Michigan Journal of Gender & Law

Volume 11 | Issue 2

2005

The Passage of Community Property Laws, 1939-1947: Was "More Than Money" Involved?

Jennifer E. Sturiale
United States Court of Appeals for the Second Circuit

THE PASSAGE OF COMMUNITY PROPERTY LAWS, 1939–1947: WAS "MORE THAN MONEY" INVOLVED?†

*Jennifer E. Sturiale**

INTRODUCTION · 213
I. LEGAL BACKGROUND · 217
A. *A Consistent Supreme Court?* · 217
B. *Adding it Up* · 219
C. *What is Community Property?* · 222
II. PASSAGE OF COMMUNITY PROPERTY LAWS IN THE STATES · 224
A. *Five States Take Action* · 224
B. *Congress Takes Action* · 226
C. *4 Repealed, 1 Held Unconstitutional* · 227
III. WAS "MORE THAN MONEY" INVOLVED? · 227
A. *Women and Work: Would Community Property Laws Really Save Money?* · 229
1. Married Women Go to Work · 231
2. Women as Significant Wage Earners · 233
3. Chasing Butterflies . . . · 234
B. *Femme Fatale: Husbands Beware of Your Wives* · 237
C. *Community Property, Pulp Fiction?* · 246
CONCLUSION · 252

INTRODUCTION

In 1930, the Supreme Court decided two cases and reached seemingly contradictory results regarding the ability of a married couple to receive preferential tax treatment by one spouse diverting income to the other.[1] The distinction between the two cases lay in the legal instrument

† *See* ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY 178–202 (2001) (suggesting that "More than Money is Involved" in the history of various tax measures that were considered during the 1930s and 1940s).

* Law clerk, the Honorable Robert A. Katzmann, United States Court of Appeals for the Second Circuit; J.D. 2004, Georgetown University Law Center.

1. *Compare* Lucas v. Earl, 281 U.S. 111, 114 (1930) (holding that the taxpayer should be taxed for all of his earnings, regardless of a contract between him and his wife that provided that all earnings would be owned by them as "joint tenants"), *with* Poe v. Seaborn, 282 U.S. 101, 118 (1930) (holding the taxpayer liable for taxes on only half

that operated to divert that income. In the first case, *Lucas v. Earl*, a husband and wife entered into a contractual agreement that assigned half of the husband's income to his wife.[2] In contrast, *Poe v. Seaborn* considered Washington state's community property statutes, which automatically diverted income from a husband to his wife.[3] The Court held that where one spouse diverted income to the other by virtue of a private, contractual agreement, as in *Earl*, the couple was not entitled to file separate returns, each reporting only half of the household's total income. However, where one spouse diverted income to the other by operation of the state's community property regime, as in *Seaborn*, the couple was entitled to file separate returns with each spouse reporting only half of the income earned.

Significant tax consequences resulted from the ability of one spouse to divert income to the other. At the time *Earl* and *Seaborn* were decided, there was only one tax schedule used by all taxpayers, and husband and wife were treated as separate taxpayers. In addition, tax liability increased rapidly as income rose, imposing a heavy burden on the nation's taxpayers in the post-World-War-I and World-War-II era. For example, in 1944, a taxpayer was taxed at a marginal tax rate of fifty-nine percent on income between $20,000 and $22,000 and paid as much as ninety-four percent of his income in taxes for income over $200,000.[4] The ability to divert income from one spouse to another consequently allowed married couples to shift some of the household's income to a lower marginal tax rate. For example, if a husband earned $22,000 in wages in 1944, the ability to divert his income to his wife for income tax purposes subjected both husband and wife to only a forty-one percent marginal tax rate, rather than the husband alone being subjected to the fifty-nine percent rate. This shifting of income would reduce the household's income taxes from $9,040 to $6,700, resulting in the addition of $2,340 to a married couple's after-tax income.

---

of his earnings, while his wife was liable for taxes on the other half, because his earnings constituted community property).

2. 281 U.S. 111, 113–14 (1930).
3. 282 U.S. 101, 110 (1930).
4. Tax Policy Center, *Tax Facts, available at* www.taxpolicycenter.org/taxfacts/individual/brackets_1944.cfm (last visited Feb. 11, 2005) (citing JOSEPH PERCHMAN, FEDERAL TAX POLICY (1987)).

In response to the disparate treatment of taxpayers that resulted from *Earl* and *Seaborn*, a flurry of states adopted community property statutes between 1939 and 1947[5]—Michigan,[6] Nebraska,[7] Oklahoma,[8] Oregon,[9] and Pennsylvania.[10] Eight states—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington—already had community property laws in place.[11] Before other states could similarly adopt community property statutes,[12] Congress responded with the Revenue Act of 1948, which stated, in pertinent part, "[e]qualization is provided for the tax burdens of married couples in common-law and community property States."[13] The Revenue Act achieved such equalization by allowing husbands and wives to file one return together—that is, a joint return[14]—and calculating the tax liability on the joint income by determining the tax liability on half the income and multiplying that figure by two.[15] In less than a year after the adoption of the Revenue Act of 1948, Michigan, Nebraska, Oklahoma, and Oregon repealed their

5. *See* Godfrey N. Nelson, *Need to Equalize Taxes on Couples*, N.Y. TIMES, Nov. 9, 1947, at F1.
6. *See* Act of July 1, 1947, No. 317, 1947 Mich. Pub. Acts 517 (codified as amended at MICH. COMP. LAWS § 557.201–.220 (1947)) (repealed 1948).
7. *See* Act of June 12, 1947, ch. 156, 1947 Neb. Laws 426 (codified as amended at NEB. REV. STAT. § 42-601 to 616 (1947)) (repealed 1949).
8. *See* Act of May 10, 1939, ch. 62, 1939 Okla. Sess. Laws 190 (codified as amended at OKLA. STAT. § 51–65 (1941)) (repealed 1945).
9. *See* Act of Mar. 29, 1943, ch. 440, 1943 Or. Laws 656 (codified as amended at OR. REV. STAT. § 63-2A01 to 2A16 (1945)) (repealed 1945); Act of Apr. 19, 1947, ch. 525, 1947 Or. Laws 910 (codified as amended at OR. REV. STAT. § 63-2B01 to 2B16 (1947)) (repealed 1949).
10. *See* Act of July 7, 1947, ch. 550, 1947 Pa. Laws 1423 (to be codified at PA. STAT. ANN. § 201–15 (1947)); Willcox v. Penn Mut. Life Ins. Co., 55 A.2d 521 (Pa. 1947) (holding Pennsylvania's community property law unconstitutional); Godfrey N. Nelson, *Test Upsets Law Affecting Spouses*, N.Y. TIMES, Dec. 14, 1947, at F1.
11. WILLIAM QUINBY DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 56 (2d ed. 1971) [hereinafter COMMUNITY PROPERTY 2D].
12. In September of 1947, *The New York Times* reported that "the Legislature of the State of New York may soon consider the advisibility [sic] of . . . adoption" of community property laws. Godfrey N. Nelson, *Community Taxes of Income Spread*, N.Y. TIMES, Sept. 28, 1947, at F1. At the same time, Kentucky saw strong support for community property legislation developing, while in North Dakota, legislation was under consideration at the time the Revenue Act of 1948 became effective. COMMUNITY PROPERTY 2D, *supra* note 11, at 89 n.77.
13. H.R. REP. NO. 80-1274 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1258, 1258; *see also* S. REP. NO. 80-1013 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1163, 1163.
14. I.R.C. § 51(b)(1) (1949).
15. I.R.C. § 12(d) (1949) ("In the case of a joint return of husband and wife . . . the combined normal tax and surtax . . . shall be twice the combined normal tax and surtax that would be determined if the net income and the applicable credits against net income provided by section 25 were reduced by one-half.").

community property statutes.[16] Pennsylvania may have, as well, had the Pennsylvania Supreme Court not already found its state's community property laws unconstitutional.[17]

These facts raise at least two interesting questions. First, was the adoption of community property regimes motivated by the beneficial tax treatment of married couples or was more than money involved? Second, what underlying facts and social conditions led such laws to be adopted with little fear of wives' newly created property rights?

Part I of this article reviews the legal landscape that provided the backdrop against which Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania later adopted community property laws. It also examines the tax consequences of the two Supreme Court cases, *Lucas v. Earl* and *Poe v. Seaborn*, that resulted in the disparate tax treatment of married couples in common law and community property law states. Part II briefly reviews the subsequent passage of community property laws by Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania; the passage of a federal tax reduction bill that provided for equal treatment of community property law and common law jurisdictions; and the subsequent history of those laws in each of the five states. The immediate repeal by Michigan, Nebraska, Oklahoma, and Oregon of their community property laws following passage of the Revenue Act of 1948 suggests that the passage of the community property laws was simply a tax saving measure. This is the belief of some reputable scholars.[18] This article does not refute that such laws were passed, in part, to achieve tax savings; however, it does suggest that other social forces were at work, as well.

Part III of this article suggests that legislatures were able to pass community property laws, in part, because they gave little in the way of rights to wives, but went far, symbolically, in building married women's confidence that their household responsibilities were worth a portion of their husbands' salaries. Such confidence was necessary if the pre-war social order, with women primarily in the home rather than the workforce, was going to be successfully reinstated after the war. This Part examines the social and cultural context in which a few states passed

16. *See supra* notes 6–9.

17. Nelson, *supra* note 10, at F1.

18. Professor Martin D. Ginsburg has described the passage of the community property laws as a reaction to the favorable tax treatment of married taxpayers in community property law states. Professor Martin D. Ginsburg, Fall 2002 Georgetown University Law Center Tax I Lecture (Nov. 18, 2002) [hereinafter Tax I Lecture]. Professor Daniel Ernst commented similarly during an informal discussion. *But see* KESSLER-HARRIS, *supra* note †, at 197 ("[Splitting income] provided persuasive economic incentives for most married women to file jointly with their husbands and *even to stay out of the labor force*." (Emphasis added.)).

community property laws together with the legislative debate in Pennsylvania—the only state for which a substantive legislative history is available—over the passage of its community property law. Part IV concludes that although states passed community property laws, in part, for the tax benefits, more than money was involved.

I. Legal Background

A. A Consistent Supreme Court?

In *Lucas v. Earl*,[19] the Supreme Court held that the taxpayer, Mr. Earl, was taxable for the whole of his salary earned for the years in question, regardless of a contract between Mr. Earl and his wife that provided that his salary belonged to the Earls jointly.[20] In 1901, Mr. Earl and his wife entered into a contract, which provided, in part, that "any property either of us now has or may hereafter acquire . . . in any way, . . . (including salaries, fees, etc.), . . . shall be treated and considered, and hereby is declared to be received, held, taken, and owned by us as joint tenants."[21] The couple entered into the contract because Mr. Earl had been ill, and he believed such an agreement would simplify Mrs. Earl's affairs in the event of his death.[22] Assuming that their contract vested half of Mr. Earl's earnings in Mrs. Earl, each reported half of Mr. Earl's earnings in 1920 and 1921. Noting that the case was "not to be decided on attenuated subtleties," Justice Holmes held that Mr. Earl was liable for the tax on all of his earnings, reasoning that "the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it."[23]

It is interesting to note that Mr. and Mrs. Earl entered into the contract at issue in 1901, before the adoption of the Sixteenth Amendment to the Constitution,[24] which allowed the federal government to impose a federal income tax. In addition, it was not until 1913 that the first federal income tax legislation became law.[25] Thus, Mr. and Mrs. Earl's contract could hardly be described as one "skillfully devised" to

19. 281 U.S. 111 (1930).
20. *Id.* at 114–15.
21. *Earl*, 281 U.S. at 113–14.
22. Earl v. Comm'r of Internal Revenue, 10 B.T.A. 723, 723 (B.T.A. 1928).
23. *Earl*, 281 U.S. at 115.
24. The Sixteenth Amendment was adopted in 1913. U.S. Const. amend. XVI.
25. The Revenue Act of 1913, ch. 16, 38 Stat. 114, 166 (1913) (codified as I.R.C. § 2(A) (1913)).

prevent the payment of income tax. Nonetheless, the Supreme Court extinguished any income tax benefits arising from such contracts.

Eight months after *Earl*, the Supreme Court decided *Poe v. Seaborn*,[26] which held that Mr. and Mrs. Seaborn were entitled to file separate returns, each reporting only half of their joint income by virtue of the community property laws operating in Washington state, where they lived.[27] In 1927, the tax year in question, the Seaborns' income was comprised of Mr. Seaborn's salary; interest on bank deposits, bonds, and dividends; and profits on the sale of real and personal property.[28] All of the real estate was in Mr. Seaborn's name alone.[29] Nonetheless, the Court noted that it was "undisputed that all of the property real and personal constituted community property and that neither owned any separate property or had any separate income."[30] The Court reasoned that the Seaborns' property in question vested in the community first: "[T]he earnings are never the property of the husband, but that of the community."[31] In contrast, Mr. Earl's property vested in him first; otherwise there would be nothing for Mr. Earl to contract away.[32] Because the property in the Seaborns' case belonged to the community and, thus, Mrs. Seaborn had a vested property right equal to that of her husband, the Seaborns could split Mr. Seaborn's income and each would pay taxes on only half of their total income.

Two points of the *Seaborn* case are noteworthy. First, the Court rejected the Internal Revenue Commissioner's argument that Mrs. Seaborn did not have a vested interest in the community property because the management and control of the property was delegated to Mr. Seaborn. The Court reasoned that "[t]he community must act through an agent."[33] And the husband merely served as that agent, "[t]his right being vested in him, not because he was the exclusive owner, but because by law he was created the agent of the community."[34] This was the customary understanding in community property regimes.[35]

---

26. 282 U.S. 101 (1930).
27. *Id.* at 118.
28. *Seaborn*, 282 U.S. at 108–09.
29. *Seaborn*, 282 U.S. at 109.
30. *Seaborn*, 282 U.S. at 109.
31. *Seaborn*, 282 U.S. at 117.
32. *Seaborn*, 282 U.S. at 117; *see* Lucas v. Earl, 281 U.S. 111, 115 (1930).
33. *Seaborn*, 282 U.S. at 112.
34. *Seaborn*, 282 U.S. at 112.
35. *See* WILLIAM QUINBY DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY 262, 322 (1st ed. 1943) [hereinafter COMMUNITY PROPERTY 1ST].

Second, the Court concluded that the wife's interest was no less real simply because the state of Washington limited the wife's ability to "call [her husband] to account in a court."[36] The Court reasoned,

> The reasons for conferring such sweeping powers of management on the husband are not far to seek. Public policy demands that in all ordinary circumstances, litigation between wife and husband during the life of the community should be discouraged. Law-suits between them would tend to subvert the marital relation. The same policy dictates that third parties who deal with the husband respecting community property shall be assured that the wife shall not be permitted to nullify his transactions.[37]

Thus, although a wife in the state of Washington had neither the right to manage and control the community property, nor the ability to seek remedial relief for a husband's violation of his duty to administer the community property, the Court concluded that the wife had a present vested interest in such property. A vested interest in the community property was sufficient, for tax purposes, to allow the Seaborns to split Mr. Seaborn's income.

Despite Justice Holmes's claim that *Earl* was "not to be decided on attenuated subtleties," the Court reconciled the seemingly contradictory outcomes of *Earl* and *Seaborn* by making metaphysical distinctions about when, and in whom, property vests. The two cases are better explained, however, by principles of federalism. "In deference to principles of property ownership, [the courts] declared that federal tax policy could not override claims to property whose legitimacy was rooted in the laws of the several states."[38]

B. Adding it Up

The Supreme Court's disparate treatment of common law and community property law states effected substantial tax consequences. The post-World-War-I tax schedule, which increased tax liability rapidly as income rose, imposed a heavy burden on taxpayers. In

36. *Seaborn*, 282 U.S. at 113.

37. *Seaborn*, 282 U.S. at 112.

38. KESSLER-HARRIS, *supra* note †, at 175. Professor Martin D. Ginsburg has also explained that the Supreme Court has often been especially deferential to state property law. Tax I Lecture, *supra* note 18.

addition, only one tax schedule applied to individuals and married persons alike, and husband and wife were treated as separate taxpayers. Thus, in common law states, if the husband was the only wage earner, as his income rose, it was taxed at a higher marginal tax rate. In contrast, in community property states, if the husband was the only wage earner, half of the husband's income would be taxed as though the wife had earned it; thus, the couple could have a second stab at the lower marginal tax rates. A simple example may best demonstrate such consequences.

Consider a tax regime that has only two tax rates: ten percent on the first $10,000 and fifty percent on any income above $10,000.[39] Table 1, below, demonstrates the tax consequences for each of four hypothetical, unmarried individuals under such a regime.

TABLE 1
INCOME AND TAXES BEFORE MARRIAGE

Taxable Unit	Income	Tax
Ann	$10,000	$1,000[40]
Bob	$10,000	$1,000
Catherine	$20,000	$6,000[41]
David	$0	$0

Now, consider the case in which Ann marries Bob and Catherine marries David under a tax regime that treats husbands and wives as separate taxpayers and where income splitting is not permitted. Table 2 summarizes the consequences.

39. I am indebted to Professor Martin D. Ginsburg for the example of the two-rate tax system; Professor Ginsburg pays credit for such an example to Professor Boris Bittker. *See* Martin D. Ginsburg, *An Introduction to Issues of Income Taxation and the Family* 6 n.4 (2002) (unpublished paper, on file with the author).

40. *$10,000 * 10% = $1,000.*

41. *($10,000 * 10%) + ($10,000 * 50%) = $1,000 + $5,000 = $6,000.*

TABLE 2
INCOME AND TAXES AFTER MARRIAGE
WITH NO INCOME SPLITTING

Taxable Unit	Income	Tax	Total Household Tax
Ann	$10,000	$1,000	$2,000
Bob	$10,000	$1,000	
Catherine	$20,000	$6,000	$6,000
David	$0	$0	

As evident from Tables 1 and 2, in a regime that treats the husband and wife as separate taxpayers, marriage has no consequence on total tax liability.

However, consider the tax consequences of income splitting, which allows a couple to add together their separate incomes, determine the tax liability on half of that total income, and then multiply that tax liability by two. Table 3 summarizes the effects of income splitting on the two hypothetical couples.

TABLE 3
INCOME AND TAXES AFTER MARRIAGE WITH INCOME SPLITTING

Taxable Unit	Income	Taxable Income	Tax	Total Household Tax
Ann	$10,000	$10,000	$1,000	$2,000
Bob	$10,000	$10,000	$1,000	
Catherine	$20,000	$10,000[42]	$1,000	$2,000
David	$0	$10,000	$1,000	

Income splitting effectively distributes income equally between husband and wife. Consequently, in one-wage-earner families, less of the household's income is taxed at the progressively higher tax rates. For example, Catherine and David are liable for taxes on only $10,000 each at the ten percent marginal tax rate, rather than Catherine alone being liable for taxes on $20,000–$10,000 of which would be taxed at the ten

42. *($20,000+$0)/2 = $20,000/2 = $10,000.*

percent marginal tax rate while the other $10,000 would be taxed at the fifty percent marginal tax rate. For families with two wage earners, the benefits of income splitting are notably less significant, or absent. As the example of Ann and Bob demonstrates, if a family has two wage earners whose incomes are equal, income splitting proves inconsequential—the total tax liability for the household remains the same.

C. What is Community Property?

In order to understand the consequences to a married couple of putting a community property regime in place, it is necessary to understand, generally, what "community property" is.

Community property is a system of property ownership that gives a husband and a wife equal ownership of property held in common. The community property system conceives of the marriage as "a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after its dissolution."[43] One of the leading scholars on community property in the 1940s, William Quinby de Funiak, explained in his treatise that the wife "is placed on a basis of equality with the husband as to her ownership and rights in the community property."[44]

A community property system conceives of two types of property: separate property not subject to community ownership and joint, or "community," property. Separate property includes property acquired during the marriage by gift, inheritance, or the like.[45] In all of the eight states that originally had community property regimes, the spouse who received the separate property retained exclusive control over it; a husband or wife could exclusively manage, control, or dispose of his or her separate property.[46] In contrast, the common law placed the management and control of the wife's separate property in the hands of her husband.

The Spanish ganancial community property system prevails in many states.[47] The ganancial system transforms only property "increased

43. COMMUNITY PROPERTY 2D, *supra* note 11, at 2–3.

44. COMMUNITY PROPERTY 1ST, *supra* note 35, at 3. A similar view is expressed in the second edition of this book: "Equality is the cardinal precept of the community property system. . . . [T]he rubric itself is a shorthand rendition of the whole concept that the husband and wife are equals." COMMUNITY PROPERTY 2D, *supra* note 11, at 2–3.

45. COMMUNITY PROPERTY 1ST, *supra* note 35, at 318.

46. *See id.* at 314–15.

47. *Id.* at 2.

or multiplied during marriage" into community property[48]—that is, it transforms into community property only that property acquired by labor, while property obtained by gift, succession, or inheritance remains a husband's or a wife's separate property. In addition, under the Spanish system, the profits from a spouse's separate property are communal property, regardless of whether the spouse acquired the property before or after marriage.[49] Some states follow the Spanish system, while others provide by statute that the profits of a spouse's separate property also remain the separate property of that spouse.[50]

Of particular interest is the management and control of the community property. The law treated the community of the husband and wife as a partnership, with the husband acting as the managing partner.[51] Consequently, the husband customarily had a duty to administer the community property.[52] The husband could dispose of the property without the consent of or conveyance by his wife,[53] and this disposition would be valid unless it defrauded or injured the wife.[54] The husband's right to manage, control, and dispose of the marital community property, however, could only be exercised for the preservation or benefit of the community.[55] The husband "could not dispose of it for his own exclusive benefit, dispose of it for inadequate consideration, or otherwise deal with it in a manner indicative by its very nature of an express or implied intent to prejudice the rights of the wife."[56] If the husband neglected his duties, the wife was able to obtain remedial relief.[57] Thus, not only did the operation of a community property regime divert property from a husband to his wife, but it also provided recourse to the wife in the case of mismanagement. Nonetheless, the male legislatures in five states enacted community property statutes between 1939 and 1947.

---

48. *Id.* at 2 n.4.
49. *Id.* at 180.
50. *Id.* at 181–82.
51. *Id.* at 263–66.
52. *Id.* at 262, 322. De Funiak offered his own explanation of why: "This has resulted from the consideration of the husband as the head of the family, as the one who due to economic and *biological* factors has been the member of the marital partnership more practiced and experienced in the acquisition and management of property." *Id.* at 322 (emphasis added).
53. In some states, however, the husband and wife were required jointly to execute and to acknowledge any instrument to convey, transfer, or encumber property. *See id.* at 324–25.
54. *Id.* at 262.
55. *Id.* at 323.
56. *Id.*
57. *Id.* at 326.

II. Passage of Community Property Laws in The States

Earl and *Seaborn* made clear that the recently imposed federal income tax might be avoided by novel legal maneuvers. Married couples consequently engaged in various transactions in an effort to reduce the household's income tax liability. Some husbands gave gifts of income-producing property to their wives, while others established trusts for their wives or created partnerships "in which the wife was said to have invested time and energy in lieu of money."[58] While married couples attempted to reduce their income tax liability through private action, state legislators attempted to reduce their constituents' federal income tax liability through state action by proposing and enacting community property laws.

A. Five States Take Action

In 1939, Oklahoma became the first of the common law states to enact laws creating a community property regime.[59] Oklahoma's community property statute provided that the law only applied to those married couples that elected to come under the terms of the Act.[60] In 1943, Oregon followed Oklahoma's lead and enacted its own community property statute,[61] which similarly required that married couples elect to have the law treat their separate property as community property.[62] The following year, however, in *Commissioner of Internal Revenue v. Harmon*, the Supreme Court held that Oklahoma's statute did not effectively create a community property system.[63] Because Oklahoma's statute did not automatically transform married couples' property into community property, it did not create community property between a husband and a wife as an incident of matrimony.[64] Thus, Oklahoma did

58. Kessler-Harris, *supra* note †, at 175. It is estimated that the number of partnership returns filed by married couples reached 244,670 in 1930, declined during the depression, but increased steadily after 1937. Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 Law & Hist. Rev. 259, 303 n.118 (1988).

59. *See* Act of May 10, 1939, *supra* note 8.

60. *Id.* § 51.

61. *See* Act of Mar. 29, 1943, *supra* note 9.

62. *Id.* § 1.

63. 323 U.S. 44, 47–49 (1944).

64. *Harmon*, 323 U.S. at 47–48.

not create a system "dictated by State policy,"[65] whereas the traditional community property system in states such as Washington, where the Seaborns lived, presumably reflected state policy and thus required deference by the Court. As the Court explained, "The most that can be said is that the present policy of Oklahoma is to permit spouses, by contract, to alter the status which they would otherwise have under the prevailing property system in the State."[66] In other words, the statute provided for the same private ordering that the Court invalidated in *Earl*. Because Oregon's community property law also provided for private contracting similar to that struck down in *Earl*, *Harmon* effectively invalidated Oregon's community property law, as well.

This, however, did not discourage Oklahoma. During the next legislative session, in 1945, Oklahoma repealed the 1939 Act at issue in *Harmon* and enacted a new law that created community property between husband and wife as an incident to marriage, thus curing the 1939 Act's deficiencies.[67] Oregon, however, lacked Oklahoma's confidence. It, too, promptly repealed its community property law during its 1945 legislative session,[68] but Oregon waited until April 19, 1947 to enact a law that effected community property as an incident of marriage.[69]

The legislators of Michigan, Nebraska, and Pennsylvania concurrently were considering enacting community property laws in their own states. In June of 1947, Nebraska enacted a community property statute; on July 1, 1947, Michigan enacted its own law; and just days later, on July 7, 1947, Pennsylvania approved a similar law.[70]

---

65. *Harmon*, 323 U.S. at 48.
66. *Harmon*, 323 U.S. at 47. It is interesting to note that existing community property regimes had historically allowed for married couples to contract out of the community property system before marriage. COMMUNITY PROPERTY 1ST, *supra* note 35, at 265.
67. Act of May 5, 1945, ch. 1, 1945 Okla. Sess. Laws 121 (repealing 1939 Act); *Id.* §§ 1–15, 17–18 (codified as amended at OKLA. STAT. § 66-82 (1945)) (enacting new community property legislation) (repealed 1949).
68. Act of Mar. 20, 1945, ch. 270, 1945 Or. Laws 409.
69. Act of Apr. 19, 1947, *see supra* note 9.
70. *See supra* notes 6, 7, and 10. The legislative history of the enactment of the Pennsylvania community property law and the subsequent ruling of the Pennsylvania Supreme Court that the law was unconstitutional are discussed *infra* Part III.C.

B. Congress Takes Action

While the legislators of Oregon, Michigan, Nebraska, and Pennsylvania were considering community property laws in their states, Congress was relentlessly considering various tax reduction bills at the federal level. In January of 1947, the 80th Congress introduced House Bill 1, which provided for a reduction in income tax rates.[71] President Truman vetoed the bill, and supporters of the bill could not mobilize the two-thirds majority necessary to override the President's veto.[72] Less than six months later, Congress attempted to pass House Bill 3950,[73] a tax reduction bill that was almost identical to House Bill 1; the only difference was that it would take effect in January of 1948, rather than in January of 1947.[74] Again, Truman vetoed the tax reduction measure, and again the veto was sustained.[75] In 1948, Congress, during its second session, put forth a third attempt to enact a tax reduction bill, House Bill 4790,[76] and for a third time, the President vetoed the bill. Determined to pass a tax reduction bill—and not discouraged by what seemed to be the bill's "ill-omened star"[77]—the Congress mustered the two-thirds majority and overrode Truman's veto.[78] An article in *The New York Times* reported, "Both houses overrode Mr. Truman's veto less than four hours after its receipt and with many votes to spare . . . . [T]he House overrode the veto without a word of debate, and the Senate followed suit after a brief discussion."[79]

House Bill 4790, like its predecessors, reduced the "extremely high rates of the individual income tax."[80] But it did more than merely reduce tax rates. It also introduced what is now known as the "married, filing jointly" tax return—married couples could elect to file a joint return,[81]

71. H.R. 1, 80th Cong. (1947).
72. MAURICE ALEXANDRE ET AL., PRACTISING LAW INSTITUTE, MARITAL DEDUCTIONS, SPLIT INCOME AND THE REVENUE ACT OF 1948: THE TREASURY REGULATIONS 1 (1948); *see also* Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1097 n.2 (1948).
73. H.R. 3950, 80th Cong. (1947).
74. ALEXANDRE ET AL., *supra* note 72, at 1.
75. *Id.*
76. H.R. 4790, 80th Cong. (1948).
77. Surrey, *supra* note 72, at 1097.
78. Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 114 (codified as amended in scattered sections of 26 U.S.C.).
79. John D. Morris, *The Tax Reduction Bill Becomes Law*, N.Y. TIMES, Apr. 3, 1948, at 1.
80. H.R. REP. No. 80-1274 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1258, 1258.
81. I.R.C. § 51(b)(1) (1949).

and, if they did, income tax liability would be calculated by determining the tax liability on half the income and multiplying the tax liability by two.[82] The married filing jointly tax return effectively made community property law regimes inconsequential to a taxpayer's tax liability.[83]

C. 4 Repealed, 1 Held Unconstitutional

In less than a year after the adoption of the Revenue Act of 1948, Michigan, Nebraska, Oklahoma, and Oregon repealed their community property statutes.[84] Michigan led the way, repealing its community property law within just a few months of the enactment of the Revenue Act of 1948. The other states quickly followed, taking action during their next legislative sessions in 1949. The legislatures in Nebraska, Oklahoma, and Oregon introduced bills repealing the community property laws just days apart in January of 1949. Pennsylvania's Supreme Court had already declared Pennsylvania's statute unconstitutional in 1947.[85] Not only did Michigan, Nebraska, Oklahoma, and Oregon take quick action to repeal their community property laws, but none of the five states seemed interested in enacting similar legislation.[86]

III. Was "More Than Money" Involved?

The quick repeal of the community property laws in Michigan, Nebraska, Oklahoma, and Oregon following the enactment of the Revenue Act of 1948 suggests that the passage of the community property laws in these states, as well as in Pennsylvania, simply served as a tax-saving measure. The foreword address by William A. Sutherland, the Chairman of the Section of Taxation of the American Bar Association (ABA), to an ABA report explained that the Revenue Act of 1948 "accomplishes substantially complete equalization of taxes as between community property and common-law states without the necessity of

82. I.R.C. § 12(d) (1949).
83. *See supra* Part I.B.
84. *See supra* notes 6–9.
85. Nelson, *supra* note 10, at F1.
86. The legislative journals of the five states indicate that none of them considered enacting community property laws in the years immediately following the repeal of such laws.

changing the fundamental law in either."[87] The ABA had an active role in the passage of the Revenue Act of 1948, and Sutherland played a particularly instrumental role in the bill's passage.[88] Thus, Sutherland was in a position to know, or at the least in a position to recommend, why House Bill 4790 should pass: to reduce taxes while neutralizing the consequences of a community property regime on a taxpayer's tax liability.

A House report from the Committee on Ways and Means, which recommended passage of House Bill 4790, similarly implied that various community property laws were passed to achieve tax savings. The report explained that "[e]qualization is provided for the tax burdens of married couples in common-law and community-property States" by operation of the bill.[89]

Little can be learned from the legislative journals of Michigan, Nebraska, Oklahoma, and Oregon. Although the relevant legislative journals for these states chronicle the respective legislature's actions, for the most part, they do not report or preserve debates, discussions, or oral statements, either on the floor or in committee meetings. What these chronicles do indicate is that many bills were referred to the Committee on Taxation, or the equivalent, of the relevant legislative body, which suggests that some of the legislators were aware that adopting a community property regime would effect tax consequences.

Unlike the journals of its sister states, the Pennsylvania legislative journals do chronicle the debates over the proposed community property regime. An examination of those debates in tandem with a consideration of the social context in which they occurred suggests that the community property laws were adopted for more than the tax benefits that accrued to the states' citizens.

In July of 1947, Governor Duff of Pennsylvania signed the Community Property Act of 1947 ("Act") into law.[90] The legislation provided, in part, that "[a]ll property acquired by either the husband or wife during marriage . . ., except that which is the separate property of

87. William A. Sutherland, *Foreword, Supplemental Report of Committee on Equalization of Taxes in Community-Property and Common-Law States and Resolutions of the Association Containing the Draft of a Bill to Equalize Federal Income, Estate, and Gift Taxes as Between Community-Property and Common-Law States*, 1947 A.B.A. SEC. TAXATION.

88. An article in *The New York Times* reported, "the members of the Section of Taxation of the American Bar Association, who through its chairman, William A. Southerland [sic], contributed substantially to the draftsmanship of the bill." Godfrey N. Nelson, *Taxation Reform Is Seen Under Way*, N.Y. TIMES, May 9, 1948, at F1.

89. H.R. REP. No. 80-1274 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1258, 1258; *see also* S. REP. No. 80-1013 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1163, 1163.

90. *See* Act of July 7, 1947, *supra* note 10.

either, . . . shall be deemed the community or common property of the husband and wife, and each shall be vested with an undivided one-half interest therein."[91] The enactment defined "separate property" as all real and personal property of the husband and wife, "owned or claimed . . . before marriage . . . and that acquired afterwards by gift, devise or descent, or received as compensation for personal injuries."[92] In addition, section four of the Act provided that the husband and wife each shall have the management and control of his or her separate property, *and* the wife shall have management and control over "that portion of the common or community property, consisting of her earnings, all rents, interest, dividends and other income from her separate property and all other common or community property, the title to which stands in her name."[93] In addition to the management and control over his separate property, the Act provided that the husband shall have management and control over all community property "which is not conferred upon the wife."[94]

A. Women and Work: Would Community Property Laws Really Save Money?

Significant debate preceded the passage of the Pennsylvania Community Property Act. In a statement issued by Governor Duff accompanying his approval of the Act, he commented that it was "one of the most discussed bills before the General Assembly," and he noted that he had received a substantial number of letters regarding the proposed Act.[95] Debates in the House and Senate were primarily concerned with two issues: the Act's tax consequences at both the state and federal level, and the effect of a community property regime on the property rights of husbands.

The bill's potential tax benefits motivated its introduction in the Pennsylvania Senate. Nationally, there was a press for tax cuts. Republican members of Congress were ever introducing legislation to achieve federal tax cuts, only to time and time again meet President Truman's veto. Whether federal tax cuts would ever be achieved was doubtful, and pressure on state legislatures to achieve tax relief was

91. *Id.* § 3.
92. *Id.* § 1.
93. *Id.* § 4.
94. *Id.*
95. *Community Property Bill Becomes State Law: Governor Hopes It Will Induce Congress to Draft New Act*, THE PATRIOT (Harrisburg, PA), July 9, 1947, at 1.

significant. Oklahoma had already enacted legislation creating a community property regime to achieve income splitting and to reduce federal taxes, and Oregon had passed similar legislation that would soon become effective. This brought the number of community property states to ten. Was it fair that the residents of ten states would receive preferential federal tax treatment while the other thirty-eight states would not?

Proponents of the Community Property Act argued that if tax relief could not be achieved at the federal level, then surely it could be achieved at the state level. Future tax savings to the residents of the nine states that already had effective community property laws were estimated to be about $200,000,000;[96] if Pennsylvania enacted the Community Property Act, its residents would potentially save more than $100,000,000 in taxes.[97] Proponents argued that Pennsylvanians surely believed they had a right to the preferential tax treatment that residents of community property states received. The sponsor of the bill in the Pennsylvania Senate, Mr. Lord, flatly pronounced during a Senate debate, "I do not see why any member of this Senate wants to discriminate in favor of the citizens of California, Arizona, Texas, Louisiana, New Mexico, Washington, Nevada, Idaho, Oklahoma, and, on July 5, 1947, Oregon."[98] Members of the Pennsylvania House similarly expressed that Pennsylvania "should be put on a par with other states."[99]

Opponents of the Act, however, thought the tax benefits of the Act were illusory. Specifically, they argued that federal tax savings in the present would lead to increased federal taxes later, and if increasingly more states adopted community property laws, the consequences to the federal treasury would necessitate additional tax measures to make up the difference.[100] In addition, the tax benefits did not accrue equally to all Pennsylvanians; individuals in higher income brackets were the primary beneficiaries of the Act's tax savings.[101] Mr. Capano, a House member and colorful opponent of the Act, noted, "Senate Bill No. 615 is designed to permit a very select class of Pennsylvania citizens to *defraud*

96. Although the Oklahoma legislature had passed a similar community property law, it had not yet taken effect, and thus the tax savings of the Oklahoma law are not included in this estimate.

97. S. 137, 63rd Sess., at 3229 (Pa. 1947).

98. *Id.* at 3227.

99. *See* H. 137, 77th Sess., at 5569 (Pa. 1947).

100. Mr. Capano, a member of the House, noted, "if this practice is widespread it would naturally result in the Federal Government budget being unbalanced and additional taxes would be levied in order to make up the shortage." *Id.* at 5565.

101. Of course, this is the natural consequence of a progressive tax schedule.

the Federal Government of a certain portion of their income tax obligations."[102]

The tax savings, however, were illusory in yet a third way that went unrecognized by both the supporters and the opponents of the bill. Much of the debate assumed that the average household contained only one wage earner.[103] In fact, during the 1940s, many married women worked.

1. Married Women Go to Work

The United States' entry into World War II, following Japan's bombing of Pearl Harbor on December 7, 1941, created such a critical labor shortage that women found themselves in great demand for high-paying jobs.[104] The number of women workers rose from more than fourteen and a half million in 1941 to more than nineteen million in 1945.[105] The proportion of employed women sixteen years of age and older rose from 27.9 percent in 1940 to 35.8 percent in 1945.[106] Many women exited the labor force when the men returned from the war, which resulted in a decrease in the number of women workers in 1946.[107] By 1947, however, when four states adopted community property regimes, women were re-entering the workforce, "as the long-term trend in female employment reasserted itself."[108] The war accelerated the trend of women's increasing presence in the labor force, but "it did not produce it."[109]

The government provided the greatest support for women's entry into the workforce. For example, Secretary of War Henry Stimson issued a pamphlet entitled, "You're Going to Employ Women,"[110] and distributed it to employers. The war effort needed women's labor, which contributed significantly to the production of "tanks, airplane frames,

---

102. H. 137-77, 77th Sess., at 5569 (emphasis added).

103. For example, Mr. Capano believed that a community property regime created the fictional belief that both husband and wife participated in the production of income. *Id.*

104. ROSALIND ROSENBERG, DIVIDED LIVES, AMERICAN WOMEN IN THE TWENTIETH CENTURY 126 (1992).

105. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 Series D 29–41 (Bicentennial Ed. 1975).

106. *Id.*

107. *Id.*

108. *Id.*; SUSAN M. HARTMANN, AMERICAN WOMEN IN THE 1940s, THE HOME FRONT AND BEYOND 24 (1982).

109. ROSENBERG, *supra* note 104, at 130.

110. *Id.* at 128.

engines, propellers, parachutes, ships, gas masks, life rafts, ammunition, artillery, and electrical equipment."[111] The government urged women to take up the helm in factory work and contribute to the war effort with posters of Rosie the Riveter. Rosie became a symbol of what the American woman could be—a patriotic, hard working wage earner. A popular song of the day celebrated "Rosies," as women working in war manufacturing became known:

> All the day long
> whether rain or shine,
> She's a part of the assembly line.
> She's making history
> working for victory,
> Rosie the riveter.
> Keeps a sharp lookout for sabotage,
> Sitting up there on the fuselage.
> That little frail can do
> More than a male can do,
> Rosie the riveter.
> Rosie's got a boyfriend, Charlie,
> Charlie, he's a marine
> Rosie, is protecting Charlie
> Working overtime on the riveting machine.
> When they gave her a production "E"
> She was as proud as a girl could be,
> There's something true about
> Red, white, and blue about
> Rosie the riveter.[112]

Most of the women who entered the workforce during this period were married. The biggest increase in the proportion of women employed occurred between 1942 and 1943.[113] *Fortune* magazine reported that by 1943, "'practically no unmarried women [were] left to draw on.'"[114] After 1943, the increase in the work force came primarily from housewives.[115] From 1940 to 1944, the percentage of married women in the workforce rose from 36.4 percent to 45.7 percent, while the percentage of single women in the workforce dropped from 48.5 percent to

111. *Id.* at 127.
112. REDD EVANS & JOHN JACOB LOEB, ROSIE THE RIVETER (Paramount Music Corp. 1942).
113. U.S. DEP'T OF COMMERCE, *supra* note 105.
114. ROSENBERG, *supra* note 104, at 130.
115. *Id.*

40.9 percent.[116] "For the first time in U.S. history married women outnumbered single women in the labor force, and women over thirty-five, once considered unemployable, outnumbered their younger sisters."[117] Because many married World War II women worked after a community property regime was less likely to produce significant, beneficial tax consequences.

2. Women as Significant Wage Earners

Of course, if women's wages were significantly below men's, then the effects of a community property regime might still be substantial. But because of the scarcity of labor during the war, women's wages actually *increased* significantly, both absolutely and relative to men's.[118] "The median income for all women, adjust[ed] for inflation, rose 38 percent during the war . . . ."[119]

The biggest increase in women's wages occurred in war manufacturing,[120] and women's work-force participation in defense work grew by 460 percent.[121] Factory work, generally, claimed two and a half million new women workers.[122] Women also took jobs in other fields traditionally occupied by men and which had historically higher wages.[123] Women took jobs as taxicab drivers, bus drivers, railroad workers, lumberjacks, security guards, welders, and riveters.[124] Women also made gains in professional careers, albeit the gains were modest because of the extensive training required. The war created career opportunities for women in medicine, scientific research, aviation, academia, journalism, music, professional athletics, and the like, as men left for the war.[125] Indeed, women's employment rose in every field except domestic services.[126] Even women who worked in industries that had traditionally employed women experienced an increase in wages.[127]

The boost in women's wages received significant support from the government. The War Manpower Commission encouraged employers

116. U.S. DEP'T OF COMMERCE, *supra* note 105, at Series D 49–62.
117. ROSENBERG, *supra* note 104, at 130.
118. *Id.* at 127; HARTMANN, *supra* note 108, at 21.
119. ROSENBERG, *supra* note 104, at 127–28.
120. HARTMANN, *supra* note 108, at 21.
121. ROSENBERG, *supra* note 104, at 127.
122. *Id.* at 127.
123. *See* HARTMANN, *supra* note 108, at 21.
124. ROSENBERG, *supra* note 104, at 127.
125. *Id.*; HARTMANN, *supra* note 108, at 21.
126. ROSENBERG, *supra* note 104, at 127.
127. HARTMANN, *supra* note 108, at 21.

to adopt uniform wages for men and women, and the National War Labor Board, in 1942, ruled that Brown and Sharp, a manufacturing company, could not pay women twenty percent less than men for the same work.[128] In addition, the army began enlisting women, enticing them with pay equal to the pay of men of the same rank.[129] Women's wages were similarly boosted by state lawmakers, as four state legislatures enacted equal pay laws during the war.[130]

One state, Oklahoma, enacted its community property laws during the wartime years when women's wages were rising. By 1947, when Michigan, Nebraska, Oregon, and Pennsylvania enacted their community property laws, women's wages had begun to decrease as the return of American men alleviated the labor shortage and employers reverted to their pre-war attitudes about employing women.[131] Nonetheless, a small number of women maintained the improvements they achieved during the war.[132] Consequently, the benefits of a community property regime were likely more modest than the legislatures of Pennsylvania, Michigan, Nebraska, and Oregon acknowledged. Any tax benefits expected for the residents of Oklahoma certainly were modest, as its community property regime took effect when women's workforce participation and wages were peaking.

3. Chasing Butterflies . . .

Nonetheless, a popular belief remained that married women did not work. In 1948, George Lawton, a commentator writing in *The New York Times*, urged married women to go to work.[133] In an article, entitled, "Proof That She Is the Stronger Sex: The 'little woman' resists overwork, budgets her energy, lives longer—and creates a new problem," Lawton, a gerontologist and psychologist, explained that women

128. ROSENBERG, *supra* note 104, at 129.

129. *Id.* at 126.

130. HARTMANN, *supra* note 108, at 22.

131. *See* ROSENBERG, *supra* note 104, at 134–35. Rosenberg explains that a Women's Bureau survey in the fall of 1946 found that forty-five percent of women working in aircraft, shipbuilding, and electrical equipment had been able to keep their wartime jobs. *Id.* at 134. "Nine out of ten of those who remained, nevertheless, experienced a decrease in pay, from roughly $50 a week to $37 a week." *Id.* at 134–35.

132. *Id.* at 135.

133. *See* George Lawton, *Proof That She Is the Stronger Sex: The 'little woman' resists overwork, budgets her energy, lives longer—and creates a new problem*, N.Y. TIMES, Dec. 12, 1948 (Magazine), at 7.

lived longer because they are the stronger sex.[134] He explained that a woman maintains her strength because she "releases her energy much more evenly and quietly"[135]—that is, because she does not work as hard as men. Lawton recounts an observation made by Thomas Sugrue in his autobiography that it takes only a little over a year to convert a luxury into a necessity.[136] Lawton must have had modern conveniences like dish and clothing washers in mind, because he concludes,

> [T]he result is that the American woman does less and less, lives longer and longer, while her husband, a drone, "a social eunuch," his insurance paid up, dies of a heart attack before he's 50.
>
> From my experience I should say that the American male of the middle-income brackets overworks himself and that his wife underworks herself. As a leading woman's magazine puts it, "Of all the labor-saving devices ever invented for women, none has ever been so popular as a devoted male."
>
> Our men die earlier probably because it is they who face most of the strain of earning a living, the high pressure and the competition. It might be that we could get men to live as long or longer than the female by making woman [sic] the wage-earner.
>
> In that case the man would remain at home and take care of the house and the children. Many men and women would find this a charming idea, but only a small number of men could endure this role. It would cripple the male animal, built for the display of energy.[137]

Lawton's solution to this disparity in longevity and the boredom that accompanies women, probably widowed, into their older age was "[f]or them to go to work, either in business or at home."[138] As Lawton saw it, the most common pursuit of working-age women was not work,

---

134. Lawton, with tongue in cheek, even concedes that women are physically stronger than men: "My Steinway is too much for me to budge, but let my maid, Alice, heave and my piano slowly ascends." *Id.* Yet, he claims "[w]omen are inferior to men in creative imagination." *Id.*

135. *Id.*

136. *Id.* at 67.

137. *Id.*

138. *Id.* at 68.

but rather pursuing an available man, only to catch him and hope that he died like a housefly the next day. A cartoon accompanying Lawton's article depicted full-figured women with large butterfly nets in hand chasing after drones with human, male heads. The author characterized his proffered advice as an effort "to help the older woman with her problems" of boredom and loneliness resulting from outliving her husband.

Lawton was not alone in his belief that women's workforce and domestic contributions paled in comparison to men's contributions. Many of the Pennsylvania legislators similarly assumed that most married women did not work in wage-earning jobs, nor did they earn their "fair share" by performing domestic work at home. For example, the Pennsylvania Community Property Act's anti-champion, Mr. Capano, noted, "In order to work this fraud it is necessary that the present laws relating to the rights of husband and wife be changed. That a *fiction be created whereby all property be considered as property common and both participate in the production of the income.*"[139] Mr. Capano believed the Act created a false conception that wives contributed to the production of income and to the marital community.[140]

Even supporters of the Pennsylvania Community Property Act operated under the assumption that most married women did not work in wage-earning jobs. The supporters of the Act justified the law by arguing that there would be significant tax savings for all families at the lowest income level.[141] This claim is accurate only if income splitting results in a significant diversion of income from a wage-earning spouse to a non-wage-earning spouse.

---

139. H. 137, 77th Sess., at 5569 (emphasis added).

140. Mr. Capano's remarks echo comments made more than a decade before. In 1933, the Treasury urged Congress to pass a law taxing married couples on their joint income without any change in the tax schedule. The Treasury's proposal reacted to the many legal maneuvers employed by married couples to reduce their tax liability. The Treasury took the position that the family, rather than the individual, was the taxable unit. Many took the view that any other view of the family

> was a mere subterfuge for tax evasion. Representative David Lewis of Maryland, reporting to the House Ways and Means Committee . . . caught the spirit of the attack. The 'legal fiction' set up in the community property states, he proclaimed, 'that the income of the husband is one half the income of the wife should not be allowed to defeat the Federal income tax law and discriminate against citizens in the other 40 states.'

KESSLER-HARRIS, *supra* note †, at 178–79.

141. H. 137, 77th Sess., at 5569.

B. Femme Fatale: Husbands Beware of Your Wives

But why? What led so many well educated men[142] to believe incorrectly that most married women were not working? Perhaps they were led to believe women were not working and significantly contributing to the household's income because that is what they hoped to achieve. In many ways, the post-World-War-II attitudes mimicked those of the late 1920s and 1930s during the Depression. After the stock market crashed in 1929, working women suffered a vicious backlash.[143] "Efforts to understand the causes of the Depression led many to blame women, especially married women, for having taken men's jobs."[144] Federal and state legislatures enacted laws that effectively prohibited married women from working in many jobs.[145] A 1936 Gallup poll asking whether married women should work if their husbands were employed reported that eighty-two percent of all respondents, and seventy-five percent of all women respondents, answered no.[146] "Many men held to this view even in the face of their own unemployment. One jobless, working class husband declared that 'the women's place is in the home. I would rather starve than let my wife work.' "[147] Nonetheless, women's participation in the labor force reached an all-time high during the Depression. Although industries in which men predominantly worked contracted during the Depression, the service and clerical sector, which employed significant numbers of women, expanded.[148]

Many were similarly reluctant to accept women into the workforce during World War II. Employers and government officials only slowly realized the need for, and the potential of, women's labor.[149] Entities such as the War Department "took the position that defense producers should not be encouraged to utilize women on a large scale until all

142. For example, many of the Pennsylvania legislators were lawyers, and Lawton was a gerontologist and psychologist.

143. ROSENBERG, *supra* note 104, at 102.

144. *Id.* at 102–03.

145. *Id.* at 103. At the federal level, "Congress passed Section 213 of the Federal Economy Act, which prohibited more than one family member from working in the federal civil service." *Id.* Efforts to keep married women from working were even more pronounced at the state level. "In half the states, bills were proposed to prohibit the hiring of married women in *any* job." *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 105.

149. HARTMANN, *supra* note 108, at 53–54.

available male labor in the area has first been employed."[150] Husbands expressed similar attitudes. A 1943 Gallup poll reported that only thirty percent of men were willing to have their wives take a full-time job running a machine in a war plant.[151]

Even after women took to the workforce in large numbers during the 1940s, many believed that it was a "regrettable necessity" that would only have to be endured "for the duration" of the war.[152] This belief was consistent with legislative action in Congress and policies adopted by trade unions. The Selective Service and Training Act of 1940, which established a draft for male citizens, also provided an employment restoration program; the Act ensured enlisted men that the jobs they had before leaving for the war would be available to them upon their return.[153] In addition, although unions, such as the Congress of Industrial Organizations (CIO) and the United Electrical Workers (UEW), played an instrumental role in easing the transition of women into the workforce,[154] they were also instrumental in guaranteeing that women would exit the workforce after the war. "To ensure that women would not stay past the end of the war, union contracts granted seniority equal to the time spent in military service both to veterans previously employed by a unionized company and to those newly hired after discharge from the military."[155]

Nonetheless, many women wanted to remain employed. Seventy-five percent of women hoped to continue working after the war, although not necessarily in the same jobs.[156] The war had allowed many women to achieve some level of economic independence. In addition, wartime propaganda infused women's work with patriotism, which enhanced "the importance of women as citizens."[157] Giving up work meant giving up more than high wages. It meant giving up independence and a respected role in society. One woman, an electrician's helper working in a navy yard who came out of the war a widow, flatly confessed, "I like my work so much that they'll have to fire me before I leave."[158]

---

150. *Id.* at 54 (internal quotations and citations omitted).
151. ROSENBERG, *supra* note 104, at 131.
152. *Id.* at 134; HARTMANN, *supra* note 108, at 23.
153. *See* Selective Service and Training Act of 1940, Pub. L. No. 783, § 8, 54 Stat. 885 (1940); Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 103-04, 119 (2002).
154. ROSENBERG, *supra* note 104, at 133.
155. *Id.* at 134.
156. *Id.*
157. HARTMANN, *supra* note 108, at 21.
158. ROSENBERG, *supra* note 104, at 134.

The "marked loosening of sexual mores"[159] during the war did not help women's cause in the labor market. Many single teenage girls, known as "Victory girls," had sex with service men before they shipped off as a gesture of patriotism.[160] Married women were not immune from the lax sexual mores. "[M]arital infidelity soared, as young wives, separated by war from their husbands, had affairs with other men."[161] Some Americans felt that something had to be done to contain married women.

A not-so-subtle change in attitude toward working, married women, reminiscent of the attitudes during the Depression, resulted. Working, married women became the enemy to men's economic vitality, the institution of marriage, and the country's safety. These women not only competed with their husbands in the labor market, but they also caused harm to the country. In the post-war years, the fear of Communism was widespread, and the suburban home and family was the American citizen's weapon in the Cold War. While the Levitt brothers made owning the suburban home possible for many Americans,[162] wives had to ensure the family's security by fulfilling the role of good mothers. And, according to psychiatrists, sociologists, and other contemporary family experts, a good mother maintained limited participation in society.[163] For example, Ferdinand Lundberg and Marynia Farnham, in their 1947 best seller, *Modern Woman: The Lost Sex*, urged women to accept graciously their subordination to their husbands and the joys of motherhood.[164] Educated and working women, they warned, would lead to the "masculinization of women with enormously dangerous consequences to the home, the children dependent on it, and the

159. *Id.* at 128.

160. *Id.*

161. *Id.*

162. *Id.* at 141–42. y applying methods of mass production to home building, the Levitt brothers were able to cut costs and undersell their competitors by $1,500 per house, thus giving birth to an entire town: Levittown, New York. Levitt homes were small, but the home only covered fifteen percent of the property lot, allowing do-it-yourself expansion. One of the Levitt brothers, William Levitt, thought of his homes as contributing to American ideals: "No man who owns his house and lot can be a Communist. He has too much to do." *Id.* at 142. Rosenberg notes that Betty Friedan remembered, "'Security' was the big part of the family's attraction." *Id.* at 148. One commentator observed, "Youngsters want to grasp what little security they can in a world gone frightening insecure. The youngsters feel they will cultivate the one security that's possible—their own gardens, their own . . . home and families." *Id.*

163. *Id.* at 153.

164. *Id.* at 153–54.

ability of the woman, as well as her husband, to obtain sexual gratification."[165]

Nowhere was the view of "women as enemy" more evident than on the silver screen. Many films during the 1940s criticized working women. One scholar argues that many women depicted in films of the 1940s suffered fates that "suggested the incompatibility of professional success with marriage."[166] The *film noir* genre especially depicted women negatively. *Noir* films of the 1940s prominently featured the *femme fatale*—the seductively attractive woman who leads men into danger. For example, in *Double Indemnity* (1944), the leading lady, beautiful Barbara Stanwyck, convinces her lover, insurance agent Fred MacMurray, to kill her husband.[167] Not only does Stanwyck undermine MacMurray's comfortable life as an insurance agent, but she also undermines any idea that the "very pretty little house on a very pretty little plot" in which she and her husband live is a secure place.[168] Although *noir* films vary wildly in their plot, "[t]he undercurrent that flows through most 'high noir' films is the failure on the part of the male leads to recognize the dishonesty inherent in many of noir's principal women."[169] This flaw ruins the leading male characters in many *noir* films, including *Laura* (1944), *Women in the Window* (1944), *Scarlet Street* (1945), and *The Locket* (1947).[170]

The attitude cast on the silver screen was reflected on the floor of the Pennsylvania legislature during the debates over the Community Property Act. Opponents of the law characterized a community property system as committing a "fraud" against the federal government by allowing Pennsylvania residents to "cheat" on their taxes.[171] These emotionally charged remarks hinted at the opponents' concerns about the

165. *Id.* at 154 (quoting FERDINAND LUNDBERG & MARYNIA FARNHARM, MODERN WOMAN: THE LOST SEX (1947)).

166. HARTMANN, *supra* note 108, at 201. A few of the movies that portrayed working women negatively include *Together Again* (1944), *Spellbound* (1945), and *Mildred Pierce* (1945). *Id.* Two movies that depicted working women positively—*Woman of the Year* (1941) and *Adam's Rib* (1949)—"were exceptional" for their positive depiction of successful, professional women. *Id.*

167. *Id.* at 202.

168. *See* Warren Susman, *Did Success Spoil the United States? Dual Representations in Postwar America*, *in* RECASTING AMERICA 19, 29 (Lary May ed., 1989).

169. Michael Mills, *High Heels on Wet Pavement: Film Noir and the Femme Fatale*, Moderntimes Classic Film Pages, *at* http://www.moderntimes.com/palace/film_noir/index.html (last visited Feb. 12, 2005).

170. *Id.*

171. *See* H. 137, 77th Sess., at 5565 (Pa. 1947). Mr. Capano bemoaned, "[w]e passed a law a few days ago to close the door to the penny chislers on the cigarette tax and we now propose to open the doors to those who cheat in thousands of dollars." *Id.*

negative effects of the Act on husbands. Mr. Capano understood the Community Property Act to create a very real threat to husbands, embodied in their wives:

> The wife or husband, as the case may be, can legally claim one-half of the real estate, money in the bank or other assets, regardless of the name thereon; one-half of the income, regardless who earns it; in the event of divorce, the wife will be entitled to one-half of all property; in cases of separation, the wife could legally claim one-half of the income and go into Court to have her husband support her from the other half of his half of the income. . . .[172]

Other legislators shared Mr. Capano's concerns:

> Mr. STONIER. Mr. Speaker, I would like to have the gentleman from Elk [Mr. Sorg] answer this question, say that a man marries a lady or a girl and she has a judgment against her, is the husband responsible for her judgment?
>
> Mr. SORG. He is not, Mr. Speaker.[173]

Although the law, on its face, could effect redistribution of property rights to the husband *and* the wife, those objecting to the act primarily were concerned with the Act's effects on the husband's property:

> Mr. ANDREWS. Mr. Speaker, I understand that this act has two salient features. I just want to be sure that one does not acquire any financial advantage under this act by marrying a rich widow.
>
> Mr. SORG. Not if she is rich when he marries her, Mr. Speaker. It is only what he acquires afterward.
>
> Mr. ANDREWS. Mr. Speaker, the gold digger who marries a wealthy bachelor, does she stand to profit under this act?
>
> Mr. SORG. Mr. Speaker, I am amazed that the gentleman would suggest that a widow marry a bachelor.

---

172. *Id.*
173. *Id.* at 5569.

> Mr. ANDREWS. Mr. Speaker, I should say a sugar daddy[ ]—a gold digger marries a sugar daddy. Does she profit under this act?
>
> Mr. SORG. This act applies only to property acquired after the marriage, Mr. Speaker.
>
> Mr. ANDREWS. Mr. Speaker, am I privileged under this act to share equally in the earnings of my wife[?]
>
> Mr. SORG. The gentleman is, Mr. Speaker.
>
> Mr. ANDREWS. Mr. Speaker, that is one good feature of this act.
>
> Getting back to the fundamental economic situation, the women of the Commonwealth have command of a budget of expenditures at the present time exceeding ninety million dollars. That is what they are spending every year. Eighty per cent of the insurance policies in force are made out for women. Practically every man that takes out insurance names a woman as his beneficiary. . . . Ninety per cent of all women that write insurance policies name a woman as beneficiary, and thirty of our major corporations in this country by their stock ownership could be controlled by women if they personally and individually voted their stock interests, so that if under this bill one shares in the earnings of one's wife, that is one virtue. I wish that the Majority Leader had explained more clearly what happens in the case of divorce, if he would clear up my mind on what happens under this bill in the case of divorce.[174]

Although Mr. Andrews understood the act to effect redistribution *to* the husband—"one good feature"—he seems at least equally aware that the act distributed property *away* from the husband, especially in the case of divorce. Other legislators expressed similar concerns regarding the distribution of property rights at the death of the husband to the wife, and away from the children.[175]

Even the beliefs of those who supported community property laws were not inconsistent with the idea that working, married women posed

---

174. *Id.* at 5566.

175. *See* S. 137, 63rd Sess., at 3226 (Pa. 1947); H. 137, 77th Sess., at 5563–71 *passim* (Pa. 1947).

a threat to their husbands and the country. Some of the supporters of community property regimes argued in favor of the laws by maintaining that wives' contributions at home were worth part of their husbands' salaries. For example, the sponsor and biggest supporter of the community property laws in Pennsylvania, Senator Mr. Lord, explained,

> Just last Saturday in the Saturday Evening Post there appeared an article, a copy of which I hold in my hand. The matter deserves such attention that they have carried this article entitled, "How nine states beat the income tax" and this article says "simply because they live in lucky states—and are good to their wives—thousands of favored citizens get a sweet reduction in the income tax.
>
> . . . .
>
> . . . A man's income, where should it go? It should go to his wife and his family. . . . [W]e all feel that [the act] will have the effect of keeping families together, by distributing the income between husband and wife, where it belongs, and in addition to that every five years—realize this, Mr. President, under this bill every five years every citizen of Pennsylvania will get a sabbatical leave from the payment of federal income tax. That is the way it works out.[176]

When the Pennsylvania Supreme Court considered the constitutionality of the Pennsylvania Community Property Act in *Willcox v. Penn Mutual Life Insurance Co.*, Justice Horace Stern, writing for the court, expressed a similar view:

> [I]t is not contended that the legislature may not establish a common ownership of the *earnings* of the husband and wife accruing in the future, it being recognized that, while the husband is usually the breadwinner, the wife, by her management of the household and rearing of the children, makes it possible for the husband to devote himself more freely to his income-producing activities; this justifies the pooling of their resources thus derived from what is essentially a common enterprise.[177]

176. S. 137, 63rd Sess., at 3226 (Pa. 1947).

177. Willcox v. Penn Mut. Life Ins. Co., 55 A.2d 521, 527 (Pa. 1947).

An Oklahoma House member expressed similar beliefs. In the only available legislative statement outside of Pennsylvania, Oklahoma House member Mr. Sherman explained,

> In its original form community of property between husband and wife is that system whereby the property which husband and wife have, is common property, that is, it belongs to both by halves. The community system is a result of cultural and economic conditions. It is not the system of the savages where a woman is little more than a chattel, nor is it the system of the titled aristocracy, where a woman is something to adorn the castle and to bear children, preferably male. It belongs to the country where the wife works shoulder to shoulder with the husband in making a living and acquiring such property as their joints [sic] efforts will achieve. Such is [sic] the cultural and economic conditions in which we live. Who can say that in the operation of a farm, the work of a doctor, lawyer or other professional man, that the wife does not work as long and as hard as her partner, her husband? It is true that she does not in all cases do the same kind of work as her husband, but she does do the work *that enables the other to devote his time to his particular work.* One is as important as the other and the joint results should be shared equally. The wife always shares the misfortunes and hardships and why should she not also share in the profits and gains?[178]

It appears that Mr. Lord, Justice Stern, and Mr. Sherman were mindful of wives' contributions in the home.[179] Unlike *The New York*

178. H. 20, 59th Sess., at 2134 (Okla. 1945) (emphasis added).

179. Even more people expressed similar views in the 1930s. When, in 1933, the Treasury urged Congress to pass a law defining the taxable unit as the family, rather than the individual, the eight, original community property states invoked states' rights and argued that it was within their purview of the states' authority to define personhood. In a heated exchange before the House Ways and Means Committee, Representative Frank Crowther of New York posited to Tom Connally, a Senator from Texas and spokesman of the community property states, "8 of the 48 states . . . have been held to permit each spouse to report one half of the community income, although it was all earned by and was expended under the control of the husband." Connally responded,

> That is not true. I don't care whether the Treasury says it or who said it, it is not true, and as to that under our law it is not all earned by the husband; it is joint earnings of the wife who stays at home, raises the children and helps economize in the kitchen; she is contributing just as much to the success of the husband as the husband is.

Times commentator, George Lawton, who opined that a married woman's boredom resulted from her working neither in business *nor* in the home, Mr. Lord, Justice Stern, and Mr. Sherman purportedly thought a wife's work in the home was significant enough to be worth at least part of her husband's salary.

Yet, the belief that women substantially contributed in the home is not inconsistent with the idea that working, married women posed a threat to their husbands and to society, generally. Putting a community property regime in place would go far in building confidence in married women that their role as homemakers was valuable—worth up to half of their husbands' salaries—and if married women could achieve significant self-worth in the home, then they would be reluctant to enter the workforce. The lawmakers' mixed motives are apparent in at least one instance: The day following the passage of the Community Property Act in Pennsylvania, Mr. Lord, the bill's sponsor, explained,

> Mr. and Mrs. John Jones are a happily married couple. Mr. Jones makes $10,000 a year. His wife keeps house. She has no income.
>
> Under the Community Property Act, Mrs. Jones is entitled to half her husband's income. She may never see it, but half of the $10,000 is hers just the same.[180]

This is not to say that the legislators' primary reason for enacting the community property laws was to keep women out of the workforce, or even to suggest a reason about which the legislators of Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania were cognizant. But, it is to say that the social attitudes of the day made enacting such laws possible. The enactment of the community property laws in Michigan, Nebraska, Oklahoma, Oregon, and Pennsylvania could be seen as consistent with a larger effort to push women back into their pre-war roles as homemakers and faithful wives. Inroads toward that effort were

---

See KESSLER-HARRIS, *supra* note †, at 180. Kessler-Harris suggests that Connally's comments were "perhaps merely instrumental." *Id.* at 179–80. This suggestion is plausible, not only because the community property states were attempting to avoid higher taxes (as Kessler-Harris suggests), but also because the benefit to building confidence in homemaking during the Depression was just as much as, if not greater than, the benefit in the 1940s. After the Depression, married, working women were perceived as a direct economic threat to the economic vitality of husbands and the nation, and building confidence in homemaking would keep them out of the workforce. *See supra* text accompanying notes 143–148.

180. *Senate Passes Community Property Act for Penna.*, THE PATRIOT (Harrisburg, PA), May 28, 1947, at 8 (emphasis added).

manifest in women's post-war-clothing designs. "Postwar clothing styles projected an image which both exaggerated women's specifically female features and enveloped them in garments which were restrictive and impractical."[181] Skirts were made longer and more voluminous; shoes were made with narrower toes and higher heels; and the new figure-forming clothing necessitated corsets, wire brassieres, and other uncomfortable undergarments.[182]

Not only was such apparel impractical for the factory work in which women had been engaged during the war, but it was also impractical for doing household chores. The impractical fashions of the day were in conflict with other efforts to make women feel "at home" again by making domestic duties easier with newly developed household appliances. Washing machines, clothing dryers, and dishwashers flooded the market during the prosperous, post-war era.[183] Levitt homes made owning a household appliance effortless, as they all came equipped with a Bendix washing machine.[184] Some wives found a life of domesticity attractive after the trauma of the war years,[185] and it became possible for these wives to have it all: to maintain a feminine appearance, to fulfill efficiently their household duties, and at the end of the day, to stake a claim, theoretically, to half of their husbands' earnings.

C. Community Property, Pulp Fiction?

The promises of a community property regime, however, were illusory, just as were the premises upon which community property laws were based. Although a community property regime resulted in a tax liability for husbands and wives that was the same as if they actually split their households' income, husbands probably did not intend actually to hand over half their income to their wives.[186]

In addition, although under a community property system half of the communal property belonged to the wife, including the husband's earnings, the management and control of such property traditionally had been vested in the husband. (Pennsylvania was slightly more gener-

181. HARTMANN, *supra* note 108, at 203.
182. *Id.* at 204.
183. ROSENBERG, *supra* note 104, at 156.
184. *Id.* at 142.
185. *See id.* at 147–48.
186. Except, perhaps, Mr. Earl, who entered a contract to split his income with his wife in 1901—before the adoption of the Sixteenth Amendment to the Constitution, which allowed the federal government to impose a federal income tax—without any hope of receiving preferential tax treatment. *See* Lucas v. Earl, 281 U.S. 111, 113–14 (1930).

ous to wives, but nonetheless provided that the husband shall have management and control over all community property "which is not conferred upon the wife.") Thus, even if enacting a community property regime transferred half of a husband's salary to his wife, it had little effect on the right to manage and control that income. It is not surprising, then, that some of the Pennsylvania legislators thought the Community Property Act confusing and "absurd."[187] Nonetheless, the Community Property Act passed in both the House and the Senate: thirty-five to fourteen in the Senate,[188] and 123 to sixty-nine in the House.[189]

Claims that the Act was confusing and absurd turned out to be well founded. About four and a half months after the enactment of the community property legislation, the Pennsylvania Supreme Court, in *Willcox*, found the law unconstitutional, in part because the Act was so "uncertain and contradictory on its terms . . . as to be, . . . inoperative and incapable of execution."[190]

The plaintiffs brought the suit as a test case to determine the constitutionality of the newly passed legislation,[191] and the somewhat complicated facts of the case indicate as much. Mr. Shippen Lewis held a life insurance policy with the Penn Mutual Life Insurance Company. Among his rights under the policy was the right to borrow against it and the right to assign the policy to another.[192] Mr. Lewis was married to Mary F. W. Lewis at the time the policy was issued to him.[193] After the Community Property Act took effect, Mr. Lewis paid in advance the annual premium on his life insurance policy with money derived from three sources: a trust Mr. Lewis held as a life tenant, a dividend payment on stock Mr. Lewis owned, and cash.[194] Mr. Lewis notified Penn Mutual that he derived the income from multiple sources. He received the income from the trust and the dividend payment after the September 1,

187. *See* H. 137, 77th Sess., at 5564 (Pa. 1947). House member, Mr. Brown, noted, "I say to you that this is the most ridiculous and absurd piece of legislation presented to this General Assembly in this session. It is so absurd that the clarifying amendments presented by the Majority Leader to this House yesterday, which attempted to clear up the bill, were withdrawn by him upon his own motion." *Id.*

188. *See* S. 137, 63rd Sess., at 3230 (Pa. 1947).

189. *See* H. 137, 77th Sess., at 5571 (Pa. 1947).

190. Willcox v. Penn Mut. Life Ins. Co., 55 A.2d at 521, 528–30 (Pa. 1947).

191. *Willcox*, 55 A.2d at 524. The court noted, "the suit is obviously a friendly one among all the parties." *Id.*

192. *Willcox*, 55 A.2d at 523.

193. *Willcox*, 55 A.2d at 523.

194. *Willcox*, 55 A.2d at 523.

1947 effective date of the Act, but he owned the cash prior to such date.[195]

Mr. Lewis paid the premium, and on the very same day, he assigned the rights under the policy to Plaintiff, Mark Willcox.[196] Mr. Willcox then sought to exchange the policy for one completely paid-up and take a loan against the policy.[197] The insurance company, however, refused to issue him a new policy or grant him the loan unless Mrs. Lewis agreed. The company reasoned that "since it had been notified that parts of the premium payment apparently consisted of community property of Mr. Lewis and his wife, [Mrs. Lewis] had a legal interest in the value of the policy which limited [Mr. Lewis's] right to assign it without her consent."[198] Mr. Willcox sought a mandatory injunction, requiring Penn Mutual to issue him the new, paid-up policy and grant him the loan.[199]

The question that arose was whether, under these facts, the income derived from Mr. Lewis's trust and stock constituted community property. Although Mr. Lewis owned the trust and stock prior to his marriage, and thus they remained his separate property,[200] the income accruing from this property and used to pay the premium was received after his marriage and, thus, was arguably community property.

The court held the Act unconstitutional for three reasons: (1) the Act violated both state and federal due process of law,[201] (2) the Act was so "uncertain and contradictory in its terms . . . as to be . . . inoperative and incapable of execution,"[202] and (3) a violation of the community property rights of the wife by the husband did not give rise to remedial relief by the wife.[203]

First, the court reasoned, the operation of the community property law violated both the federal and the Pennsylvania constitution because it retroactively accomplished an "involuntary transfer" of property with-

195. *Willcox*, 55 A.2d at 523.

196. *Willcox*, 55 A.2d at 523.

197. *Willcox*, 55 A.2d at 523. The policy Mr. Willcox received from Mr. Lewis had payments still to be made on it; Mr. Willcox sought to receive a fully paid-up policy with a price equal to the cash surrender value of the policy he received from Mr. Lewis. *See id.*

198. *Willcox*, 55 A.2d at 524.

199. *Willcox*, 55 A.2d at 524.

200. Act of July 7, 1947, *supra* note 10, at § 4.

201. *Willcox*, 55 A.2d at 525–28.

202. *Willcox*, 55 A.2d at 528.

203. *Willcox*, 55 A.2d at 530–31. The court also noted that community property law, derived from civil law, conflicted with the otherwise common law principles of the state, calling community property laws "exotic," "alien," and "foreign." *Id.* at 524 (quoting COMMUNITY PROPERTY 1ST, *supra* note 35, at 4).

out compensation and thus violated due process.[204] The court noted that had the legislature attempted to transform the separate property of the husband or wife, owned by either prior to marriage, into community property, such an enactment would be clearly unconstitutional.[205] The transformation of *future income* was no different than a transformation of separate property into community property.[206] However, the court commented,

> [I]t is not contended that the legislature may not establish a common ownership of the *earnings* of the husband and wife accruing in the future, it being recognized that, while the husband is usually the breadwinner, the wife, by her management of the household and rearing of the children, makes it possible for the husband to devote himself more freely to his income-producing activities; this justifies the pooling of their resources thus derived from what is essentially a common enterprise.[207]

Thus, the court took issue not with the general assignment of income to the community, but rather with the retroactive nature of the Act and the ability to transfer the income from separate property into community property. It is also interesting to note that traditionally the Spanish system, as well as some of the systems of the eight original community property states, had provided that the profits of separate property were communal property.[208]

In addition to finding the enactment a violation of due process, the court concluded that the act was "uncertain and contradictory in its terms" and thus "inoperative and incapable of execution."[209] The court reasoned that although one provision of the Act, Section three, provided that property acquired during marriage and after the Act's effective date shall be the community property of both the husband and wife, each with a vested "undivided one-half interest," the remaining provisions of the Act were in conflict, and, consequently, "each spouse is not in reality

204. *Willcox*, 55 A.2d at 526.
205. *Willcox*, 55 A.2d at 526.
206. *See Willcox*, 55 A.2d at 526.
207. *Willcox*, 55 A.2d at 527.
208. The court noted that some states did, in fact, allow for the separate property or the income derived from a husband's or wife's separate property to be transformed into community property; however, these states effected such a transformation by operation of their *constitutions*, not legislation in the face of an opposing constitutional due process claim. *Willcox*, 55 A.2d at 527.
209. *Willcox*, 55 A.2d at 528.

given an undivided one-half interest in the so-called community or common property."[210]

The court opined that to own property—that is, to have an interest in property—was to have the right to "*possess, use, enjoy and dispose*" of such property.[211] The Community Property Act, however, did not truly give to the husband or wife the ability to possess, use, or enjoy community property. Another section of the Act, Section four, merely gave the husband and wife rights he or she would have had, regardless of the Act—the management and control and ability to dispose of property that he or she would have exclusively owned.[212]

First, the court noted that the law did not provide any limit on the extent to which the husband could control and manage property characterized as marital community property.[213] The court explained,

> [U]nder Spanish law the husband's administration of the community property must be directed to the preservation and use of it for the common benefit of himself and his wife and may not be exercised to the latter's prejudice. But the generality of the Pennsylvania act does not admit of the adoption of such a qualified construction . . . .[214]

Instead, the Pennsylvania statute could be construed to allow the husband to manage and control property that the Act characterized as community property (but that remained under his control and management) with no responsibility to the marital community.

Second, the court concluded that the Community Property Act did not truly give a spouse the right to dispose of community property. If property that was characterized as community property nonetheless remained under the management and control of only one spouse with no accountability to the other, then this deprived the other of the right to dispose of such property. Although the court acknowledged that the Act's deficiencies applied equally to husbands and wives,[215] it seemed concerned primarily with the consequences for wives.[216] As part of a se-

---

210. *Willcox*, 55 A.2d at 528.
211. *Willcox*, 55 A.2d at 528.
212. *Willcox*, 55 A.2d at 528.
213. *Willcox*, 55 A.2d at 528–29.
214. *Willcox*, 55 A.2d at 528–29.
215. *See Willcox*, 55 A.2d at 528–29 ("An even more glaring lack of the incidents of ownership exists by reason of the power given to the husband (or wife, as the case may be) to *dispose* of community property.").
216. It is interesting to note that throughout its opinion the court notes parenthetically that its analysis applies both to wives and husbands, yet the court chooses to explain

ries of rhetorical questions about the extent of the husband's ability to dispose of community property, the court asked, "Is the husband to be permitted to expend community property in the indulgence of extravagant tastes of his own, as, for example, for extensive pleasure trips, or the purchase of jewelry or other luxuries, or in the pursuit of gambling?"[217]

Finally, the court invalidated the Act because neither a husband nor a wife could seek remedial relief for a violation by the other of his or her duties to administer, control, or dispose of the communal property.[218] The Pennsylvania statute only allowed a husband or wife to sue the other in a proceeding for divorce or "to protect or recover his *separate* property."[219] The court explained,

> Even if . . . a wife in Pennsylvania did have any actual, vested interest in the community property over which her husband had the power of disposition and which was subject to the rights of his creditors, she would not have any right of redress or appeal to the courts as long as the marriage existed, no matter what predatory and illegal acts he might commit with respect to such property.[220]

Thus, finding that the Community Property Act violated due process while creating very little, if anything, in the way of real property rights for wives (and husbands), the Pennsylvania Supreme Court invalidated the law. Because the Act did not contain a severability clause, the court invalidated the law in its entirety.[221] If the legislature wanted women to have community property rights, it would have to draft entirely new legislation.

Although the Pennsylvania Community Property Act was unusual when compared to the community property regimes in other states,[222] it

---

the problems posed by the statute from the perspective of the wife. *See Willcox*, 55 A.2d 527 *passim*. This might suggest that the court concluded that, had the statute met constitutional muster, the likely thrust of it was to give more rights to wives, and consequently, the failings of the statute primarily fell on wives. This is not clear, however.

217. *Willcox*, 55 A.2d at 529.

218. *Willcox*, 55 A.2d at 530.

219. *Willcox*, 55 A.2d at 530 (internal citations and quotations omitted).

220. *Willcox*, 55 A.2d at 530.

221. *Willcox*, 55 A.2d at 527–28, 531.

222. Justice Stern acknowledged that there were Supreme Court cases in which community property laws with some characteristics similar to the Pennsylvania Community Property Act were upheld. *Willcox*, 55 A.2d at 601–02. Justice Stern noted, however, that the Pennsylvania Community Property Act was unusual, in comparison to the laws considered in prior cases, because it contained multiple oddities, all of which had

is difficult to know whether the Pennsylvania Supreme Court would have invalidated the Act even if the Act's oddities did not exist. The court appears to have been interested in the rights of women and only wholly invalidated the law because no severability clause existed. Yet, the imposition of a community property regime in what was once a common law jurisdiction could have caused significant confusion for husbands, wives, lawyers, and those administering the laws. What is certain is that the Pennsylvania legislature crafted a law that attempted to put a community property regime in place that only minimally changed the rights of husbands and wives but had the potential to improve women's morale.

CONCLUSION

The passage and quick repeal of the community property laws in Michigan, Nebraska, Oklahoma, and Oregon following the enactment of the Revenue Act of 1948 suggest that the passage of the community property laws in these states, as well as in Pennsylvania, simply served as a tax saving measure. Certainly, some of the Pennsylvania legislators, members of the ABA, and other commentators believed that one of the virtues of a community property regime was the preferential tax treatment. However, the passage of these laws simultaneously served to reinforce the institution of marriage because only married couples received the preferential tax treatment. In addition, the community property laws served to reinforce women's roles as homemakers, as their household responsibilities theoretically entitled them to half of their husbands' salaries. At least some women, who in the aftermath of the trauma of the war sought the security of a domestic life, found this comforting. In addition, it assuaged society's fears of married, working women and the harm they could cause to their husbands by taking jobs away from them, to their children by being away from home, and to the nation by undermining the institution of marriage and weakening the American citizen's security in the wake of the Cold War. That the community property laws would effectively push women back into the pre-war roles was—if not part of the rationale for why the laws were enacted—at the least, what made the enactment of such laws possible. ♣

unfavorable consequences for women. "From the opinions in these cases it would appear, therefore, that in none of the States whose laws were thus appraised were all the factors present which exist in the Pennsylvania Community Property Law as herein previously discussed." *Id.* at 602. Thus, despite the Supreme Court precedent, invalidating the Pennsylvania Act was justified.