEGES

The first legislative attempt to reach community property states was made in the treasury's plan submitted to the House in 1921. It proposed to add the following provision to \textit{INT. REV. CODE} § 213(a) (which defined gross income):

"Income received by any community should be included in the gross income of the spouse having management and control of the community property."\textsuperscript{35}

The clause was accepted by the House but stricken by the Senate.\textsuperscript{36} In 1924 and 1934 the same provision was proposed but each time the Ways and Means Committee put the amendment to death.\textsuperscript{37} By

\textsuperscript{33} That is, if the \textit{Seaborn} case is to be disregarded, should the community property privilege be entirely eliminated? Or should each spouse pay a tax on his salary and the manager of the community pay the tax on the earnings of the property of the community? Or should the husband's control be so substantial that he should be liable for all community earnings, even the wife's, as happened in California after the \textit{Robbins} decision. See Helvering v. Hickman, 70 F. (2d) 985 (C.C.A. 9th, 1934). The writer does not believe that the commissioner would be long in formulating policies, but it is suggested that it might be better if the broad policies were worked out by Congress.
\textsuperscript{35} Poe v. Seaborn, 292 U. S. 101, 114, n. 6 (1933).
\textsuperscript{36} Idem.
\textsuperscript{37} Oliver, \textit{Community Property and the Taxation of Family Income}, 20 TEX. L. REV. 532, 545 (1942).
1934, however, another proposal was coming into prominence; this was unit taxation of the husband and wife.\(^8\)

The two most recent proposals for legislative change of income taxation have been the proposed amendments of the Senate Finance Committee and of the House Ways and Means Committee to the 1941 Revenue Act. The remainder of this article will discuss these two proposals in the light of their constitutionality and advisability.

**A. The Senate Finance Committee Amendment.**

The proposal of the Senate Finance Committee\(^9\) is somewhat of a reversion to the earlier 1921 and 1924 amendments. The general plan of the bill is, first, to tax the income of each spouse, whether or not it is treated as community property under the local law, to the earner. And, second, the bill considers income derived from community property as the income of the spouse who has the management and control of it under the local statutes. The act specifically provides, however, that income from separate property or other property acquired with this income should be taxed to the owner of such separate property.

The proposal takes into account the position of the community property states much better than did the 1921 amendment which simply taxed the income to the manager of the community. By providing the first section as to earned income, the amendment eliminates the possibility that the wife's earnings might be taxed with the husband under the control theory. That is, upon the theory that the husband has control of all community income, including the wife's, and therefore should be taxed for the whole of it. The proviso which continues to tax the income from separate property to the owner is especially important in those community states where income from such property is community income.\(^4\)

On its face, the amendment seems to embody a reasonable theory. But upon a closer investigation certain constitutional barriers to the proposal become apparent. The bill's principal difficulty lies in its disregard for the local law of ownership of both earned and unearned income. Thus the proposal raises the question of the importance of local law in tax case determinations of the ownership of income. And since, as we shall see, the local law is of importance, the proposal raises the additional question of whether there are some taxable relationships other than ownership.

**1. Local Law and Federal Taxation.**

From the previous discussion of *Poe v. Seaborn* it will be noticed that the Supreme Court carefully looked to the local law to determine the

\(^8\) Paul, *Background of the Revenue Act of 1937*, 5 U. of Chi. L. Rev. 41, 84-85 (1937). It was proposed in committee hearings in both 1934 and 1937.


\(^4\) See supra, n. 17.
interest of the respective spouses in the community income. A flood of other cases can be produced to show the court's regard for the local law in an attempt to determine how the income tax should be applied. But there are some distinctions which the court makes in regard to the effect of local law.

Upon this question the case of *Burnet v. Harmel* is of importance. Under the law of Texas, unlike that of other states, a gas and oil lease is looked upon as a present sale of the gas and oil in place. Harmel made a lease of certain gas and oil rights, receiving cash payments and stipulated royalties. In making his return under the 1924 Act, respondent reported the cash payments as gain from a sale of capital assets, taxable under the statute at a lower rate than other income.

But the Supreme Court refused to differentiate the Texas leases from those leases where the title to oil and gas passes only upon severance by the lessee. The court said: "The state law creates legal interests but the federal statute determines when and how they shall be taxed." The interest to be taxed here was the income from the oil and gas lease and the court determined that Congress could fix this interest as it saw fit with complete disregard for its characterization under state law.

Admitting, then, that the federal law will determine the character of the income earned from a Texas gas and oil lease, what law will determine its ownership? Assume, for example, that a Texas husband owns certain separate property which he has subjected to a gas and oil lease. Will the court look to the local law which says that income from separate property is community property and uphold a division of returns in regard to such income? The question has been answered in the affirmative. The Circuit Court of Appeals distinguished *Burnet v. Harmel* in this language:

"It is true that Texas royalties are held notwithstanding the local law not to be proceeds of sale but taxable income within the meaning of the Federal Revenue Acts. But the question here is not the taxability of the royalties but the ownership of them. Whether the wife owns or does not own one-half of them in community depends on the state laws, the federal tax being imposed accordingly." (citing *Poe v. Senborn*).

A number of other cases can be cited to substantiate the principle that the court has given respectful treatment to the community property law in the past; and from the above cases it becomes apparent that the court will likely give more attention to the local law in deter-

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41 287 U. S. 103 (1932).
42 Id. at 110.
44 Id. at 770.
mining "Whose income is it?" than in "What type of income is it?" If, then, the court will look to local law to determine the ownership of the income being taxed does not the Senate Finance Committee proposal taxing the earner's salary to the earner and community property income to the manager run afoul of the rule in Poe v. Seaborn wherein the wife is said to have a presently vested interest in one-half of all community income?

2. Two Arguments for Upholding the Constitutionality of the Amendment.

From the above discussion of income tax cases dealing with the problem of interpreting local law there appear to be at least two practicable methods of upholding the Senate Finance Committee proposal. First, there is the possibility that the court, aided by a declaration from the legislative branch of the government, might overrule Poe v. Seaborn. Second, there is a possibility that the court might determine that the tax was levied upon some legal relationship other than ownership. That is, the court might look to the type of activity being taxed (as in Burnet v. Harmel) rather than to whose income is being taxed (as in Commissioner v. Wilson).


In determining the taxability of the earner's salary to the earner the question again before the court would be the scope and validity of the "unit tax" theory of Lucas v. Earl. In that case Justice Holmes disposed of the contract dividing the spouses' income in these words: "There is no doubt that the statute can tax salaries to those who earned them and provide that the tax cannot be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That is the import of the statute now before us...."

Should there be any difference between the case where the law of a state says that as an incident of marriage the wife shall have a vested one-half interest in the husband's salary and where the spouses say so by contract, or, as in the Harmon case, where the law of the state provides that the wife shall have such an interest if the spouses so elect? To state, as did the court in Poe v. Seaborn, that the Earl case is distinguishable because in the "old line" community property

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46 This is the conclusion reached by Oliver, Community Property and the Taxation of Family Income, 20 Tex. L. Rev. 532, 547-549 (1941), and Paul, Studies in Federal Taxation (2d ed., 1938) p. 33.
47 281 U. S. 111, 115.
48 The Tax Court in its decision of the Harmon case said: "Contract forms the basis of that form of the marital property association called the conventional community. McKay, Community Property (2d ed.) § 147; Civil Code of Louisiana, art. 2807. In states where the community property law is self-operating a marriage in itself is a voluntary contract or "anticipatory arrangement" by which the contracting parties agree that their separate earnings shall become community income." C. C. Harmon, 1 T. C. 40 (1942).
states the earnings are never the property of the husband is close to an “attenuated subtlety.” Does the wife have less an interest in the one case than in the other? Perhaps, with the aid of this amendment, the court might see fit to overrule the Seaborn case and declare that in community property states the tax must be paid by the one who earns the income.

It must not be forgotten, moreover, that there is another line of cases which may prompt the court to overrule Poe v. Seaborn. These cases develop the “control theory” established by Justice Holmes in the Robbins and Corliss opinions and bolstered in many later decisions. Although this theory would do much to strengthen the taxation of earned income to the earner, it plays a much more important role in the taxation of unearned income to the manager of the community. Each spouse has a certain amount of control over the income derived from his labor whereas income derived from community property is more easily controlled by the manager of the community.

In developing the control theory it has already been noted that it would not be difficult for the court to decide that Poe v. Seaborn missed the real intent of the Robbins case; that Justice Roberts’ distinction of the Robbins case on the basis of the wife’s mere expectancy in California as compared with the wife’s “vested” interest in Washington seems unjustified; that the controlling factor is the husband’s substantial ownership which is similar in California to the other community property states and upon which Justice Holmes really placed the husband’s responsibility for taxation.

Thus the court would have sound reasons for upholding the statute by overruling the Seaborn case, but it is submitted that for reasons stated in a previous section discussing this same topic, the court is unlikely to do so.

b. Taxing Some Legal Relationship Other than Ownership.

In order, then, to circumnavigate the difficulties presented by the Seaborn case, is it not possible that the tax may be placed on some legal relationship other than ownership? That is, applying the premise that the court will look to the local law to determine “Whose income?” but not for “What type of income?”, may not the tax be levied upon the “type” of income rather than the “ownership” of income?

For example, cannot the Senate Finance Committee proposal be

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50 See, for example, Helvering v. Horst, 311 U. S. 112 (1940); Helvering v. Eubank, 311 U. S. 122 (1940); Hormel v. Helvering, 312 U. S. 552 (1940); and Harrison v. Schaffner, 312 U. S. 579 (1940).
51 See supra, p. 50.
52 See Bruton, The Taxation of Family Income, 41 Yale L. J. 1173-1178. Compare the interest of the husband in California and Nevada (as suggested by Mr. Bruton) in 32 Ops. Att’y Gen. 435, 450-452 (Nev.), and 454-456 (Calif.).
53 See supra, p. 48.
upheld, without overruling the Seaborn case, by classifying the proposal as an excise tax upon the right to earn a salary, or as a tax upon the one who has the control of community income? And inasmuch as the Robbins, Corliss, and Lucas cases, as well as Poe v. Seaborn, were all classified by the court as interpretations of the Revenue Act, the court would be justified in fully re-examining the cases in the light of the Senate Finance Committee proposal.

Although there are other possible legal relationships which might be taxed, it would seem that taxing one's right of control is, perhaps, the most clearly developed.

The Revenue Act already taxes upon this theory in certain sections. The "control" theory of one of these sections was clearly emphasized in Burnet v. Wells, wherein Justice Cardozo, in validating INT. REV. CODE § 167(a)(3), developed the "canalization control" approach. The court found that the income from an irrevocable trust set up to pay premiums on insurance for the benefit of the grantor's family should be taxed to the grantor because he had a "continuing exercise . . . of a power to direct the application of income along predetermined channels." But it has been suggested, and reasonably so, that such a theory is more than tenuous when applied to a man's marrying in a community property state knowing that his earnings will then fall into the community property concept of ownership.

Nor does the control concept of the Clifford case seem applicable to the community income problem. Here the husband set up an irrevocable five-year trust of the income from his property for the benefit of his wife. The husband, however, retained broad powers of control as trustee. And the three themes of the close relationship between husband and wife, the extensive powers of control and management which the husband reserved, and the short period of the trust's existence in the end persuaded the court to tax Clifford because he was still in reality the owner under INT. REV. CODE § 22(a) (defining gross income).

The essential differences between the trust in the Clifford case and the community property situation are too much to justify taxing the husband under the Clifford control theory. The grantor had broader powers as owner of the corpus than does the manager of the community. The short duration of the trust is another point of dissimilarity, as is also the fact that he is the owner of the corpus and will eventually gain complete control.

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\[\text{For instance, the tax, as suggested above, could be regarded as an excise on the right to earn a salary, or on the right to earn income from property.}

\[\text{For example, INT. REV. CODE §§ 166 and 167.}

\[289 \text{ U. S. 670 (1933).}

\[309 \text{ U. S. 331 (1940).}

\[\text{The Clifford and Wells cases are well analyzed by Oliver, Community Property and the Taxation of Family Income, 20 TEX. L. REV. 532, 552-554 (1941).} \]
The Code sections, and the *Burnet*, *Clifford*, and other cases are specialized situations where the hazy themes of family benefit, "pressing social needs," and similar terms are the foundations for taxing the "controller." It is difficult to generalize from these cases. This fact is clearly pointed out in the *Clifford* case for the court said: "Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, we cannot say that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of § 22(a).

As a final word upon the constitutionality of this proposal, *Hooper v. Tax Commission of Wisconsin* must not be overlooked. Although this case will be discussed thoroughly under the joint return proposal, it is well to note that if by that decision A cannot be taxed for income that is really B's then either the strength of the wife's ownership under *Poe v. Seaborn* will have to be overruled in the light of the *Lucas* and *Robbins* cases, or else some other theory beside taxing the owner of the income must be devised.

In concluding this discussion of the Senate Finance Committee plan, it is believed that although there is good sound reasoning behind upholding such an act, still the difficulties in the way of its passage are a definite handicap. Furthermore, an amendment which touches only the community property question will fail to reach the larger problem where by means of inter-family manipulations the wife is given a separate income. (This is a problem which will be discussed more fully under the next section.)

It seems, therefore, that the Senate Finance Committee proposal, with its possible constitutional difficulties and its narrowness of scope, does not threaten the community property tax privileges as does the compulsory joint return amendment which will next be considered.

B. The Proposal of the House Ways and Means Committee—

The Compulsory Joint Return.

The second of the most recent legislative proposals is the theory of taxing the family as a unit. This method of solving the community income tax problem was recommended to Congress in 1933 by the Secretary of the Treasury's proposal: "to require a joint return in the case of husband and wife living together, each spouse to pay the tax attributable to his share of the income." The proposal was again considered in 1937 and in 1941 the Ways and Means Committee

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50 See cases *supra*, n. 50, for further examples of the court's application of the control theory upon the basis of family relationships and/or retaining powers of control by the original owner.

52 309 U. S. 331, 336.

53 284 U. S. 206 (1931).


54 Idem.
formulated a definite bill which it recommended to the House but which failed of passage.  

The measure, however, is still of live importance and has been characterized as the "most practical solution of this problem that promises to be constitutional."  

The amendment, as it was proposed in 1941, required generally that any husband and wife living together at any time during their joint taxable year shall report their income in a single joint return and compute the tax on the aggregate of such income. A husband and wife were considered living together if they had not separated with an intent to permanently abandon the marriage relationship. In regard to payment, either spouse may elect to have the liability for the tax apportioned between them so that each spouse will be liable for the total tax in the same ratio that each spouse contributes to the family income. Also, if one spouse has no income, deduction, or credit appearing on the return, such spouse is not required to sign or swear to such return. And finally, the joint tax liability is automatically terminated upon divorce or legal separation.

1. Economic Advantages of the Proposal.

The report of the House Ways and Means Committee to Congress presents a brief in support of the amendment. The brief makes the following points to illustrate how the act would alleviate inequities in the present law.

a. Under the law, as it is now written, if the entire income is earned by the husband the family is required to pay a greater tax than if the wife had contributed to the family income. For example if the family has an income of $10,000 a year but it is all earned by the husband, the tax burden will be measured upon that sum alone. On the other hand, if $5,000 of the income was contributed by the wife, the family may divide its income so that each spouse will pay a tax upon $5,000 instead of one spouse paying upon $10,000. These two families have exactly the same income yet one will pay considerably more in taxes than the other.

Since in most cases the husband contributes the whole family income, under the present law the husband so situated is less favored. He has a greater tax burden than the husband whose wife contributes to the family income and who thus enjoys a special advantage since he does not

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64 § 111 of the proposed bill (H. R. 5417), H. R. REP. No. 1040, 77th Cong., 1st Sess. (1941).
66 This statement was made by Paul, Background of the Revenue Act of 1937, 5 U. of Chi. L. Rev. 41, 85 (1937).
67 The committee report estimated that in 1941 the tax on $10,000 would be approximately $1,166 and on $5,000 approximately $440, or a total of $880 for the family where the wife had a separate income.
have to set aside as much for her as where she is entirely dependent upon him.

b. The problem which touches the present topic most closely, of course, is the manner in which the present law allows a differentiation between families living in different parts of the country. In the community property states if the husband earns $10,000 a year, this salary is divided equally between husband and wife for income tax purposes. On the other hand, a husband earning the same salary in a non-community property state must report the entire $10,000 as his own. And there is no way the husband in the non-community property state can mitigate his burden because of the Supreme Court's decision that an assignment of income for personal services does not give the wife the right to make a separate return on the assigned income.\(^6\)

c. The present law also discriminates against a family living in a non-community property state receiving all or most of its income from earnings as contrasted with a family receiving all or most of its income from investments. As has been noted before, the husband cannot assign part of his earnings to his wife in order to modify his tax burden. Yet it is common practice for a husband holding considerable investments to make a gift to his wife of part of those investments and thereby considerably reduce his tax burden while at the same time keeping the money in the family control.

d. And there are many more instances of reducing tax liability accomplished by giving the wife (or other members of the family) a separate income through the means of family gifts, partnerships, and trusts.

From the standpoint of equal treatment of family income and also from that of greater revenue to the government, the compulsory joint return has great advantages. But as in the case of most legislation, a determination of its merits is not alone sufficient. The constitutionality of the measure must also be considered.

2. The Constitutionality of the Ways and Means Committee Proposal under the Due Process Clause.

In order more clearly to determine the constitutional barriers to the adoption of the compulsory joint return amendment, it is necessary to recapitulate a moment so that the full scope of the proposal may be realized. The amendment looks at the husband and wife as a unit and levies the tax on that unit without regard for the separate contributions of the spouses except that their liability may be based upon the amount they contribute to the total family income. The act, then, raises two constitutional barriers: (a) the possibility that A is being taxed for B's income, which is proscribed under the Hoeper case,\(^9\) and

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(b) the possibility that classifying the family as a taxing unit is an unreasonable classification.

a. The Hoeper Case.

In this case the Supreme Court had before it certain sections of the Wisconsin state income tax laws which instituted a system of compulsory joint returns somewhat similar to the proposed House amendment. The Wisconsin act provided that in computing taxes payable by persons living together as a family, the income of the wife and minor children under eighteen should be added to that of the father, or head of the family, and assessed to him. The father was primarily liable for payment, but if he failed to pay, any other member of the family whose income was included within the computation would be liable.

The state assessed against Hoeper a tax computed upon the total of his and his wife's income (from her separate property) treating the aggregate as his income. The taxpayer protested against the method of assessment as violating due process.

The majority of a divided court held the act unconstitutional. Mr. Justice Roberts, speaking for the majority, based his decision upon four grounds. (1) First he noted that under the state's Married Women's Property Act the wife has full independent ownership of her separate property and the income therefrom. Therefore, by making the husband liable for the tax on the wife's property the state was taxing as joint income that which is really separate. It was taxing A for B's income and this it cannot do without violating due process. (2) The majority refused to validate the tax upon the state's contention that it was necessary to prevent fraud. On this point the court relied upon the Schlesinger case which had found unnecessary as a classification to prevent frauds and evasions, a statute which, for purposes of inheritance tax, classified all gifts inter vivos, effective within six years of death, as gifts made in contemplation of death. Justice Holmes dissented on this point. He felt the Schlesinger case was distinguishable. (3) Moreover, Justice Roberts could find no justification for holding this act to be a regulation of marriage. This phase of the decision is not within the scope of this discussion, however, since the marriage relation is entirely the province of state law. But it is interesting to note that the substance of Justice Holmes dissent was exactly to the contrary.

70 The next two grounds for the decision are answers to the state's arguments for upholding the taxation of A for B's income.
72 Justice Holmes would, among other reasons, have justified the tax for its tendency to prevent tax evasion. He found in the Wisconsin statute a reasonable relation between the means and the evil which was perhaps not the fact in the Schlesinger case. And, furthermore, his decision in Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192 (1912) illustrates that if the state has the right to set up a prohibited classification the fact that it reaches innocent persons does not necessarily condemn it.
INVASIONS OF TAX PRIVILEGES

That is, he felt the act could be upheld as a regulation of married women's property rights. (4) And finally, the court made the broad statement, which seems to be purely dictum, that the state has no power by an income tax law to measure one's tax, not by his own income, but, in part, by that of another. That is, A's tax may not be measured in part by the income of B.

Does the Hoeper case invalidate the Ways and Means Committee amendment? The fundamental holding of the Hoeper case is, as has been noticed, that A cannot be taxed for B's income. If the committee proposal can circumvent this prohibited possibility the direct holding of the Hoeper case will not only be inapplicable but the vitality of the court's other arguments against the Wisconsin tax will be sapped of much of their strength.

It seems apparent to the writer that the proposal does circumvent the Hoeper decision. In that case, the husband, and after him each contributing member to the family income, was made separately liable for the whole amount of the family tax liability. The plan of the amendment, however, is not to tax each spouse for the total tax liability, for it provides that while the husband and wife may be jointly and severally liable, they may, at their option, ask that their liability be apportioned between them according to the amount of their contribution to the family income. Furthermore, the act provides that if one spouse contributes no income he shall not be required to sign or swear to the return, nor shall he be liable in any case, for an addition to the tax based upon a failure to file a return. Thus, under the proposal A may not be taxed for B's income, the spouses will be "a unit for computation but individuals for payment."

But what of Justice Robert's statement that A's tax may not be

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7 Notice, also, the statement that A cannot be taxed for B's income is not all pervasive. A may be taxed for B's income if there are sufficient justificatory facts. In Burnet v. Wells, 289 U. S. 670 (1933) a statute taxing the grantor of an irrevocable trust to pay premiums on his life insurance was held constitutional by the majority of the court on the theory that the grantor's privileges and benefits were so substantial as to justify taxing him on that basis. Justice Van Devanter, McReynolds, and Sutherland dissented upon the ground that the statute taxed A for B's income. Also, in Helvering v. Clifford, 309 U. S. 331 (1939), Justice Douglas, speaking for the court, held as taxable the grantor of the short term trust for the benefit of the grantor's wife. He did not mention that the husband was being taxed for the wife's income. Nor was the point extensively argued for only the brief of the respondent Clifford mentioned it, and then only incidentally in a footnote comment. It would seem, therefore, that in the light of these and other recent cases (e.g., n. 50 supra) the Supreme Court might decline to follow the Hoeper case.

It is interesting to note that Mr. Ray in his article, Proposed Changes in Federal Taxation of Community Property: Income Tax, 30 CALIF. L. REV. 397, 427, states that the Wisconsin statute provided that each person be liable in proportion to the amount he contributed to the total income but that the majority seemed to overlook this provision.

74 Comment, Purdue, Listen to the Drums—the Compulsory Joint Return, 17 WASH. L. REV. 101, 109 (1942).
measured in part by that of another? There are at least two answers to that assertion. In the first place, we have noted before that this statement seems to be merely dictum. And the only basis for it is a quotation from *Knowlton v. Moore* which Justice Roberts failed to mention was itself expressly dictum. Thus the statement that the measure of A's tax cannot be based partly upon B's income is dictum based upon dictum: a weak enough argument in itself.

Secondly, that statement is faced by a strong decision to the contrary. In *Maxwell v. Bugbee* the court had before it a statute of New Jersey which imposed an inheritance tax upon the estate of a non-resident decedent by taking into account the whole of the deceased's estate as if it were in New Jersey and then the rate so adduced was applied to the part of the estate actually in New Jersey. The court held that a state may validly measure its inheritance tax by including the value of property outside its jurisdiction.

Thus although New Jersey could tax A (property within New Jersey) and could not tax B (property outside New Jersey), the state could measure the tax upon A by taking into account B. If we apply the rule of the *Maxwell case*, then, to the income tax problem we find that although A could not be taxed for B's income, A may, nevertheless, have the tax on his income measured by taking into account B's income. And, notice, that in both of these situations B has a close relationship to A. In the *Maxwell* case A and B are part of the same estate. In the income tax situation, A and B are husband and wife.

Professor Loundes has suggested that the *Maxwell* case provides a valuable analogy for upholding a family-unit tax proposal. He says: "The objection to the Wisconsin statute, according to the Supreme Court, was that it taxed A's income to B. This was not true of the proposal made to Congress (in 1934). If husband and wife are required to file a joint return, this does not involve taxing one spouse for the other's income, nor even measuring the tax on one spouse by the other's income. Husband and wife are taxed on their separate incomes. The tax rate for their separate incomes, however, is determined by the amount of their combined income. This can be fitted into the pattern of *Maxwell v. Bugbee* rather than that of *Hooper v. Tax Commission of Wisconsin*. The only problem that need legitimately be considered in connection with such a scheme is one of classification ..." (which shall be done in the next topic under this section).

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72 178 U. S. 41, 77 (1899).
76 See Comment, 17 Wash. L. Rev. 101, 109, n. 37. For a contrary view in regard to this interpretation of the *Hooper* decision, cf., Oliver, *Community Property and the Taxation of Family Income*, 20 Tex. L. Rev. 532, 552-554 (1941).
77 250 U. S. 525 (1919).
Therefore, aside from the fact that *Hoeper v. Tax Commission of Wisconsin* involves a state income tax law and thus is not a direct precedent for a federal act, the case seems to be validly distinguished from the committee proposal on other grounds. That is, $A$ is not being taxed for $B$'s income and the amount of $A$'s tax may validly be measured by reference to $B$'s income.

b. *The Reasonableness of Classifying Husband and Wife as a Taxable Unit.*

Under this heading will be considered the other possible constitutional limitation presented by the due process clause of the Fifth Amendment. The question here deals essentially with the scope of Congressional power to classify income for the purposes of taxation. In other words, may Congress place married persons in a separate class, and, by reason of the fact that each one of those persons has a separate income, require each of them to pay a higher tax upon his or her income than he or she would have been required to pay had they not been married? Is there present an invalid discrimination against married persons?

The scope of the power of Congress to classify income for the purposes of taxation has always been broad. *Flint v. Stone-Tracy Co.* demonstrates the general principle that Congress has plenary power to classify income for the purposes of taxation. In this case the court upheld the power of Congress to levy a tax on income derived from a business under the corporation form, although persons who carried on the same business as a private enterprise were not taxed on their income.

A case in point presenting an even closer analogy to the compulsory joint return problem is *Brushaber v. Union Pacific R. R.* Here the court had before it the Revenue Act of 1913 under which a single person was allowed an exemption of $3,000 but married persons living together were allowed only an exemption of $4,000. If the husband and wife were separated and not living together, they were allowed an exemption as two separate persons, that is, $3,000 each. It was contended in the *Brushaber* case that the act violated the due process clause in that the provisions allowing the above deductions discriminated between single and married persons living together and those living separate and apart.

The court denied this contention by saying in part: "**"* **In fact, comprehensively surveying all the contentions relied upon, aside from the erroneous construction of the amendment which we have previously disposed of, we cannot escape the conclusion that they all rest upon the mistaken theory that although there be differences between the

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220 U. S. 107, 158 (1910).
240 U. S. 1 (1916).
Italics supplied.
subjects taxed, to differently tax them transcends the limit of
taxation and amounts to a want of due process, and that where a tax
levied is believed by one who resists its enforcement to be wanting in
wisdom and to operate injustice, from that fact in the nature of things
there arises a want of due process of law and resulting authority in
the judiciary to exceed its powers and correct what is assumed to be
mistaken or unwise exerions by the legislative authority of its lawful
powers, even although there be no semblance of warrant in the Constitu-
tion for so doing.\textsuperscript{82} Thus, in a word, different treatment of mar-
rried and single persons as to exemptions does not violate due process.

A number of other cases can be cited to illustrate the broad powers of
Congress to classify for tax purposes. Important among these decisions
are two recent cases in which the court recognized that a joint return
under the existing law is the return of a taxable unit.\textsuperscript{83}

In the light of these cases, then, let us look at the scope of the
classification made by the proposed amendment. As the writer has
pointed out before, there is no taxation imposed on one person for the
taxes payable by another; there is only an increase of tax upon the
individual income of each spouse.

This increase of tax may well be analogized to the principle that the
income tax burden should be levied on the ability of the taxpayer to
pay. In pursuance of this principle, Congress has long singled out
the family status as something which should be allowed distinct
recognition. The provisions of the law which allows the head of a
family to take special deductions for his dependents is only a recogni-
tion that a man in this position has less ability to pay than one who has
no dependents.

It would seem to follow that the converse should be true. That
is, a man who is receiving economic benefits because the family income
is being increased through earnings of other members of the family
should be in a position to pay a higher tax. Thus Congress has
refused to allow deductions for losses from a sales or exchange of
property between members of a family.\textsuperscript{84} A man whose wife enjoys
a private income may enjoy special benefits. For instance, he may
not have to carry as much insurance, or be relieved from providing
for small luxury items for his wife.

\textsuperscript{82} 240 U. S. 1, 25-26.

\textsuperscript{83} Helvering v. Hanney, 311 U. S. 189 (1940); Taft v. Helvering, 311
U. S. 195 (1940). Both cases upheld the solicitor-general's ruling upon
the optional joint return that: "In cases, therefore, in which the husband
or wife has allowable deductions in excess of his or her gross income, such
excess may, if the joint return is filed, be deducted from the net income
of the other for the purpose of computing both the normal and the sur-
tax." 311 U. S. 195, 197. For other cases showing Congressional power to
Northwest Steel Mills, 311 U. S. 46 (1940).

\textsuperscript{84} Int. Rev. Code § 24 (b) (1) (A).
It seems reasonable to say, therefore, that the classification of the family as a unit can be justified under the due process clause. Any intimations to the contrary in the Hoeper case, the writer believes, must be regarded in the light of the strict holding that A cannot be taxed for B's income. The court there did not in fact pass upon the larger due process questions. Nor would the statements in the Hoeper case compare with the finding of Justice Cardozo in Burnet v. Wells that refinements of title will be disregarded when they form the basis for an attack upon the constitutionality of a tax act designed to plug loopholes.

From the authorities above noted, and the present day attitude of the court as to tax matters, it seems likely that the compulsory joint return proposal stands in a better position constitutionally speaking than the Senate Finance proposal.

III. CONCLUSION

But, as has been noted before, the fact that the joint return proposal is more apt to be held constitutional is not the only reason for preferring it to the Senate Finance Committee amendment. Another fundamental reason is that it reaches deeper into the problem of separate returns. For not only does it cover the community property problem, it also takes care of inter-family exchanges of property and other manipulations of this character. All of which gives the joint return proposal a further obvious advantage in that it will raise more revenue.

And there are other factors to consider. Legislative amendment will eliminate the possibility that Poe v. Seaborn may be overruled and the attendant confusion that would follow such a judicial pronouncement. Moreover, administrative detail and difficulties will be reduced, as, for example, determining whether property is separate or community. Returns may also be simplified, for such difficulties as allocating exemptions, credits and deductions will be made easier.

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86 289 U. S. 670, 677, 678.
88 The suggestion has been made that including the wife and husband in a joint return would not eliminate the problem of dividing unearned income among the family for separate returns for the property could still be given to the children. It is true that such transactions would occur in a lesser number of families since not every family has children. But if the possibilities of tax avoidance are of sufficient weight—then the act could be further amended to include the earnings of unemancipated children as done in the Wisconsin statute in the Hoeper case. It is also true that property might be given to close relatives, other than children, living with the family, or even to close friends. Thus the scope of the compulsory joint return might be broadened to include these income earners into a unit. See Comment, 17 WASH. L. REV. 101, 111, n. 49. But such a sweeping basis for unit taxation would hardly seem necessary since it is unlikely that the taxpayer would give away his property beyond those over whom he has substantial control.
Despite these obvious advantages for the compulsory joint return, it is only fair to note that the amendment's antagonists have found other faults with it. For example, they maintain that the proposal will foster illicit relations since only married people are subject to the tax. Another argument is that the separate property rights of married women will be decreased by subjecting wives to the family return. But nothing is said of the husband's rights!

The answers to such contentions seem obvious. They appear to the writer to be merely unfounded arguments of special interest groups and should be left at that.

It is not difficult, therefore, to conclude that the compulsory joint return presents the most dangerous threat to the community property tax privileges. New fields for tax revenues are being avidly sought by the government and this bill presents a cogent possibility. It has been previously suggested in this Review that the adoption of the joint return would achieve the best result from the standpoint of all interested parties, and from an investigation of the above proposals, this is the thought of the writer.

80 Most of the objections are found in Hearings Before the House Ways and Means Committee on Revenue Revision of 1942, 77th Cong. 2d Sess. (1942).
80 They are adequately answered in Comment, 17 WASH. L. REV. 101, 108 (1942).
81 Id. at p. 111.